The London School of Economics and Political Science

‘Examining the role of the intermediary in the criminal justice system’

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science (LSE) is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Abstract

Intermediaries were first introduced by the Youth Justice and Criminal Evidence Act (1999) to facilitate communication between individuals with communication needs and the criminal justice system. Yet, despite increased academic attention into this new criminal justice actor, the content of the role remains unclear. This thesis undertakes a sociolegal examination of the intermediary role within the criminal justice system. It examines how those executing the role understand its work and how other criminal justice actors perceive it. To do so, the thesis incorporates empirical data gathered through a series of semi-structured interviews with intermediaries and police officers in England and Wales and intermediaries and judges in Northern Ireland. It uses a grounded theory methodology to generate a theory of the intermediary role and its scope and content. I identify three key themes from the data which are integral to how we can conceptualise the intermediary role and its work: i) the role's professional status, ii) the role's commitment to neutrality and, iii) the relationship between the role and the criminal justice value of participation. I argue that recognition of differences between intermediary work with witnesses on one hand and defendants on the other is crucial to understanding the nature of the role more broadly. Finally, I make several recommendations regarding the future of the intermediary role and how it can be better integrated into the criminal justice system.

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List of abbreviations

MoJ - Ministry of Justice

DoJ - Department of Justice

YJCEA - Youth Justice and Criminal Evidence Act 1999

CPD - Criminal Practice Directions

CPR - Criminal Procedure Rules

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

GRH - Ground Rules Hearing

WIS - Witness Intermediary Scheme

RIS - Registered Intermediary Scheme

HAIS - HMCTS Court Appointed Intermediary Scheme

NCA - National Crime Agency

ABE - Achieving Best Evidence

Contents

Chapter 1: Introduction

'The use of intermediaries has introduced fresh insights into the criminal justice process…a number of those who are among the most vulnerable in the community may now be heard when before they would have been forced to remain silent.'[1]

Imagine a specialist police interview suite where it is proving difficult to elicit evidence from a child interviewee. But a breakthrough is imminent. The police have introduced a communication expert who contrives a game to secure the child's evidence. Requiring a mouth swab from the child for forensic analysis, the specialist child abuse police officer cuts an intimidating figure armed with blue latex medical gloves. The two-year old girl initially hides and refuses to cooperate with anyone. It is only when a game involving everyone pretending to brush their teeth is played that the child relaxes and provides a swab without complication. The defendant's subsequent guilty plea results in a minimum ten-year custodial sentence for a child sex offender whom prosecutors believe targeted very young victims believing they could never testify against him.[2] The outcome also ensures the child is spared the ordeal of testifying later in the trial process.

The communication expert in the above scenario is known as an intermediary – a 'special measure' introduced by s.29 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). The legislation introduced a range of special measures to facilitate the evidence gathering process in criminal courts in England and Wales for those considered vulnerable.[3] Collectively, the measures sought to maximise the quality of evidence and reduce the stress associated with the criminal justice process.[4] Other special measures include the use of a live link enabling the witness to give evidence during the trial from outside the court through a visual link, the use of screens in court, and the removal of wigs and gowns from advocates.[5] This thesis focuses on the role of the intermediary - the only special measure that is imposed between the questioner (usually the judge or a lawyer) and the witness. Their function is to communicate 'questions put to the witness' and 'to any person asking such questions, the answers

[1] The Rt Hon Lord Judge, 'Vulnerable Witnesses in the Administration of Criminal Justice' (Australian Institute of Judicial Administration, 7th September 2011) 15-16.
[2] Owen Bowcott, 'Two year-old girl gives evidence in UK abuse case' (The Guardian, Tuesday 10th October 2017).
[3] ss. 23-30.
[4] Ministry of Justice (MoJ), 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures' (January 2022) [1.22].
[5] Many of these measures, such as use of screens and removal of wigs and gowns, had developed through individual court practices but the YJCEA gave them a statutory footing, see: Camilla MacPherson, 'The Youth Justice and Criminal Evidence Act 1999: achieving best evidence?' (2001) 41(3) Med Sci Law.230.

given by the witness in reply to them'.[6] While all of the special measures contained within the YJCEA affect how criminal trials operate, the intermediary has been recognised as perhaps the most ambitious and controversial development.[7] Described as 'little short of revolutionary',[8] the role has been credited with effecting a 'culture change'[9] in the dynamics of traditional adversarial cross-examination. The Victims' Commissioner recently described the intermediary role as 'the single biggest improvement in the criminal justice system over the last thirty years'.[10]

This chapter introduces the intermediary role and provides some context for issues examined in the thesis, namely what the role involves and how it is perceived by intermediaries themselves and other criminal justice actors. While revolutionary, the intermediary role is beset with problems about its scope and function. Although the role has been operational in the criminal justice system for around 18 years, various competing conceptualisations of the role exist. As will be explained, the present research is urgently needed to examine how the role is performed and how various depictions align with the realities of intermediary practice. The chapter outlines the current framework for intermediary provision in England and Wales and Northern Ireland and develops a basis for the interjurisdictional comparison which threads throughout the thesis. It will be explained how the two jurisdictions have previously been compared and how this work has been valuable and enlightening. This discussion will also familiarise the reader with the 'two-tier' intermediary system in England and Wales.[11] This means that eligible witnesses can access the services of a Registered Intermediary who is recruited, trained and regulated by the Ministry of Justice (MoJ). Eligible defendants, however, are entitled to the assistance of a non-registered intermediary who is appointed on an ad-hoc basis and falls outside the MoJ scheme. This thesis will further unpack the implications and practical outcomes of such a system.

The aim of the chapter is to set the scene for who the intermediary is, see how the role is organised and explain some of the key themes to be developed in the thesis. Subsequent chapters delve deeper into some of the issues raised above.

[6] YJCEA, s. 29.
[7] Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press 2002) 6.
[8] Emily Henderson, 'A very valuable tool': Judges, advocates and intermediaries discuss the intermediary system in England and Wales' (2015) 19(3) International Journal of Evidence and Proof 154, 155.
[9] Penny Cooper and David Wurtzel, 'Intermediaries' in Penny Cooper and Heather Norton (eds) *Vulnerable People and the Criminal Justice System – A Guide to Law and Practice* (Oxford University Press 2017) 364.
[10] Victims' Commissioner, 'Next steps for special measures: a review of the provision of special measures to vulnerable and intimidated witnesses' (May 2021) 27.
[11] Henderson (n 8) 167.

1.1 A role in need of clarification

'We fear that [the intermediary] may have misunderstood her role. If so, she may not be the only one to do so.'[12]

The central motivation for undertaking this doctoral research was the absence of qualitative, empirical research on the content and scope of the intermediary role in the criminal justice system. The fact that no empirical work of this kind has been carried out in any jurisdiction creates a serious gap in understanding the intermediary role. The increasing codification of the intermediary's functions through rules, directions and guidance only augments the need for a qualitative enquiry to examine potential differences in the role 'in the books' and the role 'in action.'[13] The above quote from Lord Thomas CJ in the case of *R v Grant Murray* is an important starting point in understanding different conceptualisations of the intermediary role. Several interrelated questions flow from this judicial comment. Firstly, and most broadly, in what sense is the intermediary role 'misunderstood'? Does this suggest a judicial conceptualisation of the intermediary role from which intermediaries in practice deviate? How, then, do intermediaries experience the role and how do they conceptualise its content and parameters? These questions deserve attention and relate to aspects of the intermediary role that have hitherto not featured in the literature. As recognition of communication difficulties and demand for intermediary services increases, these questions become central to understanding the nature and scope of the role and its relative position within the criminal justice system.

While Lord Thomas CJ's comments in *Grant-Murray* point to a general discord between the judiciary and the intermediary, the caselaw relating to intermediaries raises several other issues. In recent years, there has been an increase in the number of cases before the appellate courts involving intermediaries and their role in criminal proceedings. The majority of these decisions has concerned the appointment and role of defendant intermediaries which, considering the role's lack of regulation and formal guidance, continues to pose problems in terms of trial fairness and effective participation. Examined discretely, these decisions ostensibly provide important guidance on the intermediary role, both registered and non-registered, and reflect the growing influence of the intermediary as a criminal justice actor. However, when read together, these judgments seem to complicate an already poorly understood role.[14] Perhaps of even more concern is that these decisions reflect a glaring divide between the judicial conception of the intermediary role and that of intermediary practitioners themselves.

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[12] *R v Grant-Murray & Anor* [2017] EWCA Crim 1228 [199] (Lord Thomas CJ).
[13] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12, 12– 15.
[14] Penny Cooper, 'Highs and lows: the 4th intermediary survey' (Kingston University London, 13th October 2014) <http://eprints.kingston.ac.uk/28868/1/Cooper-P-28868.pdf> accessed 8 February 2019.

A number of these cases have focused on the length of defendant intermediary appointment i.e., whether appointments should be made for 'evidence only' or for the full duration of the trial (see below for further discussion). The amendment to the Criminal Practice Directions (CPD) in April 2016 which outlines that 'Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare…' suggested a serious curtailment to defendant intermediary appointments which was confirmed in the case of *R v Rashid*.[15] Subsequently, in the case of *R v Biddle*, the Court of Appeal reinforced the judicial discretion in deciding whether intermediaries should be appointed for the whole of a trial.[16] The Court was firm in directing intermediaries to follow the trial judge's directions and not dictate the terms of their own appointment.[17] In *R v Thomas* the Court largely echoed this, but emphasised the need for intermediary applications to be 'addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation'.[18] The more recent case of *TI v Bromley Youth Court*,[19] however, signals a potential change in judicial attitude to defendant intermediary appointments with the 'rarity' provision of the CPD directly questioned.[20] How these key appellate decisions can be reconciled, and whether the number of defendant intermediary appointments will now increase, remains to be seen.[21] In Northern Ireland, the restriction of defendant intermediary to the period of evidence only remains and has not been challenged in the courts.

But the question of the 'role' of the intermediary is more complex and goes beyond the duration of appointment. Even though much of intermediary practice is now governed by the CPD[22] and the Criminal Procedure Rules (CPR),[23] intermediaries have generally been regarded as a peripheral figure within the context of the adversarial criminal trial. This assumption was challenged in *R v Grant Murray* as it was contended that an intermediary had been 'undermined and undervalued' and been treated as an 'enemy of the court' at trial.[24] The Court of Appeal recognised that intermediaries 'provide a very useful service to the court' but commented that they are 'not to dictate to anyone what is to happen'

[15] [2017] 1 WLR 2449.
[16] [2019] EWCA Crim 86.
[17] Ibid.
[18] [2020] EWCA Crim 117 [38].
[19] [2020] EWHC 1204 (Admin).
[20] Laura Hoyano and Angela Rafferty QC, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' (2017) Criminal Law Review 90.
[21] Data collected by 'Communicourt', a commercial provider of defendant intermediaries, shows a slight overall decrease in the number of defendant intermediary referrals from 2016 to 2020 (personal email correspondence between author and Communicourt, 22 April 2022).
[22] Criminal Practice Directions 2015 (CPD) [2015] EWCA Crim 1567, 3F.
[23] Criminal Procedure Rules (October 2020) Pt 18, rules 18.27-18.32.
[24] *Grant-Murray* (n 12) [196].

and that the role provides assistance 'as directed by the judge'.[25] In equally strong terms, the court stated that intermediaries 'should not interfere with the functions of others unless specifically directed to do so by the judge.'[26] Cooper has commented that these judicial statements should act as a reminder to defendant intermediaries who are not selected, trained or quality assured, but in truth, the force of the judgment applies equally to all intermediaries, both registered and non-registered.[27] The Court clarified that while intermediaries are instrumental in the effort to achieve the effective participation of the defendant, ultimately the burden for ensuring this happens is on the judge.

Considering the pivotal role of the judge in controlling criminal proceedings, the relationship between the judiciary and the intermediary requires closer examination. Intermediaries cannot be expected to operate effectively without the confidence of the judiciary, and it is the judge who ultimately decides the individual terms of intermediary appointments.[28] Plotnikoff and Woolfson found it troubling that many judges were unable to distinguish between Registered Intermediaries for witnesses and defendant intermediaries.[29] Further, the case law suggests that the role's status within criminal proceedings is far from settled. For example, in both *R v Boxer*[30] and *R v Beards and Beards*,[31] intermediaries were asked to provide expert evidence on the communication needs of vulnerable individuals. As has been recognised by the Advocate's Gateway guidance[32] and the Criminal Practice Directions, this is contrary to good practice if the intermediary is at the same time acting in their intermediary role.[33] In the more recent case of *R v Pringle*, the Court of Appeal noted that the trial judge was open to the possibility of an intermediary acting as an expert witness and did not expressly reject the notion.[34] It is stark that all three of these cases came years after the Lord Chief Justice, speaking extrajudicially, stated categorically that intermediaries are neither expert witnesses nor supporters.[35]

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[25] Ibid [199].
[26] Ibid.
[27] Penny Cooper, 'Joint enterprise: R. v Grant-Murray (Janhelle); R. v McGill (Joseph) Court of Appeal (Criminal Division): Lord Thomas of Cwmgiedd CJ, Hallett LJ (VP CACD) and Goss J: 11 August 2017; [2017] EWCA Crim 1228' (2018) 1 Criminal Law Review 71, 74.
[28] Joyce Plotnikoff and Richard Woolfson, 'Falling short? A snapshot of young witness policy and practice A report for the NSPCC, revisiting 'Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings' (February 2019. London: NSPCC) 17.
[29] Ibid.
[30] [2015] EWCA Crim 1684.
[31] [2016] EW Misc B14 (CC).
[32] The Advocate's Gateway, 'Intermediaries: step by step (Toolkit 16, 2nd September 2019) available at: < https://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2019.pdf> accessed 7 April 2019.
[33] The Advocates Gateway, 'Cases' <https://www.theadvocatesgateway.org/cases> accessed 18 April 2019; CPD (n 22) 3D.7.
[34] [2019] EWCA Crim 1722.
[35] The Rt. Hon. The Lord Judge, Lord Chief Justice of England and Wales, 7 September 2012, at the 17th Australian Institute of Judicial Administration Conference in 'Vulnerable Witnesses in the Administration of Criminal Justice.

Elsewhere, the Equal Treatment Bench Book and the Registered Intermediary Procedural Guidance plainly state that the intermediary is not to be treated as an expert witness.[36] The practice of judges asking intermediaries to effectively act as expert witnesses has been well documented empirically and must be recognised as inappropriate.[37]

The literature on intermediaries provides insight into the role's historical development, organisation, and legal provision. Plotnikoff and Woolfson's book entitled 'Intermediaries in the Criminal Justice System' narrates the emergence of the role and documents some of the earliest experiences of those working at the coalface. Cooper has also written extensively about the use of intermediaries in England and Wales and Northern Ireland and similar schemes internationally with several co-authors.[38] These publications are crucial to understanding how the role operates, from the police station to the courtroom, and how it has become integrated into the criminal justice process. O'Mahony et al's research is also important to understanding the sorts of practical challenges encountered by intermediaries in their work and how the role could be better utilised.[39] The operation of the 'two tier' intermediary system in England and Wales has been the subject of more recent academic critique, with Hoyano and Rafferty lamenting the 'inequality of arms' between witnesses and defendants in terms of intermediary access.[40] This followed the Law Commission's conclusion a year earlier that statutory entitlement to intermediaries should be extended to defendants to ensure the right to a fair trial is upheld.

There has, however, been less research into the scope and content of the intermediary role. Writing shortly after the YJCEA was implemented, Birch noted that flesh would have to be put on the 'bare bones' of s.29 YJCEA due to the legislation's vagueness.[41] While the literature has contributed to a better understanding of intermediary provision, there has been scant empirical research examining

[36] Judicial College, *Equal Treatment Bench Book* (February 2018 edition, revised March 2020) Available at: <www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amendedMarch-2020.pdf> 58 accessed 7 November 2020 58; MoJ, Registered Intermediary Procedural Guidance Manual 36.
[37] Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System* (Policy Press 2015) 258-260; Law Commission, 'Unfitness to Plead, Volume 1: Report Law' (2016 Com No.364) 117-118.
[38] Penny Cooper and David Wurtzel, 'Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales' (2014) 65(1) Northern Ireland Legal Quarterly 39; Penny Cooper and David Wurtzel, 'A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales' (2013) 1 Criminal Law Review 4; Penny Cooper, Paula Backen and Ruth Marchant, 'Getting to grips with Ground Rules Hearings – a checklist for judges, advocates and intermediaries' (2015) 6 Criminal Law Review 420; Penny Cooper and David Wurtzel, 'Intermediaries' in Cooper and Norton (n 9); Penny Cooper, Michelle Mattison and Heather Norton, 'Looking Ahead' in Cooper and Norton (n 9).
[39] Brendan O'Mahony, Jane Creaton, Kevin Smith and Rebecca Milne, 'Developing a professional identity in a new work environment: the views of defendant intermediaries working in the criminal courts' (2016) 18(2) Journal of Forensic Practice 155.
[40] Hoyano and Rafferty (n 20) 97.
[41] Diane Birch, 'A better deal for vulnerable witnesses?' (2000) Criminal Law Review 223, 249.

how the role is performed. Cooper and Mattison have identified a 'pressing need for further research into…the role in practice' and found it 'striking how little research has been conducted into the completeness, accuracy and coherence of the evidence that intermediaries facilitate.'[42] It is also significant that no research to date has compared the roles of intermediaries working with witnesses on one hand and defendants on the other. Indeed, much of the research which has touched on the use of intermediaries has done so as part of a wider focus on witnesses policy and practice and has not considered the use of defendant intermediaries at all.[43] While there have been calls for the extension of Registered Intermediaries to vulnerable defendants, there has been insufficient regard given to how the work of intermediaries working with witnesses and defendants differs.[44]

1.2 Contribution to existing knowledge

The present research makes an original contribution to existing knowledge in four principal ways.

This thesis is the first study examining how the relative positions of witnesses and defendants in the criminal justice system impact performance of the intermediary role. Through the theorisation of 'witness work' and 'defendant work', my findings shed light on the qualitative differences in intermediary work when assisting witnesses on one hand and defendants on the other. My data challenges the view of intermediary work as homogenous and draws attention to how the differing communication challenges faced by witnesses and defendants are reflected in relevant guidance and policies. These findings are particularly significant considering Her Majesty's Court and Tribunal Service (HMCTS) has recently launched the Court Appointed Intermediary Services (HAIS) scheme (explained further below) to allow, for the first time, vulnerable defendants to access a regulated cohort of intermediaries. This should encourage the MoJ/HMCTS to critically examine the rationale for separating intermediary provision between witnesses and defendants.

Secondly, my research is the first qualitative, empirical work to consider the inter-jurisdictional comparison between Northern Ireland and England and Wales with a focus on the scope and content of intermediary work. My findings highlight how the governance and organisation of intermediaries can impact how the role is performed and how intermediaries themselves understand the role. As other jurisdictions seek to introduce their own intermediary schemes, my research provides a unique

[42] Penny Cooper and Michelle Mattison, 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model' (2017) 21(4) International Journal of Evidence and Proof 351.
[43] Victims' Commissioner, 'A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses' (January 2018).
[44] Law Commission (n 37); Victims' Commissioner (n 10).

comparative perspective on the individual experiences of intermediaries working within a 'unitary' system (Northern Ireland) and a 'two tier' system (England and Wales). This is significant, particularly as the Witness Intermediary Scheme (WIS) in England and Wales is regarded as the original blueprint for a formalised intermediary scheme.

Thirdly, my research examines several aspects of intermediary work which, hitherto, have either been under-researched or else not identified. The issues of neutrality, professional work and participation emerged through my data collection and subsequently formed the basis of my three analysis chapters. While intermediary neutrality and the role's involvement in facilitating participation have been discussed to some extent in the literature, my research builds on these issues with a rich qualitative dataset. The first-hand accounts of intermediaries in both Northern Ireland and England and Wales provided a basis to problematise the orthodox position of neutrality in a way never previously done. Further, while it is uncontroversial that intermediaries allow vulnerable individuals to participate in the criminal process, my data reveals how intermediaries understand and shape their own practices in response to differing participatory roles. Finally, my thesis engages with the notion of the intermediary performing 'professional work', which has not been discussed in the literature. This is a novel angle of analysis which allows us to critically examine the intermediary's relative position in the professionalised world of the criminal justice system. It also provides some theoretical grounding for further research into how the role may develop as it competes for legitimacy among more established criminal justice actors.

Finally, the thesis introduces some nuanced theoretical reflections on the intermediary's relative position within the criminal justice system. While much of the literature on the role has related to policy and practice, I locate the intermediary role within the structure of the criminal process and probe how the role impacts aims and values which underpin the trial. Examining the intermediary role in this way allows for a deeper understanding of the role's function and the impact it can have on the nature of the adversarial tradition.

All of these findings contribute to a better understanding of the nature of intermediary work and the role's parameters, as well as highlighting lines of enquiry for future research in the field.

1.3 Research questions

In what follows, I present the results of a qualitative, sociolegal examination of the intermediary in the criminal justice system. The thesis explores the role and considers how it is executed in practice. It examines the role's relationship with other actors in the criminal justice system and how it is

conceptualised by intermediaries and other key stakeholders. While the thesis is not a comparative analysis, the main research question is approached with an awareness that the intermediary role may be performed differently in England and Wales and Northern Ireland. It is hoped that a richer and deeper understanding of the role can be gained by reflecting on experiences in both jurisdictions. The main research question is:

What is the role of the intermediary in the criminal justice system? This broad question will be guided by the following sub-questions:

1.

a) What are the parameters of the intermediary role?
b) How has the role of the intermediary been conceptualised by key stakeholders?
c) What, if any, differences exist between the roles of 'registered' and 'non-registered' intermediaries?

1.4 Legal framework

Considering that England and Wales and Northern Ireland share broadly similar legal systems, there is obvious scope for comparison between the jurisdictions. More importantly for the purposes of intermediary provision, the Northern Irish model established by the DoJ was largely based on the experiences of the WIS in England and Wales. Writing shortly after the launch of the DoJ's pilot project, Cooper and Wurtzel compared the respective schemes 'which, though similar, are distinct and significantly different in respect of defendants'.[45] Further, in its own guidance the DoJ explicitly recognised the lack of formal intermediary provision for defendants in England and Wales and decided to diverge from this position.[46] I concluded that whether such organisational differences in intermediary provision may affect the scope and content of the intermediary role invited examination. Cooper and Wurtzel's work also provided a useful analysis of the challenges the DoJ was likely to face in implementing the Registered Intermediary Scheme (RIS) and lessons that could be learned from nearly a decade of intermediary provision in England and Wales. How these challenges have been faced and what they can tell us about the work of intermediaries on the ground is explored in this thesis. As such, there are similarities in how intermediaries are organised in both jurisdictions but sufficient divergence for a useful research enquiry. Although the thesis is not a structured as a comparative piece of work,

[45] Cooper and Wurtzel (n 38).
[46] DoJ, 'Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review' (January 2015).

references to both jurisdictions throughout aid understanding of the intermediary role, its scope and content.

i) England and Wales

Intermediaries are a creature of statute. S.29 of the YJCEA contains the intermediary special measure and outlines the role's functions as follows:

> (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.

The eligibility criteria for an intermediary for non-defendant witnesses are contained within s.16(1)(a).[47] This sets out that a witness may be granted an intermediary:

> "(a) if under the age of [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 of 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."

[47] The YJCEA, as amended in June 2011 by s.98 of the Coroners and Justice Act 2009 (CJA) increases the age limit from 17.

After the YJCEA was implemented, it was not clear how any resulting intermediary scheme would be rolled out, what profile of individual would carry out the role, or how it would operate in practice.[48] Birch raised similar questions and noted that s.29 provided only a 'briefest description of the intermediary's function'[49]. The intermediary special measure was first piloted in 2004 in six police force areas (pathfinder areas) in England.[50] The Home Office recruited a cadre of intermediaries, mostly trained as speech and language therapists, deemed to possess the 'relevant professional skills' who were required to undergo a specific training course.[51] These first intermediaries were trained on criminal procedure and in writing court reports based on their assessment of communication needs. Based largely on poor understanding of the extent of miscommunication in the criminal justice process, recognition of eligibility was initially a major obstacle.[52] The pilot scheme was relaunched in 2005 with clearer guidance and the rates of requests increased.[53] The resulting evaluation report recommended national rollout of the intermediary scheme which occurred in 2007. This involved delegating the cost of the scheme to local police forces and the Crown Prosecution Service (CPS) areas which helped further improve awareness of the scheme and the numbers of vulnerable individuals matches with intermediaries.[54] The Witness Intermediary Scheme (WIS), now managed by the National Crime Agency (NCA), was fully implemented nationally in 2008. The key operational element of the scheme became known as the 'Matching Service', which is the mechanism by which Registered Intermediaries are matched to the requirements of witnesses at the request of the end-user.[55] The service is run by the Witness Intermediary Team (WIT) which has responsibility for matching requests from the police and the CPS using a centrally held register of qualified 'Registered Intermediaries'.[56] The NCA collects data, such as number of requests in each area and the reason(s) for the request (such as type of disability and age of witness).[57] While the vast majority of intermediaries initially recruited to the register were

[48] Home Office, 'Measures to assist vulnerable or intimidated witnesses in the criminal justice system: Implementing the Speaking up for Justice Report' (Home Office Communication Directorate 2002). Chapter 2 of the thesis outlines the 'emergence' of the intermediary role in a historical context.
[49] Birch (n 41) 249.
[50] Joyce Plotnikoff and Richard Woolfson, 'The Go-Between: Evaluation of Intermediary Pathfinder Projects' (Lexicon 2007).
[51] Plotnikoff and Woolfson (n 37) 11.
[52] ibid 10-11.
[53] Ibid 13.
[54] Cooper and Wurtzel (n 38) 45.
[55] MoJ, 'The Witness Intermediary Scheme: Annual Report 2018/2019 (September 2019) available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835941/witness-inter-scheme-annual-report.pdf> 10 accessed 7 January 2020.
[56] For a full outline of the governance of the Witness Intermediary Scheme (WIS) see: MoJ, 'Registered Intermediary Procedural Guidance' (September 2020) 8-11.
[57] Ibid, 11.

speech and language therapists, in recent years there has been an increase in individuals from other backgrounds, such as teaching, nursing and social work.[58]

Registered Intermediaries operating within the WIS are available only to non-defendant witnesses. The provision of intermediaries for defendants was never part of the WIS because the YJCEA initially specifically excludes defendants.[59] As a result, any application for intermediary assistance for a vulnerable defendant must be dealt with under common law, applying the court's inherent jurisdiction.[60] Intermediaries who assist suspects and defendants through this route are termed 'non-registered intermediaries'.[61] As Cooper and Wurtzel note, in the absence of in-force legislation, judges in England and Wales have 'stepped in to fill the gap and permit defendant intermediaries where they are necessary for a fair trial'.[62] Exercise of the court's inherent powers in this way has been viewed as an attempt to 'redress the imbalance between witnesses and defendants.'[63] Non-registered intermediary appointments are decided on a case-by-case basis. The difference in treatment between witnesses and defendants in terms of intermediary provision has been described as 'puzzling' by the Divisional Court.[64] As Plotnikoff and Woolfson highlight, many defendants would meet the criteria governing intermediary assistance which makes the discrepancy even more difficult to justify.[65] This difference in treatment of witnesses and defendants has resulted in what Henderson has termed a 'two-tier' system of intermediary provision.[66]

[58] 58.8% of Registered Intermediaries in England and Wales list their profession as 'Speech and Language Therapist', 19.6% listed 'Education', 3.5% 'Psychologist', 2.5% 'Nurse', 2.0% 'Social Worker'. A further 5.5% list some variation on 'Intermediary' as their profession, with 2% of these identifying specifically as a 'Deaf Intermediary: E-mail from MoJ to author (6 September 2021).

[59] Penny Cooper and David Wurtzel, 'A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales' (2013) 1 Criminal Law Review 4, 7. Section 33A of the Youth Justice and Criminal Act 1999 (YJCEA) now provides that the court can allow a defendant to give evidence by live link.

[60] Section 33BA of the Coroners and Justice Act 2009 (CJA) amended the YJCEA to provide a statutory basis for defendant access to intermediaries; however, this has not been implemented.

[61] Cooper and Wurtzel note that there is no standard way of finding an appropriate defendant intermediary and funding arrangements differ for pre-trial and trial. See Cooper and Wurtzel (n 38) 18.

[62] Cooper and Wurtzel (n 38) 18.

[63] Plotnikoff and Woolfson (n 37) 248.

[64] *OP v Secretary of State for Justice* [2014] EWHC 1944 (Admin).

[65] Plotnikoff and Woolfson (n 37) 247; Communication difficulties and disorders are even higher among defendants than the general population, see: Laura Farrugia and Fiona Gabbert, 'Vulnerable Suspects in police interviews: Exploring current practice in England and Wales' (2020) 17(1) Journal of Investigative Psychology and Offender Profiling 17.

[66] Henderson (n 8); Also see: Louise Tickle, ''Justice must be for all': why court intermediaries are vital for vulnerable.' The Guardian (London, 28 October 2020) <https://www.theguardian.com/society/2020/oct/28/justice-for-all-court-intermediaries-vulnerable-people-england-wales> accessed 5 June 2021.

In practice, the work of intermediaries extends beyond assisting at police interview and facilitating communication at trial as originally envisaged by the YJCEA.[67] Registered intermediaries in England and Wales routinely attend police stations, as well as other locations, such as schools or homes, to assess vulnerable witnesses.[68] Flexibility is at the heart of the communication assessment and intermediaries are encouraged to assess the witness where the witness feels calm and safe.[69] The purpose of the assessment is for the intermediary to ascertain the witness's communication abilities and specific needs.[70] This includes language, attention span, understanding of temporal and spatial concepts, abstract terms, and the extent of suggestibility and compliance. After the assessment, the Registered Intermediary is required to prepare a preliminary report setting out their findings and recommendations for the Achieving Best Evidence (ABE) interview. ABE interviews are investigative interviews with witnesses which aim to obtain 'an accurate and reliable account in a way that is fair, is in the witness's interests and is acceptable to the court.'[71] Once the intermediary has assessed and established a rapport with the witness, they will have a planning meeting for the ABE interview with the police officer. This may include a discussion of communication needs, room layout, potential use of communication aids or props, vocabulary and how to ensure that the witness remains engaged and calm.[72] The police officer conducts and manages the ABE interview and while the intermediary may intervene during interview when communication breaks down, their role does not amount to 'a second interviewer'.[73] Intermediaries rarely attend suspects at the police station, although when they do, it is on an ad hoc basis. Official guidance on questioning vulnerable suspects at the police interview stage provides only for the involvement of an appropriate adult.[74] Appropriate adults aim to support, assist and advise vulnerable suspects in custody, ensure that the police are acting fairly and enable the suspect to understand their rights and entitlements.[75] While both appropriate adults and intermediaries facilitate communication, appropriate adults are not ordinarily communication experts

[67] Plotnikoff and Woolfson (n 37) 18.
[68] The Advocate's Gateway (2019) Intermediaries. Available at: <www.theadvocatesgateway.org/intermediaries> accessed 4 March 2021.
[69] Plotnikoff and Woolfson (n 37); MoJ (n 56) 13.
[70] MoJ (n 56) 13.
[71] MoJ (n 4) [3.00].
[72] Ibid [4.52].
[73] Ibid [2.200].
[74] Home Office, 'Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (Police and Criminal Evidence Act (PACE) 1984) [1.4].
[75] Ibid.

like intermediaries and operate mostly in a volunteer capacity.[76] The role can be performed by various types of individuals including parents or family members, friends or carers or social workers.[77]

If a case proceeds to court, the intermediary is required to prepare a written report for the court explaining their own experience and skills and how communication assistance may be given. For Registered Intermediaries, comprehensive guidance on the court report, its structure and what it should include are contained within the MoJ's Procedural Guidance Manual.[78] Unsurprisingly, no such guidance exists for non-registered intermediaries. However, since many non-registered intermediaries also work with witnesses under the WIS, there tends to be a degree of uniformity in how recommendations are presented.[79] The period of communication assistance provided to vulnerable individuals often differs between witnesses and defendants. Registered Intermediaries facilitate communication during the period of oral testimony. While non-registered intermediaries may be appointed to assist a defendant throughout the duration of a trial, the Criminal Practice Directions (CPD) and subsequent case law state that this should be 'extremely rare'.[80] As such, there exists a presumption against the use of an intermediary for a defendant at trial.[81] Without any formalised guidance or equivalent procedural manual, the involvement of non-registered intermediaries for defendants is more varied and potentially flexible. As will be developed later in the thesis, the different participatory roles of witnesses and defendants invariably mirror intermediary involvement at all stages of the criminal process.[82]

ii) Northern Ireland

The Department of Justice of Northern Ireland (DoJ) in 2013 developed a model for the provision of intermediaries for vulnerable complainants and witnesses in the criminal justice system. This was based on the provisions of the Criminal Evidence (Northern Ireland) Order 1999,[83] which mirror the provisions of s.29 YJCEA. These provide that an application for an intermediary may be made where their use is

[76] For further discussion on how the appropriate adult role is framed, see: Roxanna Dehaghani, 'Defining the "appropriate" in "appropriate adult": restrictions and opportunities for reform' (2020) 12 Criminal Law Review 1137.
[77] National Appropriate Adult Network, 'About appropriate adults' (NAAN, 2018) <https://www.appropriateadult.org.uk/information/what-is-an-appropriate-adult#act> accessed 8 December 2017.
[78] MoJ (n 56) 31-39.
[79] Plotnikoff and Woolson (n 37) 250.
[80] CPD (n 22) 3F.14.
[81] ibid, 3F.12. The Practice Directions also state that the court should be: 'satisfied that a non-registered intermediary has expertise suitable to meet the defendant's communication needs' (3F.12); *OP* (n 29) [47].
[82] For further discussion of 'effective participation', see: Chapter 9.
[83] Arts 17 and 21BA.

likely to improve the quality (completeness, coherence and accuracy) of the evidence given by a witness. For defendants, an intermediary may be appointed to enable effective participation during oral evidence in court and to help to ensure a fair trial.[84] Intermediaries in Northern Ireland are all trained, registered and regulated by the DoJ. The DoJ concluded that respect for the principle of equality of arms demanded that all vulnerable individuals - including defendants - be eligible for intermediary assistance.[85] Therefore, what Henderson has termed the 'two tier' intermediary provision in England and Wales does not exist in Northern Ireland.[86] The DoJ initially sought to recruit candidates 'from a wide background of professional roles and occupations, including speech and language therapy, occupational therapy, psychology, social work, the mental health professions, counselling, teaching and nursing'.[87] It advertised for 'professionals with specialist skills in communication' from fields such as 'speech and language therapy and social work'.[88] Like England and Wales, the vast majority of those on the Registered Intermediary Scheme (RIS) register are speech and language therapists with a number hailing from a social work background.[89] The RIS was subsequently established to allow end users i.e. police, prosecutors and defence solicitors, to access intermediary services. The first batch of registered intermediaries underwent an intensive training and assessment course covering legal procedure, report writing, the role and responsibilities of the intermediary and court work with a witness.[90]

Registered Intermediaries in Northern Ireland can support both witnesses and suspects at the police station, assist with the planning of interviews and indeed attend interviews to help facilitate communication.[91] Their involvement at this stage mirrors the WIS in England and Wales and is comprehensively set out in the DoJ Procedural Guidance Manual. At trial, Registered Intermediaries in Northern Ireland are appointed on an 'evidence only' basis i.e. they are restricted to assisting during the period of testimony.[92] The court can, however, appoint a 'court defendant supporter', who typically also works as an appropriate adult, to provide emotional and general support to the defendant for the periods when an intermediary is not present.[93] After an initial Pilot in May 2013, the scheme was extended and now operates in respect of criminal cases being heard in all Crown, Magistrates' and Youth courts.

[84] DoJ (n 46) 6.
[85] Ibid.
[86] Henderson (n 8).
[87] DoJ 'Application Information Pack' (August 2012) 7.
[88] DoJ (n 46) 5.
[89] E-mail from DoJ to author (August 21, 2020).
[90] Cooper and Wurtzel (n 38) 40.
[91] DoJ (n 46) 3.
[92] This has also been set out in a recent Crown Court Practice Direction: Practice Direction No. 2/2019, Case Management in the Crown Court Including Protocols for Vulnerable Witnesses and Defendants, A5.4.
[93] DoJ (n 46) 21.

In both jurisdictions, intermediaries are involved in pre-trial case management hearings known as a 'Ground Rules Hearings' (GRH). The GRH affords the intermediary the opportunity to discuss with the advocates and the judge any adjustments to questioning and any other recommendations contained within the Court Report. The GRH should establish the rules relating to the manner and duration of questioning, how the intermediary may intervene if necessary and generally how the intermediary will assist the advocates and judge.[94] The judge may also order that the intermediary reviews the questions that the advocates plan to ask the witness and provide advice on their suitability in terms of the witness's communication needs. The judge makes the necessary directions to set the parameters for fair treatment of the witness.[95] GRHs are integral to ensuring the proper questioning of a vulnerable witness or defendant.[96]

The differing intermediary regimes in England and Wales and Northern Ireland are set out below in Table 1.

Table 1: Intermediary provision in Northern Ireland and England and Wales compared

	Northern Ireland	England and Wales
Coverage	Witnesses and defendants eligible for Registered Intermediaries (RIs).	Only witnesses are eligible for Registered Intermediaries (RIs). Defendant intermediaries are appointed using the court's inherent jurisdiction.
Duration of appointment	Evidence only.	Generally evidence only, although courts can exercise their inherent powers to allow longer appointments for defendants.
Use for suspects	RIs routinely attend police station to assist suspects at interview.	Defendant intermediaries rarely attend for suspect interview.
Funding	DoJ provides funding for RI appointments at set rates.	MoJ provides funding for RI work at set rates. Fees for defendant appointments are unregulated with the Legal Aid Agency covering pre-trial work and HMCTS funding work at court.
Training and accreditation	All RIs are trained, overseen and regulated by the DoJ and	All RIs are trained, overseen and regulated by the MoJ and

[94] MoJ, Registered Intermediary Procedural Guidance Manual22; DoJ, 'The Registered Intermediaries Procedural Guidance Manual' (Northern Ireland) (July 2019) 45-46.
[95] Cooper, Backen and Marchant (n 38) 431.
[96] Penny Cooper, 'Ticketing Talk Gets Serious' (Counsel Magazine, November 2014) 11–12.

	must adhere to a Code of Ethics and a Code of Practice. RIs must update their knowledge and skills through continuing professional development.	must adhere to a Code of Ethics and a Code of Practice. RIs must update their knowledge and skills through continuing professional development. Defendant intermediaries are unregulated with no equivalent oversight.

1.5 Neutrality and impartiality

Neutrality is a core tenet of the intermediary role. As will be explained in Chapter 3, from the earliest stages of government consultation there was a strong presumption that the role must be objective and separate from the defence or prosecution. Both the MoJ and DoJ outline in their respective procedural guidance manuals that Registered Intermediaries owe their duty not to the defence or prosecution, but rather to the court and the criminal justice system.[97] This means that intermediaries are not to assume the role of expert witnesses or witness supporters.[98] While intermediaries for defendants and witnesses are organised differently in England and Wales, the Criminal Practice Directions 2015 outline that both roles are underpinned by a narrow focus on facilitating communication and that intermediaries must 'ensure they act impartially'.[99] The Equal Treatment Bench Book also describes intermediaries as 'impartial, neutral officers of the court'.[100]

In Northern Ireland, the decision to limit intermediary involvement to oral evidence was premised on the need to protect the role's impartiality.[101] The DoJ reasoned that provision of intermediary assistance for the whole trial risked the role being perceived as acting for the defence.[102] However, the role of the 'court defendant supporter' is available to assist the accused when they are not providing evidence. This role provides general support and reassurance to the vulnerable accused which the intermediary is unable to.[103] The scheme is operated by a mental health charity named 'Mindwise' and is commonly recommended by intermediaries as an adjunct to their services. These volunteers are not, however, accredited, trained, or subject to any codes of practice or conduct in the way that Registered

[97] MoJ (n 56) 6; DoJ (n 46) 14.
[98] Lord Thomas speech (n 1) 16; For a discussion of how intermediaries can often struggle with the neutrality element of their role see: Brendan O'Mahony, 'How do intermediaries experience their role in facilitating communication for vulnerable defendants?' (PhD thesis, University of Portsmouth 2013) 150.
[99] CPD (n 22) 3F.2.
[100] Equal Treatment Bench Book (n 36).
[101] DoJ (n 46) 6.
[102] Ibid.
[103] DoJ (n 46) 6.

Intermediaries are. While the DoJ is concerned with upholding the intermediary's independence as an officer of the court, the Law Commission found 'no reason why partiality concerns should act as a bar to intermediary assistance in the wider trial process.'[104] Recommending a statutory entitlement for defendant intermediary assistance, the Law Commission noted that intermediaries (like defence representatives) owe a duty to the court to "act with independence in the interests of justice" which overrides any other inconsistent obligations to their client.[105]

The significance of neutrality as a value underpinning the intermediary role is explored in depth in later chapters. Chapter 7, 'The Paradox of Neutrality', focuses on how intermediaries conceptualise neutrality as a component of their work and how this should make us reflect on the role more broadly.

1.6 Thesis structure

The first part of the thesis (chapters 1 – 5) provides important context and sets the scene for later chapters by examining the emergence of the intermediary role, how it fits within the existing trial structure and theories of the trial, and existing accounts of the role. Chapter 5 discusses the methodology and data to be used in this study. The second part of the thesis (Chapters 6– 9) engages with the empirical data collected to address the above research questions. Chapter 9 offers a conclusion and discusses the future of the intermediary role.

Chapter 2 sets out the story of how the intermediary role first emerged. While the YJCEA outlines the intermediary's function in straightforward terms, the role was the subject of much disagreement for the preceding 30 years. The intermediary role did not merely appear with the passing of the YJCEA but had been in embryonic form for quite some time. This chapter considers the historical record of the Parliamentary debates, government committees and surrounding academic literature which paints a picture of a confused and ill-understood role. It reveals how diverging representations of the intermediary role have contributed to questions over the role's scope and underscores the importance of this research project.

Chapter 3 locates the intermediary role within the structure of the English criminal trial. The chapter considers some of the main theoretical accounts of the trial and asks how the intermediary role impacts core aims which underpin the trial. This sets the scene for a more nuanced discussion of the values intrinsic to the trial and how they relate to the intermediary role. This acts as an important foundation

[104] Law Commission (n 37) 46.
[105] Ibid.

for subsequent chapters which explore the ambiguities around the role's parameters. This chapter also serves as an important reference point for the analysis chapters wherein a grounded theory of the role and its content emerge.

Chapter 4 seeks to impose some order on existing accounts of the intermediary role and its function. The chapter thematically organises the differing roles that intermediaries have been thought to and/or are expected to perform. The chapter is centred around a typology which serves as a conceptual framework to better 'comprehend, understand, and explain complex social realities' that are involved in the performance of the intermediary role.[106] The classification of the intermediary is instructive in identifying shared and divergent criteria that emerge from the themes and ideas in the discourse. The typology is constructed around the following types: 'the communicator', 'the supporter' and the 'the intervener'.

Chapter 5 outlines and explains the methodological choices for gathering and analysing the empirical data. This involves explaining why a qualitative form of inquiry was considered appropriate and how this approach aligns with the chosen research questions.[107] Central to this chapter is a discussion of grounded theory methodology - involving the progressive identification and integration of categories of meaning from data.[108] The chapter also explains why semi-structured interviews were chosen as the main method for data collection, how the study population was selected and how the resulting data was analysed. Finally, the ethical issues arising from the research are acknowledged and discussed.

Chapter 6 focuses on the contested status of the intermediary as a 'professional' in the criminal justice system. The issue of professional identity/professionalisation was an emergent theme in the interview data. The analysis contained within the chapter focuses on two key theoretical constructs. The first is Abbott's work on interprofessional jurisdictional disputes which details how professions operate in dynamic social settings which shape and define individual professional roles and their content.[109] The second is Gieryn's conception of 'boundary work',[110] which outlines how professionals demarcate the boundaries which represent status, autonomy and claims over professional resources. The chapter concludes by reflecting on the various conflicts which the intermediary faces in trying to secure and

[106] Susann Kluge, 'Empirically grounded construction of types and typologies in qualitative social research' (2000) 1(1) Forum: Qualitative Research 14.
[107] Norman Denzin and Yvonna Lincoln, *The Sage Handbook of Qualitative Research* (SAGE Publishing 2005) 10.
[108] Kathy Charmaz, *Constructing Grounded Theory. A Practical Guide Through Qualitative Analysis* (SAGE Publishing 2006).
[109] Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (The University of Chicago Press 1988).
[110] Thomas Gieryn, 'Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists' (1983) 48 American Sociological Review 781-795.

maintain jurisdiction. It asks if the role's jurisdictional conflicts will result in a 'jurisdictional settlement' whereby intermediaries accept a more limited role with distribution of some of their work tasks among other criminal justice actors.[111]

Chapter 7 posits that intermediaries are embroiled in an ongoing struggle about how the principle of neutrality is conceptualised and negotiated within their work. It argues that the normative expectation of neutrality underpinning the role needs to be reassessed based on the realities of the role at the coalface. This inherent tension allows for an analysis utilising the Bourdieusian concept of 'illusio'. Illusio relates to a collective belief among members of a 'field' in the value of taking part in collective struggles.[112] Reflecting on the strength (or weakness) of the illusio generated by intermediaries helps locate the intermediary within the social world of the criminal justice system. Furthermore, examining the intermediary role through the prism of neutrality reinforces a key theme emerging from my data: the roles of Registered Intermediaries and non-registered intermediaries are qualitatively different. I term these concepts 'witness work' and 'defendant work' respectively.

Chapter 8 focuses on the relationship between the intermediary role and the criminal justice value of participation. It examines how performance of the intermediary role is inextricably tied to the different ways in which vulnerable individuals participate within the criminal justice process. The chapter further develops the concepts of 'witness work' and 'defendant work' through a focused analysis of participatory roles. This includes an analysis of how intermediaries work to ensure the defendant's right to effective participation. This chapter seeks neither to rank witness/defendant participatory rights nor strike a conceptual balance between the two groups. Instead, it attempts to analyse the meaning and experience of participation and how this can relate to the nature and scope of the intermediary's role.

Chapter 9 concludes the thesis and addresses how each of the research questions has been answered. It discusses recent developments with the introduction of the new HMCTS Court Appointed Intermediary Services (HAIS) and makes recommendations regarding intermediary provision.

1.7 Conclusion

This thesis offers a unique insight into how intermediaries experience the world of the criminal justice system. There are several important findings that emerge from the thesis, including how the role is fundamentally shaped by its commitment to the facilitation of communication, that intermediaries feel like outsiders in the world of criminal justice and that the role continues to be poorly understand by

[111] Abbott (n 109) 72.
[112] Pierre Bourdieu, *Pascalian Meditations* (Cambridge 2000) 187.

other criminal justice actors. These findings are developed throughout each of the chapters and help provide some context to the intermediary role and its work. A common theme threaded throughout this thesis is that there is a perceptible difference between the content and scope of witness intermediary work on one hand and defendant intermediary work on the other. This difference matters to the extent that two roles have emerged which are qualitatively different and must be recognised as such. The standard depiction of the intermediary as an objective communication facilitator takes no account of the role's nuances nor how the profile of the vulnerable individual markedly shapes the scope and content of intermediary work. The thesis reveals that the 'two tier' system of intermediaries exists not only organisationally but also culturally in the way that intermediaries approach the individual demands of their work tasks. This research not only highlights this bifurcation in intermediary work but also calls for its recognition in intermediary provision in England and Wales. The unified system of intermediaries in Northern Ireland is presented not as a panacea to the problems associated with the two-tier system, but as an instructive reference point. While both the WIS in England and Wales and the RIS in Northern Ireland share a 'common purpose', how the two differ and what impact this has on the content and scope of the intermediary role will be explored throughout the thesis.[113]

[113] Cooper and Wurtzel (n 38) 39.

Chapter 2: Emergence of the intermediary role

The intermediary role is a creature of statute and was formally introduced on 23rd February 2004 when s.29 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) came into force. The legislation provides for the 'examination of a witness through intermediary' and outlines that this individual will be 'an interpreter or other person approved by the court for the purposes of this section.'[114] While the intermediary is one of a broad range of special measures, there has been little focus on the background to s.29 YJCEA and the developments that led to its inclusion within the legislation. Tracing the legislative and policy background to s.29 can help us understand how the intermediary role was originally envisaged and how it was expected to operate within the criminal justice system. This is an important prerequisite to understanding the scope and nature of the intermediary role.

The discussion in this chapter sets the scene for two fundamental questions which thread throughout the thesis: i) who are intermediaries? and ii) what does the role involve? These questions link directly to the broad research question underpinning the thesis. The chapter firstly considers the development of accommodations for children as the archetypal vulnerable individual and how momentum developed for the extension of assistance to a wider cohort of vulnerable witnesses. It then explores the workings and recommendations of the Pigot Committee which was established to examine a 'growing body of support for a change in the law' relating to the treatment of vulnerable witnesses.[115] The Committee's recommendation of an 'interlocutor' was a forerunner to the intermediary role and is an instructive reference for the remainder of the thesis. The chapter then examines the 'Speaking Up For Justice' report in which the term 'intermediary' was first used and which also recommended the creation of a scheme for the accreditation of the role. Finally, the chapter considers the legislative passage of the YJCEA and the discussions, debates and concerns that were raised about the prospective operation of the intermediary role.

2.1 Children as archetypal vulnerable individuals

The momentum for change regarding special measures began with a focus on children and the challenges associated with their testimony. Children providing evidence to police at interview and later at trial has not always been the norm. Children were viewed as being different from adults in that their

[114] Youth Justice and Criminal Evidence Act (YJCEA), s.29.
[115] Home Office, 'Report of the Advisory Group on Video Evidence' (London 1989) (hereafter referred to as the 'Pigot Report').

developmental immaturity was thought to render their evidence intrinsically unreliable.[116] Under the common law, children under 14 years old could only testify if they were sworn and possessed sufficient knowledge of the nature and consequences of an oath.[117] Legislative provision in The Children and Young Persons Act of 1933 then provided for the allowance of the unsworn evidence of children who did not understand the oath. However, the Court of Appeal decision of *R v Wallwork* in 1958 diminished the perceived value of child witnesses, branding 'ridiculous'[118] any suggestion that a jury could treat unsworn evidence seriously. The Court stated that it deprecated the calling of such a young witness and called for a stop to permitting such evidence in future cases.[119]

While children have historically been depicted as unreliable witnesses, they have also been portrayed as archetypal vulnerable victims and witnesses.[120] Yet children were not the only group to receive special attention. The plight of victims of sexual offences, who often felt stigmatised by their ordeals being ventilated in public, have also been well documented. In response, the Sexual Offences (Amendment Act) 1976 was passed with the aim of preventing questioning of victims that 'does not advance the cause of justice but in effect puts the woman on trial'.[121] Yet the ability of children to testify about their experiences and treatment continued to be severely curtailed by the mistrust which the system placed on them as providers of evidence.[122] Despite the bespoke procedures to ensure child witnesses understood the oath and the importance of telling the truth, they were still expected to cope with all of the other associated pressures of the court process. While perceived as vulnerable, the primary concern was the reliability of their evidence rather than their experience of the process.

Since the 1970s there has been a growing acceptance that the adversarial model of criminal justice poses particular problems for victims and witnesses.[123] For example, the establishment of 'Victim Support' signified a growing realisation that achieving reliable evidence must be balanced with the better treatment of witnesses and victims.[124] Through the Criminal Justice Bill 1987, the government outlined its plans for legislation introducing live video link evidence and the possibility of video

[116] Jessica Jacobson and Jenny Talbot, 'Vulnerable defendants in the Criminal Courts: a review of provision for adults and children' (Prison Reform Trust 2009, ISBN: 0 946209 96 0) 8.
[117] Pigot Report (n 115).
[118] [1958] 42 Cr App R 153 [160].
[119] Ibid.
[120] Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour and Victims* (Oxford University Press 2004) 377.
[121] Dame Rose Heilbron, 'Report of the Advisory Group on the Law of Rape' (HMSO, London 1975).
[122] Mandy Burton, Roger Evans and Andrew Sanders, 'Are Special Measures for Vulnerable and intimidated witnesses working?: Evidence from the criminal justice agencies' (Home Office Online Report 01/06) 2.
[123] Ibid. For further critique of the adversarial model, see: Chapter 3.
[124] Burton et al (n 122) 2.

recordings of investigative interviews in child abuse prosecutions.[125] Despite an attempt in the Commons to revive an amendment allowing for video recorded interviews, the government rejected it, stating that the proposal raised 'complex issues which need careful consideration'.[126] The government continued to resist introducing pre-recorded testimony, but the accedence to the modest reforms in the Criminal Justice Act 1988 (most significantly the introduction of the ability to give evidence via live link) highlighted the need for more drastic changes. While the intermediary as a special measure was not contemplated at this stage, momentum was beginning to develop for innovate ways to assist the evidence giving process.

Around the same time, the first prototype of the intermediary role was proposed by Glanville Williams which took the form of a 'child examiner' who would relay questions posed by lawyers to young witnesses.[127] The proposal sought to remove the child witness from the courtroom environment entirely with all evidence being video-recorded and later relayed to the full trial.[128] The proposal was, however, rejected by the government based on concerns that it could 'dilute the interaction between counsel and child which is a key part of protecting the right of the accused person who, we must remember, is innocent until proven guilty.'[129] It is noteworthy that other jurisdictions had previously introduced a role similar to the intermediary much earlier. For example, in Israel the role of the 'youth examiner' has existed since 1955. However, this role assumes investigatory powers ordinarily held only by the police and thus is much broader in scope.[130] In Western Australia, legislation has been in force since 1906 affording a court discretion to appoint a communicator for a child. As noted later in the chapter, much about this communicator role in Western Australia was unexplored at the time the intermediary role was proposed in England and Wales.

2.2 The Pigot Committee

The government's commitment to investigate further reforms and their potential ramifications led to the establishment of the 'Report of the Advisory Group on Video Evidence'. The exploratory mandate given to the Advisory Group reflected the caution advocated in some of the final speeches made in the Commons during the debates on the Criminal Justice Act 1988. These speeches urged restraint from

[125] Carolyn Yates, 'The Pigot Committee Report: Children, Evidence and Video-tape' (1990) 2 Journal of Child Law 96.
[126] HL Deb 27 April 1987, cols 1266-347.
[127] Glanville Williams, 'Videotaping Children's Evidence' (1987) New Law Journal 108.
[128] Kate Warner, 'Child Witnesses: Evidentiary Reforms' in Julia Vernon (ed) *Children as Witnesses* (Proceedings of a Conference held 3-5 May 1988).
[129] HL Deb 22 October 1987, vol 120, cols 266-267.
[130] Solomon Eaglestin and Yuval Karniel, 'The Youth Examiner: An Israeli socio-legal experiment' (1991) 5(4) Children and Society 317.

rushing into the introduction of radical changes to evidence giving procedures. Nonetheless, it was apparent that conflicting arguments existed and the responsibility of evaluating all viewpoints was offloaded to an independent committee. Subsequently described as an attempt to 'deflect' the proposed amendments to the Criminal Justice Act 1988, the move was postulated as a chance to conduct a thorough examination of the potential merits and drawbacks of the greater user of video technology in courts.[131]

Immediately prior to the Advisory Group's establishment, the government was unclear about the sort of conclusions it may have welcomed. In justifying the limitations of the 1988 Act, as well as its decision to establish the Advisory Group, the government was ambivalent about the benefits of widening measures for children in courts. Whilst noting the immediate attractiveness of the proposals, Home Secretary Douglas Hurd cautioned that: 'we have had some doubts as to whether it would actually have the effect of making things easier for the child victim, and can see grounds for fearing that it might make matters worse'.[132] The differing opinions that existed and the government's preference for a comprehensive, independent evaluation was explicitly recognised by the Advisory Committee in its report.[133]

The Committee, chaired by HHJ Thomas Pigot QC, had child witnesses as its direct focus but was given malleable terms of reference: 'to look in greater depth than has so far been possible that video recordings of interviews of child witnesses (and possibly other victims of crime) should be readily admissible as evidence in criminal trials.'[134] While children had hitherto monopolised discussion relating to adaptations of the evidence giving process at trial, the purview of the Pigot Committee broadened the scope of concern. That certain groups of adults could also come within the Pigot Committee's remit must have been fairly surprising at the time; at least when considering the relative inattention they had received compared to children. Prior to the establishment of the Committee, the debate relating to difficulties certain adults may similarly face when giving evidence was notably absent.[135] Indeed, the only mention of adult witnesses throughout the whole of the House of Lord's debate on the CJA 1988, for example, related to the government's view that a court appearance placed more of a strain on children than on adults.[136]

[131] Laura Hoyano, 'Variations on a theme by Pigot: special measures directions for child witnesses' (2000) Criminal Law Review 250.
[132] Pigot Report (n 115).
[133] ibid 7.
[134] ibid 1.
[135] Jonathan Herring, *Vulnerable Adults and the* Law (Oxford University Press 2015) 38.
[136] HL Deb 27 April 1987, vol 120, cols 1266-347.

2.3 Pigot's vision of the 'interlocutor'

Contrary to the previously cautious attitude of the government, the Pigot Committee recommended that 'quite radical changes are now required if the courts are to treat children in a humane and acceptable way'.[137] Using the Committee's own terminology, one of these more 'radical' changes came in the form of recommendation 6 which related to the possibility of a child being examined through what was termed 'an interlocutor'. The Report clarified that this would involve:

> 'the relaying of questions from counsel through a paediatrician, child psychiatrist, social worker or person who enjoys the child's confidence. In these circumstances nobody except for the trusted party would be visible to the child although everyone with an interest would be able to communicate, indirectly, through the interlocutor.'[138]

Of the Committee's 24 recommendations, this was the only one not to receive unanimous support from its members. The unease at the prospect of interposing a third party between the advocate and the witness was noted and the expected opposition of the legal profession was pre-emptively addressed. The fact that an advocate may have to sacrifice some 'forensic skills, timing, intonation and the rest' was recognised but not seen as an automatic barrier to the interlocutory measure being introduced.[139] Committee member Anne Rafferty, a practising barrister at the time of the Report's publication, dissented and argued that the interlocutor provision would 'hinder rather than assist counsel conducting the case'.[140] The alternative proposed was to provide greater opportunities for counsel to 'establish a rapport with a child witness before the hearing takes place'.[141] The difficulties which Ms Rafferty considered that advocates may encounter were not elaborated upon, nor were the profiles of those deemed suitable for the role.

Pigot's vision of the interlocutor raises some important points when considering how the role of the intermediary emerged and subsequently developed. The first relates to the profile of the individual the Committee expected to perform the interlocutory role. As noted above, the sole dissenting voice on this recommendation rejected the proposal in its entirety as opposed to advocating a less obstructive measure. It may be asked: why did the Committee identify paediatricians, child psychologists and social workers as being suitable for the role? A similar question arose in relation to the Criminal Justice Bill 1987 and, specifically, amendments on the use of video-recorded interviews and the questioning of child witnesses in court. The amendment included provision that a 'prescribed officer of the court'

[137] Pigot Report (n 115) [2.9].
[138] Ibid [2.33].
[139] Ibid [2.33].
[140] ibid [2.34].
[141] Ibid.

would help to relay questions put to child witnesses by lawyers.[142] The amendment specified that the prescribed officer should be a 'qualified social worker, child psychologist or probation officer.'[143] While the amendment was withdrawn, it was announced by the government at this point that the Pigot Committee would be established to consider the specific issues in more detail.[144]

It is also of note that the Committee considered '[a] person who enjoys the child's confidence' as a potentially suitable interlocutor.[145] The Committee noted that 'nobody except for the trusted party would be visible to the child, although everyone with an interest would be able to *communicate*, indirectly, through the interlocutor'[emphasis added].[146] One can imagine how this label could apply to a relatively large pool of individuals in the child's own private life outside of criminal proceedings and could relate to the role of a parent or close relative. How this aspect of the role fits in with the bespoke interlocutor role to be executed by a paediatrician, child psychiatrist or social worker is puzzling. The Committee provided no explanation about why, for example, these individuals might fulfil different roles depending on the level of communication difficulty.

In attempting to rationalise its interlocutor recommendation, the Committee drew a comparison with the court interpreter. It noted that there would be 'no great difference of principle' between the use of someone who can help a child to communicate and 'the employment of an interpreter where a witness cannot speak English'.[147] It was suggested that both roles act to prevent the loss of crucial evidence without which the court is unable to dispense justice. The comparison with the court interpreter is notable as it appears to be the first time an analogous position or role is identified. Five years previously, the Police and Criminal Evidence Act 1984 (PACE) created the new role of the 'Appropriate Adult' who could be called to the police station to assist juvenile or mentally vulnerable persons understand the custody procedures and their own rights.[148] While the interlocutor and the Appropriate Adult are both involved in assisting communication, the latter role was limited to the police station.[149] The Pigot Committee's terms of reference, however, were directed towards the criminal trial and it did not consider pre-trial matters. It seems that, for this reason, more was not made of the potential overlap between the two roles.

[142] HC Deb 20 June 1988, vol 135, col 846.
[143] Ibid.
[144] Ibid 879.
[145] Pigot Report (n 115) [2.34].
[146] Ibid.
[147] Ibid [2.33].
[148] Home Office (n 74).
[149] Home Office, 'Guidance for Appropriate Adults' (19 April 2011, London).

The rationale for comparing the interlocutor and the interpreter is not a tenuous one. As the Committee recognised, the non-involvement of either actor, when required, is likely the diminish the quality of evidence with which a court is presented. But there are two clear differences between the roles that the Committee did not address. The first relates to the focus on the 'rapport', 'trust' and 'confidence' that underpinned the interlocutor role. Interpreters, while possessing their own relevant qualifications and perhaps individually able to form trusting relationships, are typically not described as being required to do so for the execution of their role.[150] Indeed the impartiality that underpins the work of an interpreter is incongruous with the profile of a trusted individual who has been brought in specifically because they are known to the witness.[151] Secondly, the actual physical placement of the interlocuter when assisting a child is unique in that the Committee envisaged a complete removal of the child from the courtroom. This was later described as an attempt to 'shield [the child] from direct contact with anyone participating in the trial, including the judge'.[152] Interpreters, conversely, are ordinarily visible to the full courtroom and the suggestion that their role may involve 'shielding' or protecting the witness in some way has been heavily criticised both judicially and academically.[153] The removal of the child from the courtroom was envisaged by the Committee to be part of the overall package to improve communication whereas it is difficult to imagine how the same would be true for a foreign speaker and their interpreter.

Finally, while the Pigot Report recognised the position of vulnerable adults and the range of special measures available within the criminal court, the interlocutory role was to be restricted to children.[154] The trial judge would have the power to make special arrangements 'for the examination of very young or very disturbed children…if he thinks appropriate'.[155] Children, however, were not to be automatically eligible simply by virtue of their age and the measure was to be available only 'exceptionally'.[156]

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[150] Whilst the demonstration of understanding and compassion are often encouraged the 'detachment' and avoidance of personal dependency of an interpreter from their client has been stressed see: Joan Colin and Ruth Morris, *Interpreters and the Legal Process* (Waterside Press 1996) 144-145; Ruth Morris, 'The gum syndrome: predicaments in court interpreting (1999) Forensic Linguistics 6.

[151] National Register of Public Service Interpreters (NRPSI), 'Code of Professional Conduct' <https://www.nrpsi.org.uk/for-clients-of-interpreters/code-of-professional-conduct.html > [3.12] accessed 18 June 2020.

[152] Home Office, 'Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System' (London 1998) 58.

[153] William Wells, *An Introduction to the Law of Evidence* (AB Caudell Adelaide 1991) quoting a former Australian Supreme Court judge at [329]: 'It cannot be overemphasised that an interpreter should interpret every single word that the witness utters, exactly as it is said, whether it makes sense or whether it is obviously nonsense; whether the witness has plainly not heard or whether, if he has heard, he has not understood. The interpreter should look upon himself as an electronic transformer; whatever is fed into him is to be fed again, duly transformed'; Sandra Beatriz Hale, *The Discourse of Court Interpreting: Discourse practices of the law, the witness and the interpreter* (John Benjamins Publishing Co. 2004) 8.

[154] Birch (n 41) 229.

[155] Pigot Report (n 115) [2.32].

[156] Ibid.

Furthermore, there was no acknowledgement that children could be considered vulnerable for reasons other than their age and the meaning of 'very disturbed' was not elaborated. The Committee adopted a narrow understanding of children's inherent vulnerability rather than individual assessment – a position which has changed significantly in more recent research.[157] Nonetheless, it is apparent that the interlocutor was to be an exclusively child-focused special measure. The possibility of vulnerable adult witnesses, for example, requiring similar communication assistance was not considered and does not feature in the recommendation nor its accompanying explanatory notes.

The Committee recognised that once their suggested changes relating to children had been introduced, these could be extended to vulnerable adult witnesses at the discretion of the court.[158] The recognition of the position of vulnerable adults would prove to be significant. Considering the subsequent Government Reports and legislative developments discussed below, the Pigot Committee's recommendations may be regarded as a harbinger of later campaigns which tried to secure the rights of vulnerable adults within the criminal justice system. Building on the small steps taken by the Criminal Justice Act 1988, the Pigot Report delineated the parameters for future reform and gave impetus to the campaign for more wide-ranging modification of evidence giving procedures.[159]

2.4 Speaking up for Justice

Shortly after its election victory in 1997, the Labour government committed to providing a greater amount of support to victims of sexual offences and for vulnerable and intimidated witnesses generally.[160] The first effort towards securing this pledge was the establishment of the 'Working Group on the Cross-Examination of Rape Victims by Unrepresented Defendants'. Much like other government committees, it acquired what Rock terms a 'sponge-like capacity to absorb new tasks' and soon assumed a broad agenda which considered the difficulties faced by victims generally as opposed to one distinct category or group.[161] The Group's focus had shifted towards the treatment of vulnerable or intimidated witnesses in the criminal justice system and although it remained a Working Group, was renamed the 'Vulnerable Witness Group' in April 1997. A significant reason for the enlargement of the Group's remit related to the findings of Andrew Sanders one year previously in his Home Office

[157] Ruth Marchant and Marcus Page, 'The Memorandum and Disabled Children' in Helen Westcott and Jocelyn Jones (eds), *Perspectives on the Memorandum (*Arena 1997); Helen Westcott, 'The Memorandum of Good Practice and Children with Disabilities' (1994) 3(2) Journal of Law and Practice 21; Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com No 141, 1996).
[158] Jacki Pritchard, *Good Practice in the Law and Safeguarding Adults* (Jessica Kingsley Publishing 2008) 72.
[159] Hoyano (n 131) 251.
[160] Burton et al (n 122).
[161] Rock (n 120) 352.

commissioned research. Sanders' work considered the recommendation of the Pigot Report which related to extending those provisions for children to other witnesses (including vulnerable adult witnesses) which the Criminal Justice Act 1991 had failed to fully endorse.[162] Sanders concluded that legislative reforms relating to children could equally apply to other vulnerable individuals. One particular group comprised of individuals with learning difficulties who did not form a homogenous population but rather required individual assessment.[163] Sanders noted that ample scope existed for offering such individuals much more support and that fixating resources on one group would be misguided.

The Vulnerable Witness Group enjoyed wide terms of reference to consider measures that would improve the treatment of vulnerable witnesses and, additionally, measures that may encourage such witnesses to give evidence in court.[164] The narrow perspective that the child, or even victims of sexual abuse, were the only witnesses deserving of special attention was dispensed with.[165] It published its Report entitled 'Speaking up for Justice' in June 1998.[166] It contained 78 recommendations which sought to improve the treatment of vulnerable and intimidated witnesses within the criminal justice system and to enable them to give best evidence in criminal proceedings.[167] In seeking solutions, it should be remembered that the Working Group accepted the constraints of existing trial procedure. While recognising that many of the difficulties met by vulnerable witnesses emerge directly from the adversarial nature of the trial process, the appropriateness of the process itself was not questioned.[168] A series of recommendations involving modifications to the traditional trial process were proposed which came to be known as 'special measures'.[169] These included the provision of screens to shield a witness from the accused and allowance of CCTV links for witnesses to give live evidence in a separate room.[170]

2.5 Communicator/Intermediary

Although the Pigot Report nine years earlier had recommended the introduction of an 'interlocutor' to assist children give evidence in exceptional cases, nothing was done legislatively to realise that

[162] Andrew Sanders et al, 'Witnesses with learning disabilities: Research Findings No.44 (Home Office Research and Statistics Directorate December 1996).
[163] Ibid 3.
[164] Ibid 35.
[165] Ibid.
[166] Speaking up for Justice (n 152).
[167] Burton et al (n 122) 4.
[168] Louise Ellison, 'The protection of vulnerable witnesses in court: an Anglo-Dutch comparison' (1999) 3(1) The International Journal of Evidence of Proof 29.
[169] Speaking up for Justice (n 152) 43.
[170] Ibid 44.

ambition. Significantly, recommendations 47 and 48 of *Speaking up for Justice* revived the issue and envisaged a special measure that was referred to as a 'communicator or intermediary'.[171] Building on the Pigot Report's recommendation that measures relating to children should be extended to vulnerable adults, the communicator/ intermediary measure was to be of dual application. The Report cited 'The Western Australia Experience' in support of its conclusions and the procedure in that jurisdiction allowing for the appointment of a 'communicator' for a child under 16 years of age.[172] Through the Evidence Act 1906 (Western Australia),[173] courts were afforded the discretion to appoint such a communicator who could explain questions to the child as well as explain the child's responses. While impressed by the Australian model, the Report nonetheless recognised that much was 'unexplored' about the role of this communicator.[174] Another trait that the proposed system was to have in common with the Western Australian model was that the courts were to be given the statutory power to appoint the communicator/intermediary.[175]

As well as providing the impetus for the establishment of such a measure, the Report explained the basis for its recommendation. Like the Pigot Committee, it drew parallels with the role of an interpreter and submitted that it might 'involve the intermediary/communicator putting supplementary questions to the witness'.[176] More broadly, the function of the role was to 'assist the witness communicate' with particular focus on the complexity of language used in courts and the frequent confusion this generates for young children.[177] This would involve the intermediary/communicator explaining questions put to the child to ensure comprehension and avoid the child feeling unfairly treated by the justice system.[178] It is worth remembering that the Pigot Committee had not only identified 'very young children' as being potentially eligible for interlocutory assistance, but that 'very disturbed' children could also benefit. Despite discussing the plight of young witnesses in some detail, this was not developed by *Speaking up for Justice,* with child witnesses instead being placed within a homogenous group facing language and comprehension difficulties.

The concerns that underpinned Anne Rafferty's dissent from the Pigot Committee's interlocutor recommendation also re-emerged. The danger that the role's boundaries could become blurred was acknowledged as well as the risk that the communicator/intermediary may provide their own

[171] Ibid 59.
[172] Cooper and Mattison (n 42) 352.
[173] s.106(f)(1).
[174] Speaking up for Justice (n 152) 58.
[175] Ibid 59.
[176] ibid.
[177] Ibid 58.
[178] Ibid.

interpretation of the witnesses' evidence.[179] It recognised the 'fine line' between the witness being assisted to give evidence and the communicator/intermediary essentially distorting the evidence produced.[180] Another concern was the sharp divide that existed among the Western Australian Judiciary where exactly half of those surveyed were strongly opposed to the child communicator provision.[181] Even those judges who supported the introduction of the role voiced concern about its untested nature and urged caution when incorporating it into the courtroom.[182] As will be explored in Chapter 3, the adversarial trial model orientates the process on the lawyers and the intermediary/communicator role arguably undermines the commitment to the principle of orality.

Speaking up for Justice did not elaborate on the lack of guidance given to the Western Australia judiciary about when the child communicator may be ordered. [183] The Western Australian legislation permits the court to appoint an individual it 'considers suitable and competent to act as a communicator for the child' but provides no detail about the factors judges ought to consider.[184] The Pigot Committee had previously referred to the judge's discretion to order the appointment of the interlocutory 'if he thinks this is appropriate' but no specific guidelines were included.[185] Similarly, *Speaking up for Justice* highlighted the need for introduction of a communication medium without suggesting firm eligibility criteria. The interlocutor and communicator/intermediary roles were both clearly predicated on assisting communication, but how that aspiration would inform the practical decision making of the judiciary would later be left to the Home Office.[186]

Despite providing more detail than *Pigot* about the rationale behind its respective recommendation, *Speaking up for Justice* made no mention of the profile of the communicator/intermediary or professions from which it might be drawn. As noted above, *Pigot* suggested a number of professional roles that suitable candidates may also perform, although the Committee's reasoning behind their choices was far from clear. It could be argued that the recommendations within *Speaking up for Justice* were general in nature and that the goal was to alert the government to the need for a communicator type role. This view is buttressed by the Report's lack of guidelines or criteria for judges to consider

[179] Ibid.
[180] Ibid 59.
[181] Celia O'Grady, 'Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia' (Ministry of Justice 1996).
[182] Ibid.
[183] Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story (1997) 23(1) Monash University Law Review 171, 193.
[184] s.106(f)(1).
[185] Pigot Report (n 115).
[186] It is interesting to note that the 'child communicator' provision has been rarely utilised in Western Australia whereas other states such as New South Wales are moving closer to the England and Wales intermediary scheme, see: Tasmania Law Reform Institute, 'Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania? (2016 Hobart); Cooper and Mattison (n 42) 357.

when making a relevant appointment. Further, there was an explicit expectation that an accreditation scheme would later be established to ensure independent verification of the individuals appointed.[187] Perhaps the 'novel nature' of the role,[188] as then described by the Report, was such that it would have been premature to identify potential candidates when the parameters of the position itself were not yet firmly established.

The fact that *Speaking up for Justice* precipitated a legislative response demonstrates how it maintained the momentum of *Pigot* in highlighting the need for communication assistance for all vulnerable individuals.[189] But much about the intermediary role was unclear at the time of its publication, and as noted above, it even rowed back from some of the specificities of *Pigot* nine years before. Beyond a general appreciation of the core communicatory function of the role, *Speaking up for Justice* added little to what was still very much an aspiration as opposed to a working model requiring mere legislative approval. The Report's recommendation that vulnerable adults could also benefit from intermediary assistance was unquestionably a step further than *Pigot* had gone, but again did not resolve the ambiguity surrounding the role's nature. If anything, the suggested extension of intermediary provision to adults ran the risk of clouding the picture further with potential questions raised over whether an adult ought to be treated differently to a child and whether the intermediary must duly perform a different role.[190] That *Speaking up for Justice* failed to identify this new role's function and identity is less of a criticism and more of an observation. By 1998 the intermediary role was at an embryonic stage of development with a need for delineation of its scope.

2.6 The Youth Justice and Criminal Evidence Act 1999

Speaking up for Justice and its 78 recommendations were accepted by the government which indicated its intention to enact legislation to implement the findings. In contrast to the 'half hearted' attempt to implement the Pigot Report in 1991, the vast majority of the recommendations were included in Part II of the Youth Justice and Criminal Evidence Bill 1999.[191] *Speaking up for Justice* had concluded that 7-10% of all witnesses fall into the 'vulnerable or intimated' category. Thus the legislation's endorsement

[187] Speaking up for Justice (n 152) 59.
[188] Ibid.
[189] Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (Longman 2004) 132.
[190] Note that Jonathan Herring argues that all humans should be deemed inherently vulnerable by virtue of being a member of the human race and thus prima facie vulnerable adults and vulnerable children share many common traits: Herring (n 135).
[191] Jonathan Doak, *Victim's rights, human rights and criminal justice: reconceiving the role of third parties* (Hart Publishing 2008) 78.

of its findings was predicated on the assumption that such persons form a small, but significant, distinct minority of witnesses.[192]

Part II of the Bill detailed what were termed 'special measures directions' aimed at the vulnerable and intimated witnesses that the *Speaking up for Justice Report* had identified. A raft of specific measures which would be judicially directed were included in the Bill, including the use of screens to shield witnesses from the accused, removal of wigs and gowns, clearing the court to allow evidence to be heard in private and measures concerning video-taped evidence. In addition, the Bill contained provisions to prevent the cross-examination of witnesses by unrepresented defendants, measures relating to the use made of sexual history evidence in trials involving rape and other sexual offences and changes to the restrictions on press reporting of criminal cases.[193]

2.7 Passage through Parliament

Speaking up for Justice identified that vulnerable witnesses may need help to give their 'best evidence' in the court environment.[194] It was further recognised that many may encounter communication difficulties as a part of the evidence giving experience.[195] During the Bill's passage through Parliament it was also recognised by the House of Lords that the introduction of special measures was an important step for 'the determination of the truth' in the criminal trial.[196] Yet beyond this cursory reference, the initial House of Lords debate revealed scepticism about whether the Bill was in fact as transformational as had been suggested. The speech of Viscount Colville of Culross questioned the need for a statutory basis for special measures at all when evidence appeared to suggest that certain measures were already in operation in criminal courts. He argued:

> 'We already use screens on suitable occasions in the Crown Court, we already use the television link and there are many cases where the video recording of the evidence-in-chief of a child is played in court to the jury in the course of the trial. I am not absolutely certain why it is necessary to put these procedures on a statutory basis.'[197]

[192] Burton, Evans and Sanders (n 122) 5.
[193] Mary Barber, 'The Youth Justice and Criminal Evidence Bill [HL]' (HOC Research Paper 99/40, Bill 74 of 1998-1999) 7.
[194] Speaking up for Justice (n 152) 5. For further discussion of the meaning of 'best evidence' see: Samantha Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment' (2021) 41(4) Oxford Journal of Legal Studies 1066.
[195] Home Office, 'Action for Justice: Achieving best evidence in criminal proceedings: guidance for vulnerable or intimidated witnesses, including children: Implementing the Speaking up for Justice Report' (Home Office 2000).
[196] HL Deb 15 December 1998, vol 595, cols 1266-307.
[197] HL Deb 15 December 1998, vol 595, 1266-307.

Lord Thomas of Gresford agreed and further questioned why Parliament was required to legislate for what appeared to already be in operation:

> 'There is nothing new in the special measures proposed in the Bill, as the noble Viscount, Lord Colville of Culross, pointed out in his speech. I have personal experience of screens being erected in court. Indeed, it is now so commonplace in the Old Bailey that in some courts, there are permanent frameworks in place so that screens can readily be put up. Similarly, I have personal experience of video links, of private hearings, of video questioning, even of removing my wig and gown in an appropriate case.'[198]

However, the Bill amounted to more than a mere codification of existing evidence giving procedures in criminal courts. Clause 27 of the Bill, relating to the cross-examination and re-examination of witnesses on video, was indeed new and was the focus of much of the House of Lords debate. The findings of a Home Office Police Research Group from 1996 which pointed to reluctance on the part of the judiciary to allow video evidence to be utilised was cited.[199] The early recording of the evidence of distressed witnesses was noted and strongly supported by various members.[200] Ensuring children could avoid physically attending court was cited in support of Clause 27 and calls were made for full pre-trial evidence recording to be piloted before being phased in.[201] Conversely, the potential pitfalls of Clause 27 were raised and Lord Thomas strongly opposed its enactment arguing that the ordeal of coming to court is unlikely to be worse than being videoed remotely.[202]

2.8 Clause 28- the intermediary

While the debate about pre-recorded examination of witnesses had existed for at least 10 years prior to the YJCEA, not every special measure had received this level of attention. Clause 28 of the Bill provided for the examination of a witness through an intermediary in what has since been described as 'perhaps the most witness-centred of all of the reforms introduced in the 1999 Act'.[203] The precursor to the Clause's inclusion in the Bill was the recommendation contained in *Speaking up for Justice* calling for the introduction of a 'communicator/intermediary' to assist certain witnesses with communication. While an extremely significant development, and one that built on the 'interlocutory' as envisaged by

[198] Ibid [1297].
[199] Despite being cited in the House of Lords this report has been described as 'apparently unpublished and untraceable' see: Rock (n 120) 379.
[200] HL Deb 15 December 1998, vol 595, cols 1266-307.
[201] Ibid.
[202] Ibid.
[203] Anthony Beech and Graham Davies, *Forensic Psychology: Crime, Justice, Law Interventions* (Wiley-Blackwell 2017*)* 413.

Pigot, there were still many questions about what the role of the communicator/intermediary entailed. Tellingly, the House of Commons Research Paper, providing background on the Youth Justice and Criminal Evidence Bill after it had passed the House of Lords, made no reference at all to what the role involved.[204] This was in stark contrast to the detailed explanations of the measures concerning videotaped evidence which cited various historical reference points including the Pigot Committee and legislation such as the Criminal Justice Act 1988 and the Criminal Justice Act 1991.[205]

Owing to the lack of detail in *Speaking up for Justice* and relative lack of historical reference compared to other special measures, it is perhaps unsurprising that the Parliamentary debates on the intermediary provision were limited in scope and detail. During the House of Lords debate, it was considered by some that the intermediary role would be similar to that of the foreign language interpreter, particularly in that the intermediary must not represent the intent or the particulars of a question or answer.[206] At a later sitting Lord Williams of Mostyn, recounting his experiences as a defence barrister, noted that the communication needs of witnesses vary considerably and that any intermediary scheme must be flexible.[207] Beyond these comments, the rest of the debates highlighted and endorsed the need for intermediaries to have sufficient qualifications and undergo appropriate training.[208] The imperative that 'intermediaries understand their function clearly' was emphasised in the debates – yet at that stage the title of the role had barely been decided and no specific job roles had been clarified.[209]

Once the legislation had passed through Parliament the task of ensuring that intermediaries were trained, organised and deemed competent was regarded by Lord Williams as a key one:

> '…it is vital that the scheme is implemented carefully so that both the intermediary and the court can be assured that they are performing to standards consistent with the production of good evidence. This will take some very innovative thinking on the part of the Home Office.'[210]

This fear was shared by other members of the Lords who urged caution in implementing what was considered one of the most controversial measures in the whole Bill. It was remarked that unless the intermediary schemes could be systematically implemented then the whole concept 'could be jettisoned on the grounds that they are likely to inhibit the production of quality evidence'.[211]

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[204] Barber (n 193).
[205] Ibid.
[206] HL Deb 01 February 1999, vol 596, cols 1363-410, 1383.
[207] HL Deb 02 March 1999, vol 597, cols 1633-54, 1648.
[208] HL Deb 01 February 1999, vol 596, cols 1363-410, 1383.
[209] Ibid.
[210] HL Deb 01 February 1999, vol 596, cols 1363-410.
[211] HL Deb 2 March 1999, col 1647.

The Bill's passage through committee stage saw many of the same concerns emerge. Foremost was that intermediaries must receive formal training with the Commons Standing Committee hearing that this would ensure 'confidence in the intermediary'.[212] At Committee stage in the Lords similar views were aired with training envisaged as being necessary to ensure 'standards consistent with the production of good evidence'.[213] No specific details were outlined in either chamber about what this training should involve and the aspirations were framed in general terms i.e. that intermediaries should provide safe, reliable service to vulnerable witnesses.[214] Despite this, a consensus maintained that alongside training some form of 'accreditation' should be established to ensure intermediaries possessed the required skill-set. A scheme for interpreters, which aimed to standardise arrangements and utilised a 'directory' from which interpreters could be selected, was cited as an already existing working model.[215]

The concern raised in the Lords relating to the risk of the intermediary acting 'ultra vires' also featured at the Commons Standing Committee and formed the basis of a tabled amendment. Amendment no.57 sought to clarify the ambit of the role and ensure that the intermediary 'understands the need for him to confine himself to explaining the questions to the witness and the answers given by the witness'.[216] John Greenaway MP, the amendment's proposer, grounded the move on the concern that there may be a tendency for intermediaries to advance their own opinions or interpretations of the witness's words rather than merely reflecting them.[217] The government rejected this amendment, arguing instead that such statutory language was no substitute for relevant training and guidance intermediaries would be obliged to undertake and adhere to. In addition, the government sought to assuage fears that the intermediary role may adversely affect the trial process by highlighting that each appointment would have to be judicially approved.[218] This echoes the earlier *Speaking up for Justice* recommendation that it would be within the purview of the court whether to allow an appointment or not. The Minister of State clarified that the intermediary's function would be 'purely to communicate and, if necessary, to explain'[219] and that matters relating to training and guidance would subsequently be considered and developed by a Steering Group.

While the introduction of intermediaries was described at committee stage as 'unprecedented' and representing a 'radical shift in courtroom practice', the government's initial conceptualisation of the

[212] Youth Justice and Criminal Evidence Bill Deb 22 June 1999 , col (Ms Angela Smith).
[213] Youth Justice and Criminal Evidence Bill Deb (HL) 1 February 1999, col 1383.
[214] Ibid.
[215] HL Deb 2 March 1999, col 1647.
[216] Youth Justice and Criminal Evidence Bill [Lords] Clause 28 (22nd June 1999).
[217] Ibid.
[218] Ibid (Mr Paul Boateng).
[219] Ibid.

intermediary profile did not appear so maverick.[220] The Minister for State stressed that those assuming the role must ensure victims and witnesses were comfortable, have the capacity to empathise and have a familiarity with disabilities or vulnerability in the case of youths.[221] Such individuals, it was further explained, need not possess a degree and their ability to display the aforementioned qualities would be 'more important than any formal qualification'.[222] This notion of the intermediary as a non-professional with little understanding of the justice system was also a feature of the Lords Standing Committee when Lord Swinfen remarked:

> 'the intermediary who could be appointed to help someone with a mental disability may have no idea of a courtroom, or how the courts operate, or the proper procedure. They may not be all that well educated, and it would be helpful to the court if they had some training to enable the proceedings to proceed smoothly.'[223]

It is apparent that at this early stage of the Bill there was no identifiable category of individuals or particular profession from which the intermediary was expected to be drawn. The expectation that the intermediary would be an 'outsider' and not part of the 'court workgroup' resonates with this position (see Chapter 4). Lord Williams made brief reference to the expertise of speech therapists but equally recognised that a relative could be expected to assume the intermediary position without explaining in what circumstances this may be appropriate.[224]

It could be argued that the committee debates envisaged a completely new and distinct role which required a skillset not identifiable within any existing profession. The 'special training' and 'skills' these individuals would require was stressed, as well as the fact that many individuals who support and advise people with learning difficulties have no experience of court rules or procedure. While not explicitly stated at committee stage, it could be inferred that some members foresaw a bespoke role as evidenced by the focus on training and the to-be-devised accreditation programme. Indeed, the whole committee discussion about intermediaries related to the court environment, suggesting perhaps that this was to be their primary place of work. This understanding is, however, difficult to reconcile with the position of Lord Williams who noted that some individuals, such as speech therapists, may be called to act as intermediaries on regular basis.[225] While he only identified this particular profession as an example, it nonetheless suggests that such trained professionals were to be appointed on an ad-hoc

[220] Ibid (Mr Bob Russell).
[221] Youth Justice and Criminal Evidence Bill (n 212) (Mr Paul Boateng).
[222] Ibid.
[223] Youth Justice and Criminal Evidence Bill Deb (HL) (n 214) col 1384.
[224] Ibid.
[225] Ibid.

basis rather than be expected to 'become' intermediaries on an exclusive basis. The Lord's earlier comments that a relative may also feasibly act as an intermediary only serves to reinforce this point.

The discussion of the intermediary at committee stage certainly left scope for manoeuvre with little provided beyond the general communicative nature of the role and need for training and accreditation. Indeed, the government eschewed attempts to elicit guarantees on aspects of the role's creation, preferring instead to defer clarification of details to the subsequent Steering Committee. In rejecting the tabled amendments, the government noted that the role 'must be tightly restricted to communicating questions and answers between court and witness'[226] which evidently presupposes a solely court-based role. Mirroring the debates in the House of Commons and the House of Lords, the Committee failed to consider the potential scope of the intermediary beyond the courtroom with the focus very much on traditional witness examination. Matters relating to any pre-court involvement, contact with the witness/complainant outside of the court or even post trial support or assistance feature nowhere on the record.

The Parliamentary passage of the Youth Justice and Criminal Evidence Bill demonstrated that confusion about the intermediary role persisted. Anyone hoping the debates would build on *Pigot*'s 'interlocutor' and the 'communicator/intermediary' role formulated in *Speaking up for Justice* would have been left disappointed. The same concerns which troubled Pigot Committee member Anne Rafferty remerged in *Speaking up for Justice* were discussed, yet no firm solutions were reached. Rather than the Youth Justice and Criminal Evidence Bill developing the foundations already laid by *Pigot* and *Speaking up for Justice*, no obvious continuity of ideas and thinking was apparent. The terming of the intermediary proposal as 'unprecedented', with no reference to any of the previous attempts to establish similar roles, is indicative of this discord. One explanation for the scarcity of detail about the intermediary role and profile is that such matters were expected to be clarified later by the Home Office. As noted above, the need for training and accreditation featured heavily in the Parliamentary debates and many ancillary matters were to be 'tackled through guidance'.[227]

2.9 s.29 - The Intermediary Provision

The intermediary provision was eventually introduced through s.29 of the YJCEA and its wording remains unchanged from the original bill. Section 29(2) reads:

(2) The function of an intermediary is to communicate—

[226] Youth Justice and Criminal Evidence Bill (n 212) (Mr Paul Boateng).
[227] Ibid.

(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.

The mere enactment of s.29 did not immediately clarify the various questions surrounding the intermediary provision. As the Parliamentary debates demonstrated, this was a provision which was not only open to interpretation but one which would also require some form of accompanying guidance or accreditation scheme to give substance to its wording. Writing after the YJCEA's enactment, but before intermediaries were officially rolled out in courts, Birch echoed earlier views that much remained unresolved about the intermediary role. Arguing that the impact of the intermediary was difficult to predict due to the 'bare bones' of s.29, she considered that it would be Rules of Court that would ultimately fill in the apparent gaps.[228] Birch recognised that the Act provided only the 'briefest description of the intermediary's function', yet she did not envisage that it would be the Home Office rather than the judiciary that would ultimately put flesh on the proverbial legislative bones.[229] Irrespective of how the parameters of the role were to be established, the concision with which s.29 was drafted meant it was inevitable that some subsequent direction would be required.

The identity of the intermediary role was neither included in the wording of the YJCEA nor immediately clear after it was enacted. Hoyano considered it 'remarkable' that nothing in the legislation hinted at whether an intermediary was expected to have formal qualifications or be examined by the trial judge for suitability.[230] While *Pigot* had identified specific occupations suited to the analogous 'interlocutor' role, it also implied that those closest to a child witness who enjoyed their confidence could be eligible. Lord Williams in the Parliamentary Debates of the YJCEA echoed this viewpoint and Hoyano later argued that in the case of young children it was unlikely that anyone other than a parent could be confident of fully understanding the child's meaning.[231] In the aftermath of the YJCEA's enactment, there was an expectation that the accreditation scheme for intermediaries would shed light on the role's identity. In an attempt to unravel how clarity would be brought to the role, McEwan noted that although the government had acknowledged training would be required for intermediaries it had not made clear who would provide it.[232] McEwan's own conception of the intermediary diverged from Hoyano's in that

[228] Birch (n 41) 249.
[229] Ibid.
[230] Hoyano (n 131) 271.
[231] Ibid 272.
[232] Jenny McEwan, 'In defence of vulnerable witnesses: the Youth Justice and Criminal Evidence Act 1999' (2000) International Journal of Evidence and Proof 1, 11.

she considered the formality of the system would rule out any possibility that the witness would know the intermediary well.[233] Furthermore, Lord Williams' statement that the appointed intermediary could on occasion be a family member 'who will probably never be called upon again in his or her lifetime to be an intermediary'[234] is plainly incongruous with McEwan's understanding.

Section 29 YJCEA is significant not least because it embodies the much campaigned for piece of legislation which took ten years from *Pigot* to come to fruition. Yet there is a limit to what can be extrapolated from the statutory language particularly as it mirrors verbatim the Bill proposed in Parliament. It is not surprising that McEwan and Hoyano considered the section to be short on detail. This reality prompted members to air concerns about the need for training and accreditation of intermediaries with the associated risk of distortion of evidence also raised. The government accepted that such issues would need to be explored by a Steering Group which would complement the statutory framework.[235] The result is that when the YJCEA received royal assent on 27th July 1999 an incomplete picture of the intermediary role existed with relatively little to be gained from reading s.29 in isolation.

In Northern Ireland, the DoJ's intermediary model was introduced based on the provisions of the Criminal Evidence (Northern Ireland) Order 1999, which mirror the provisions of s.29 YJCEA. As such, the key debates and discussions around the scope of the role took place within England and Wales. However, as will be discussed in later chapters, Northern Ireland's implementation and regulation of the intermediary role differs significantly.

2.10 Conclusion

This chapter has traced the emergence of the intermediary role from the recognition of challenges associated with child testimony, the development of the Pigot Committee and the later *Speaking Up for Justice* Report which led to the enactment of s.29 YJCEA. While the ten years from the Pigot Committee to the YJCEA were significant in terms of the intermediary eventually receiving statutory footing, much about the role was still left to be developed. As the YJCEA was introduced, it was not clear who would perform the role, how it would be regulated or, crucially, how it would be integrated into the criminal justice system. As practice has developed, we are now clearer about the profile of intermediaries and much of the role's work is now codified in the CPD and CPR. But as will be discussed further in later chapters, issues relating to the intermediary role's scope and legitimacy persist and much remains to be done to improve understanding of its work.

[233] Ibid.
[234] HL Deb 01 February 1999, vol 596, cols 1363-4101, 1384.
[235] Youth Justice and Criminal Evidence Bill [Lords] Clause 28 (22nd June 1999).

The present chapter provides a backdrop to the examination of the role's scope and content at the coalface. It acts as an important reference point for later chapters in terms of how the role was initially conceptualised, its intended scope and content and how questions around the individuals who would perform the role took shape. It also provides important historical context for some of the ambiguities of the role which the research questions seek to address.

Chapter 3: Locating the intermediary within theories of the criminal trial

3.1 Introduction

Criminal justice is often conceptualised as a process in which interdependent parts operate around central themes.[236] This chapter explores various theories of one component of the criminal process: the trial. The criminal trial is, at least in the English common law tradition, the focal point of criminal procedure and has been termed the 'make or break point' of the broader criminal process.[237] This chapter focuses on the trial for two main reasons. Firstly, as argued by Duff et al, the norms that govern the trial have implications for the remainder of the criminal process and the trial provides a fundamental background for how the other stages operate.[238] It is through the operation of the trial that criminal responsibility is formally assigned and the doctrines that comprise the substantive criminal law are articulated and applied.[239] Secondly, the intermediary is commonly depicted as a trial focused role. Although the involvement of intermediaries at the investigatory stage is - for good reason - increasingly recognised, my empirical data suggest that, as a 'scene of conflicting aims and interests', the trial contours the intermediary role significantly.[240] The role's professional identity, neutrality and its impact on participation are all profoundly affected by the experiences of intermediaries in and around the trial (see Chapters 6-8). This chapter provides a foundation for subsequent chapters which explore the ambiguities and confusion around the role's parameters.

The chapter begins by considering the nature of the English criminal trial and the movement towards what is loosely termed 'modified adversarialism'. This is followed by an examination of how the intermediary has shaped, and indeed is shaped by, a trial system that is increasingly dominated by

[236] Nicola Padfield and Jonathan Bild, *Text and Materials on the Criminal Process* (5th edn, Routledge 2016) 8; Stephanos Bibas, *The Machinery of Justice* (Oxford University Press 2015) 111.
[237] Hock Lai Ho, 'Liberalism and the Criminal Trial' (2010) 32 Sydney Law Review 269; Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010) 321. For a discussion of the 'crime control' vs 'due process' models and where the trial fits within both, see: Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1.
[238] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, 'Introduction: Towards a Normative Theory of the Criminal Trial' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial 1: Truth and Due Process* (Hart Publishing, 2004) 11.
[239] Antony Duff, 'Theories of Criminal Law' (The Stanford Encyclopedia of Philosophy, Summer 2013 Edition) <https://plato.stanford.edu/archives/sum2013/entries/criminal-law/> accessed 13 January 2021.
[240] Andrew Ashworth, *The Criminal Process: An Evaluative Study (*2nd edn*,* Oxford University Press 1998) 30.

managerialist concerns and prioritises obtaining 'best evidence'.[241] The chapter then considers several aims and values of the trial. Based on the overlapping nature of trial aims and trial values, these are considered together. This discussion provides an important reference point for subsequent chapters where I will present a grounded theory of the role and its content.

3.2 The intermediary and 'modified adversarialism'

The rationale underpinning the adversarial trial, at least in theory, is the pursuit of the truth through a 'sharp clash of proofs'.[242] However, because the adversarial trial is commonly understood as the opportunity for the defence to put the prosecution to proof on the evidence, the search for objective truth may be relegated to secondary importance, with the primary concern being that the case brought against the defendant is sufficiently robust to warrant a conviction.[243] It is intrinsic to the adversarial trial that the two parties, prosecution and defence, are partisan and are expected to substantiate their own case while discrediting that of their opponent.[244] Within this 'competitive battle between foes and contestants',[245] the judge fulfils a 'passive umpire' role and the bulk of evidence is presented orally.[246]

A shift away from adversarialism in English criminal justice is widely recognised and is closely related to the rise of managerialism. Managerialism, which broadly refers to services and facilities being run as streamlined, technocratic systems, suggests that judges have assumed an increased managerial role underpinned by the aim of improving the efficiency of the adjudication process.[247] Although judicial case management has promoted efficiency for decades,[248] the Criminal Procedure Rules (CPR) provided impetus for the 'emergence of a managerialist system of criminal justice'.[249] The increased judicial power to timetable, require written rather than oral arguments and impose sanctions for failure to comply with directions, all represent a transfer of power from the parties to the court.[250] The CPR encourage agreement where possible and to ensure that trials begin promptly, are as narrowly focused

[241] For a discussion of the conflict between 'best evidence' and 'best interests' see: Emily Henderson, 'Best evidence or best interests? What does the case law say about the function of criminal cross-examination' (2016) 20(3) Journal of International Evidence and Proof 183.
[242] Stephen Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* (West Publishing 1988) 2.
[243] Jonathan Doak and Claire McGourlay, *Evidence in Context* (3rd edn, Routledge 2012) 39.
[244] ibid 20.
[245] Australian Law Reform Commission, 'Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System (Issues paper No.20, Canberra, Australia Government Publishing Service 1997) [2.29].
[246] Peter Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence' in Duff et al (n 238) 29.
[247] Darryl Brown, Jenia Iontcheva Turner, Bettina Weisser, *The Oxford Handbook of Criminal Process* (Oxford University Press 2019); Ward (n 126) 6.
[248] Penny Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] Criminal Law Review 30
[249] Jacqueline Hodgson, *The Metamorphosis of Criminal Justice* (Oxford University Press 2020) 68.
[250] Ibid.

as possible, and do not last longer than necessary.[251] This is accompanied by an increased emphasis on accurate fact-finding and efficiency.[252] As such, it may be more accurate to describe the English trial as operating under a modified adversarial tradition, and one that contains elements of both the adversarial and inquisitorial models.[253] This chapter is, however, not concerned with drawing clear distinctions or ascribing strict labels to the system of criminal adjudication. Instead, it is important to recognise that the intermediary role operates in a system which contains aspects of both traditions and is informed by concerns which are not central to either, for example efficiency and managerialism.[254]

Even before its introduction through the YJCEA, the position of the intermediary within the adversarial trial was heavily scrutinised. As the only recommendation of the Pigot Committee which was not unanimously agreed, the introduction of what was termed the 'interlocutor' caused concern for several reasons. The committee raised issues about the imposition of a third party between advocate and witness, and expressed concerns that intermediaries may 'hinder rather than assist counsel conducting the case'.[255] During the YJCEA's legislative passage, several parliamentarians sought reassurance that the intermediary role would not impinge on the role of counsel.[256] Fears were later raised that advocacy techniques would require radical reassessment and that an enhanced judicial role would be inevitable to settle disputes between questioner and intermediary over content and tone of questioning.[257]

Based on Doak and McGourlay's view that the intermediary special measure was 'the most innovative' reform contained within the YJCEA, it is not surprising that the role is viewed as a threat to the adversarial trial.[258] For a start, the mere presence of an intermediary with a witness represents a 'radical departure from the archetypal adversarial duel'.[259] In the traditional adversarial trial, the judge assumes a passive role while counsel largely conduct proceedings.[260] As Langbein explains, the principle of orality cherished by the adversarial trial orientated the process on the lawyers.[261] The interposition of the intermediary between the advocate and witness (or more accurately, alongside the witness) does not

[251] Jenny McEwan, 'From adversarialism to managerialism: criminal justice in transition' (2011) 31(4) Legal Studies 519, 527; Frank Belloni and Jacqueline Hodgson, *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* (Palgrave MacMillan 2000) 203.
[252] McEwan (n 251) 520.
[253] Mirjan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986).
[254] Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2016) 32.
[255] Home Office, 'Report of the Advisory Group on Video Evidence' (December 1989, London) [2.34].
[256] Youth Justice and Criminal Evidence Bill [Lords] Clause 28 (22nd June 1999).
[257] Hoyano (n 131) 272.
[258] Doak and McGourlay (n 243) 106.
[259] Jonathan Doak and Lauran Doak, 'Non-verbal victims in the adversarial criminal process: communication, competency, and credibility' (2017) 68(4) Northern Ireland Legal Quarterly 451, 457.
[260] William David Evans, 'On the Law of Evidence' in Robert J. Pothier (ed), *A Treatise on the Law of Obligations* (W. D. Evans trans.) (London 1806).
[261] John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press 2003) 110.

fundamentally undermine a commitment to orality, but it constrains the advocate in how they conduct their questioning. Indeed, the loosely defined modified adversarialism which this chapter recognises has been shaped by the YJCEA more generally. The legislation did not represent a full-scale overhaul of orthodox adversarial trial procedures but amounted to an 'accommodation approach' in which special measures operate within the constraints of the established procedure.[262] The principle of orality and the insistence on direct oral evidence remains, but with an acknowledgement of the need to reduce the level of stress associated with it.[263]

The adversarial tradition protects the advocate's control of their case through the ability to pursue arguments in their client's favour, including through cross examination.[264] The intermediary challenges this norm in several ways. Firstly, the ability of the intermediary to intervene during witness examination represents a departure from the 'near complete autonomy' advocates enjoy in the adversarial model.[265] Judges have always enjoyed considerable power to intervene during witness examination, but the modified adversarial model positively *requires* judges to intervene proactively in the management of criminal cases before and during trial.[266] The intermediary role is innovative in that it may pivot *between* counsel and the judge.[267] The Court of Appeal in *OP* identified the intermediary role as including 'the potential for intervention and on occasion suggestion to the Bench'.[268] Further, judges must take 'every reasonable step'[269] to ensure vulnerable individuals can give best evidence (which can include the appointment of an intermediary) and also to prevent 'over-rigorous' cross examination.[270] The introduction of the intermediary may be seen as contributing to a more interventionist approach and a shift in the approach/understanding of the purpose of cross-examination from an opportunity to advocate to a more communicative exercise. Yet while Hoyano feared that intermediary involvement would require an enhanced judicial role during witness examination, there is no empirical evidence to suggest that this is the case in practice.[271] As will be

[262] Ellison (n 7) 7.
[263] Ibid.
[264] Emily Henderson, 'Theoretically speaking: English judges and advocates discuss the changing theory of cross-examination' (2015) 12 Criminal Law Review 927; Doak and Doak (n 259) 457.
[265] Doak and McGourlay (n 243) 113.
[266] McEwan (n 251) 527.
[267] Henderson (n 264) 944.
[268] *OP* (n 64) [34].
[269] Criminal Procedure Rules (n 23), Part 4, Rule 3.8(3).
[270] CPD (n 22) 3E.1. The CPD also notes that intermediaries may 'actively assist and intervene during questioning' (3F.1).
[271] In their interviews with judges, Plotnikoff and Woolfson (n 86) found markedly different views about the extent to which the involvement of intermediaries reduced the need for judicial intervention (at 102); Also see: Henderson (n 264).

discussed below, the relationship between the intermediary and advocates prior to court examination is often key to how often interventions occur.

The intermediary has a responsibility to intervene during questioning if, in their view, a communication issue arises.[272] Understandably, this involves a degree of discretion and depends significantly on the profile of the vulnerable witness and the nature of their communication difficulties.[273] As Plotnikoff and Woolfson recognise, the responsibility of the intermediary to intervene at trial requires the role to 'navigate a landscape of grey areas'.[274] The authors also note that intermediaries may be constrained as some lines of questioning which impede communication 'go beyond the boundaries of the [intermediary] function'.[275] For example, a child witness may be visibly upset by robust cross-examination but the intermediary feels their intervention risks demonstrating sympathy and partiality.[276] This indicates that some elements of traditional cross-examination remain ingrained despite efforts to reform. Henderson's research suggests that this is reflected in practice with judicial reluctance to enforce interventions and lawyers taking advantage of this beyond the intermediary's authority.[277] Even more alarming is Plotnikoff and Woolfson's finding that poor questioning from advocates persisted in a number of cases despite judicial intervention.[278] Intermediaries may be able to modify the culture of cross examination to a degree, but their impact is limited if their practices are not legitimised by the bench.[279] Since the judge decides the nature and scope of the intermediary role in each case, judicial understanding of the role and its parameters is crucial to the impact the role can have.

A second way in which intermediaries challenge the adversarial tradition relates to the intricacies of witness examination in terms of question content, style and delivery. In their court report, the intermediary is expected to 'give detailed and specific instructions on how questions may best be put to the witness' and even make suggestions regarding the 'pace of questioning'.[280] Perhaps the most significant development in this area is the practice of the intermediary 'reviewing' or 'vetting' counsel's

[272] MoJ (n 56) 5.13.
[273] Writing shortly after the introduction of the YJCEA, Ellison suggested that intermediaries would have 'limited influence over the basic tenor of cross examination…there is, for example, no suggestion that the intermediary will be at liberty to intervene actively during cross-examination to challenge the use of interrogatory devices which are potentially misleading or suggestive and liable to elicit unreliable' see: Louise Ellison, 'The mosaic art?: cross-examination and the vulnerable witness' (2001) 21(3) Legal Studies 353, 366.
[274] Plotnikoff and Woolfson (n 37) 188.
[275] Ibid.
[276] This is based on a real example cited by NI-1 in interview.
[277] Henderson (n 8).
[278] Plotnikoff and Woolfson (n 86) 119.
[279] John Spencer and Michael Lamb, *Children and Cross-Examination: Time to Change the Rules?* (Bloomsbury 2012). This also links in with the role's struggle for 'professional jurisdiction' as discussed in Chapter 6.
[280] MoJ (n 56).

questions prior to examination which is now increasingly common in practice.[281] This has helped to 'fuel cultural change in respect of cross-examination of vulnerable witnesses.'[282] Amendments to questions are to be agreed at the GRH at the judge's direction as noted by the Court of Appeal in *R v Lubemba:*[283]

> 'The ground rules hearing should cover, amongst other matters, the general care of the witness…So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.'

The practice of a third-party reviewing questions is anathema to many advocates. It jars with the freedom of the questioner to formulate questions loaded with presuppositions, make declaratory statements and use coercive forms of enquiry.[284] In my early days of practice at the Criminal Bar, one defence barrister was scathing about intermediaries generally and told me that the insistence that questions be reviewed has led to intermediaries being despised.[285] Plotnikoff and Woolfson also found strong resistance among some older barristers who saw the practice of reviewing questions as completely at odds with traditional oral advocacy.[286] Other authors suggest acceptance of the role is growing and with it a greater willingness among advocates to cooperate with the reviewing of questions.[287] Attitudes may, slowly at least, be changing. But these findings must be considered alongside the rules and underpinning rationale of cross-examination of vulnerable individuals, including children. In *R v Barker*, the Court of Appeal held that advocates must 'adapt…cross-examination…to enable the child to give the *best evidence* of which he or she is capable.'[288] If judges are expected to approach the admissibility of cross-examination questions with concern for the completeness and accuracy of the evidence, then this inevitably impacts the normative function of the intermediary during question vetting. While vetting encroaches on party control and autonomy, it may also be viewed as aiding the best evidence of the witness - something explicitly recognised as a core intermediary function in the relevant procedural guidance manual.[289] Henderson argues that the best evidence account is

[281] This is reflected in the Criminal Procedure Rules (n 23) (3E.3) and also the CPD (n 22) (3F.1).
[282] Plotnikoff and Woolfson (n 37) 219.
[283] [2014] EWCA Crim 2064; Henderson has noted that the Court of Appeal has effectively been rewriting the rules of cross examination of witnesses since 2010: Emily Henderson, 'All the proper protections - the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses' (2014) Criminal Law Review 93.
[284] Sarah Lowndes, 'Comprehension and Misapprehension in Courtroom Discourse (2007) 14(2) International Journal of Speech Language and the law 305.
[285] This conversation took place with a barrister in Northern Ireland circa 2016.
[286] Plotnikoff and Woolfson (n 37) 221-224.
[287] Cooper and Mattison (n 42) 251.
[288] [2010] EWCA Crim 4.
[289] MoJ (n 56).

consistent with the wider purposes and functions of the accusatorial trial as a fact-finding exercise.[290] If so, the intermediary role may in fact be viewed as assisting one aspect of traditional adversarialism.

The vetting of questions as a practice has now been formalised to a degree through the Criminal Practice Directions.[291] In line with *R v Lubemba*, judges should use the Ground Rules Hearing (GRH) to check that the advocates have consulted with the intermediary to ensure questions are framed in a manner that is likely to achieve the best quality evidence from the vulnerable person.[292] It is interesting to examine this aspect of intermediary practice against the rise of managerialism. The judicial responsibility to 'set the parameters' of questioning at the GRH will often be imperative for the intermediary to be able to perform its role.[293] However, while good practice positions the judge at the centre of this vetting process, it seems that advocates rarely submit questions in advance of the GRH.[294] Also concerning is that defendant intermediaries are even less likely to have the opportunity to review counsel's questions prior to trial.[295] This situation has two important consequences. Firstly, it removes the judge from the reviewing process and leaves questions to be agreed between the intermediary and the advocate.[296] Secondly, it means that intermediaries are likely to review questions closer to witness examination, thus leaving less time for preparation and increasing the need for judicial/intermediary intervention at trial. The first point undermines a central pillar of managerialist theory which holds that criminal justice reforms have produced a 'transfer of power from parties to the court.'[297] This generates a risk that without judicial oversight, advocates have less incentive to collaborate with intermediaries to tailor their questions (although this does mean that a core element of adversarialism i.e., party control, is retained). In this regard, intermediaries rely on coercive judicial power to enforce their recommendations and legitimise their position. The adversarial tradition of party control depicts advocates zealously protecting their questions, particularly defence counsel who may view the sharing of their questions as being at odds with the duty to advance their client's interests. While the vetting of questions is one example of this, the intermediary is heavily reliant on the direction of the judge for the execution of *all* its functions. As the Court of Appeal noted in *R v Grant Murray*:

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[290] Henderson (n 8).
[291] For example, the Criminal Practice Directions explain that in all cases where the Crown Court is dealing with a child witness under s.16 YJCEA it is 'it is expected that the advocate will have prepared his or her cross-examination in writing for consideration by the court.' (CPD (n 22) 18E Annex para 4).
[292] Cooper, Backen and Marchant (n 38) 427.
[293] ibid 420-435.
[294] Plotnikoff and Woolfson (n 86) 30.
[295] Ibid 106.
[296] However, there is evidence of good practice in this regard. In the case of *R v FA* [2015] EWCA Crim 209, the intermediary worked with both prosecution and defence counsel in a collaborative way to make 'sensible expert suggestions' ([13]) which were adopted at trial.
[297] McEwan (n 251) 544.

> '[Intermediaries] are instructed to provide advice and guidance to the judge (and to the advocates), not to dictate to anyone what is to happen. Their role is to provide a report and, if required by the court, to provide assistance to a witness or defendant *as directed by the judge*.'[298]

This judicial statement indicates the uneven power relations within the trial and the intermediary's status as an outsider to the inner group of court professionals (as will be discussed in more detail later).[299] It also suggests that the capacity for the intermediary role to shape the nature of trial depends on judicial management and activism, which are already at odds with elements of adversarialism. In this context, it is worth returning to consider Henderson's claim that the intermediary is the 'first new, active role to be introduced into the criminal trial in two centuries'.[300] Despite the role's distinctive character, it shares the same underpinning rationale as all the special measures contained within the YJCEA i.e., to enable witnesses to give their 'best evidence'.[301] Section 16(5) of the legislation emphasises the importance of evidence quality with special measures granted to improve the 'completeness, coherence and accuracy' of testimony.[302] Fairclough argues that these aims would also be furthered by assisting defendants to give their best evidence should they wish to testify.[303] Yet the special measures regime specifically excludes defendants and it has taken inherent judicial powers for defendant intermediaries to be granted at trial.[304] Indeed, the exercise of inherent jurisdiction to fill the breach created by the legislation has a resonance with the concept of judicial managerialism and the view that every court of law has wide inherent powers to 'control its own procedure.'[305]

Finally, what does all this mean for the defendant and their procedural rights? Dilution of the adversarial model has produced concern for the rights of the defendant, including the right of the accused to participate in their own defence.[306] As Owusu-Bempah notes, the shift away from adversarialism in England and Wales has affected, and has been affected by, changes to the role of the defendant.[307]

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[298] *Grant-Murray* (n 71) [199].
[299] Paul Rock, *The Social World of an English Crown Court* (Clarendon Press 1993).
[300] Henderson (n 8) 155.
[301] MoJ (n 4).
[302] There is some, albeit limited, empirical evidence to support the claim that intermediary involvement with witnesses leads to a higher quality evidence output, see: Kimberley Collins, Natalie Harker and Georgios Antonopoulos, 'The Impact of Registered Intermediary Presence on Adults' Perceptions of Child Witnesses: Evidence from a Mock Cross Examination' (2016) 23 European Journal on Criminal Policy and Research 211.
[303] Samantha Fairclough, 'The role of equality in the provision of special measures to vulnerable and/or intimidated court users giving evidence in crown court trials' (PhD thesis, University of Birmingham 2017) 90.
[304] I am grateful to Robert Craig for alerting me the potential problems of judicial use of their inherent powers to 'circumvent gaps in statutory language'.
[305] *Attorney General v Leveller Magazine Ltd* [1979] AC 440 [464].
[306] John Jackson, 'Autonomy and Accuracy in the Development of Fair Trial Rights' (2009) University College Dublin Law Research Paper (No 09/2009) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407968> accessed 5 January 2021; McEwan (n 251) 525.
[307] Owusu-Bempah (n 254) 35.

While this is true, there is nothing intrinsic about the intermediary special measure or its normative function which necessarily leads to diminution of defendant rights.[308] In fact, the *raison d'etre* of defendant intermediaries is ensuring vulnerable defendants can effectively participate in proceedings. Thus, while some changes to the adversarial model have the potential to impede certain defence rights, others (such as the introduction of intermediaries) have the potential to enhance them. In theory at least, in a modified adversarial system, in which judges enable intermediaries to facilitate communication, the defendant's participatory rights are protected.[309] As will be discussed in later chapters, the accused may effectively participate even if they decide not to testify but receive intermediary assistance to understand other aspects of proceedings. Of course, rights are useless if they exist purely in abstraction and Chapter 8 will examine whether defendants who need intermediaries are in practice able to access them. For now, it is clear that the introduction of intermediaries has contributed to, and been a consequence of, a shift from adversarialism to a modified adversarial system concerned with efficient fact finding. The following sections of this chapter explore several aims and values of the trial in more depth and examine the potential impact of the intermediary role on how the trial is conceptualised.

3.3 Theories of the criminal trial

Characterising the criminal trial as an example of modified adversarialism does not suggest that it is fundamentally flawed or that, as Ellison argues, a shift away from orality towards inquisitorial is urgently needed.[310] Rather, the objective has been to gain a better understanding of where the intermediary can be located within the existing system of criminal adjudication. It is necessary to develop the analysis further and examine both the function of the trial and what values underpin it.[311] When considering the criminal trial from a theoretical perspective, the complexity of the issues involved soon become apparent. One may ask what distinguishes the trial from other kinds of social institution or indeed institutions of the criminal justice system? How are the limits of state authority within the trial process established and is the criminal trial as it is currently structured an appropriate response to alleged wrongdoing? These are some of the issues that emerge when reflecting on the trial and its wider

[308] McEwan (n 251) 535.
[309] Prior to the invocation of inherent powers of the court to appoint defendant intermediaries, Hoyano argued that the 'withholding' of special measures (including the intermediary) from defendants risked their fair trial rights: Laura Hoyano, 'Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' [2001] Criminal Law Review 948, 968.
[310] Ellison (n 7) 70.
[311] Duff et al (n 238) 18.

significance and status.[312] They are, of course, not exhaustive and many other features of the trial could form the subject of theoretical examination.

Seeking to theorise the criminal trial presents another difficulty: do we need to develop a theory that articulates the principles and ideals against which empirical reality can be assessed? As Redmayne noted when reflecting on the enormity of the task: 'where does one start?'.[313] The main reason for this concern is that the *type* of theory sought is often vexed. Redmayne noted a problematic commitment among many theorists to 'explanatory unification' and considered attempts to reconcile overarching aim(s) of the trial with other competing, and often divergent values into a 'rich theory' as misguided.[314] Duff et al suggest that attempts to theorise the trial often fragment into consideration of various evidential and procedural questions and that 'no general theory of the trial but rather theories of different aspects of trials' have emerged.[315] Others have argued against a theory of the trial that seeks to balance primary aims with other principles or goals which are deemed secondary and incommensurable.[316]

It is not the intention of this section to advance a normative theory of the criminal trial nor to dwell on whether a single theory is attainable or even desirable.[317] Instead, I firstly survey some potential trial aims and values in order to demonstrate how they impact the role of the intermediary as well as how the intermediary can shape the trial itself. It is recognised throughout that no hard line exists between what may amount to a trial aim or value and that a degree of overlap is inevitable.

3.4 Aims and values of the trial

We turn, then, to consider the aims and values of the criminal trial. Aims can be described as the desired outcomes of criminal adjudication with values underpinning and informing how these aims are achieved.[318] There is, however, considerable overlap and intertwining between these aims and values.[319] For example, it may be thought that the right of participation at trial facilitates the aim of truth-finding but participation is in itself a value that is considered desirable.[320] Equally, Owusu-

[312] Andrew Ashworth and Lucia Zedner, *Preventative Justice* (Oxford University Press 2014).
[313] Mike Redmayne, 'Theorizing the Criminal Trial' (2009) 12(2) New Criminal Law Review 287, 289.
[314] Ibid 313.
[315] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) 5.
[316] Ian Dennis, 'Reconstructing the Law of Criminal Evidence' (1989) 42(1) Current Legal Problems 21, 31.
[317] Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010) 71.
[318] Andrew Ashworth, Liz Campbell and Mike Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019) 346.
[319] Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012) 70.
[320] ibid 72.

Bempah[321] argues that commitment to some values can act as a 'constraint' on the achievement of broader aims, whereas Ashworth et al suggest that values mould the way these ends may be achieved.[322] Examining these aims and values can help us locate the intermediary within the criminal trial and the criminal justice system more broadly. They can also shape our understanding of the trial both for witnesses and defendants, notwithstanding the fact that their substance may differ.[323]

It is possible to view the trial as a purely instrumental process that identifies offenders and offers a range of measures to reduce the risk of further damage to society.[324] This position regards the trial as purely serving the punitive aims of the state by identifying those liable for punishment.[325] A system that encourages guilty pleas, for example, could be viewed as serving the purpose of the trial as culpable individuals are identified and rendered liable to punishment.[326] From another instrumentalist viewpoint, the trial is concerned solely with accurate fact-finding, with other values being unable to outweigh the strong emphasis on a search for the truth.[327] There is, however, broad agreement that the criminal trial is not reducible to a mere instrumental process and that it has intrinsic values.[328] As Redmayne contends, the more difficult question, on which there is less agreement, relates to other, perhaps less instrumental, aims of the criminal trial.[329] This could include moral engagement with the defendant or even the cathartic effect of contested issues being resolved.[330] The aims and values in this section are not presented as exhaustive, but rather provide an opportunity to examine how the intermediary impacts and is impacted by different conceptions of the trial.

3.4.1 Calling the accused to account

Duff et al view the trial as a 'communicative process' in which the accused is 'called to account' by the state for the public to answer allegations of wrongdoing.[331] The trial must communicate and justify that judgment - to demonstrate its justice - to the defendant and others.[332] At first sight, there is obvious resonance between the intermediary function of communication facilitation and the centrality of

[321] Owusu-Bempah (n 254) 22.
[322] Ashworth et al (n 318) 28.
[323] Home Office, *Rebalancing the Criminal Justice System in Favour of the Law Abiding Majority* (2006).
[324] Antony Duff, *Trials and Punishments* (Cambridge University Press 1986).
[325] Antony Duff, *The Realm of Criminal Law* (2018) 31.
[326] Ibid.
[327] Larry Lauden, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press 2006).
[328] Ashworth et al (n 318) 322; Duff et al (n 238) 94.
[329] Redmayne (n 313) 322.
[330] Duff et al (n 238) 53.
[331] Dennis (n 316) 225.
[332] Duff (n 236) 115.

communication in Duff et al's trial account. As will be described in Chapter 4 (Typology of Roles), the intermediary may be conceptualised as a 'communicator' in broad terms and can facilitate the communicative dialogue Duff et al advance. In practice, however, the 'rationing' of intermediaries (see Introduction chapter) for defendants may prevent the accused from addressing the allegations against them and being responsive to a communicative dialogue.[333] There are other challenges within the communicative account. As Lacey notes, the communicative theory places so much store on shared membership of a political community and some individuals will fall outside its scope.[334] This is a valid criticism and those who require intermediary assistance are invariably vulnerable and often unlikely to be responsive to a communicative dialogue.[335] How the intermediary role may contribute towards this communicative process, or may even prompt a reconsideration of it, informs the analysis which develops later in the thesis.

3.4.2 Accurate fact finding

Ashworth et al advocate a theory of criminal procedure that is trial centred.[336] Their account is underpinned by the twin goals of 'regulating the processes for bringing suspected offenders to trial so as to produce accurate determinations, and . . . ensuring that fundamental rights are protected in those processes'.[337] The authors caution against an overly simplistic, diagnostic conception of the trial although they view accurate determinations as a key aspiration of the trial process.[338] Importantly, they view the preparation of cases for *possible* trial as the principal objective of the investigative and pre-trial stages. The aims of the trial, according to Ashworth et al, cannot be examined in isolation. Their account interweaves these aims with the trial's underpinning values seamlessly so that the two must be considered together. For example, a court may reach an accurate verdict (accuracy being a potential trial aim), but all actors involved must be treated with dignity and respect (these both being potential trial values). Another example is the overlap between the potential aim of accuracy and the value of participation. The Criminal Procedure Rules (CPR) provide that a court must take 'every reasonable step' to facilitate the participation of any person, including the defendant.[339] It intuitively follows that the participation of both witnesses and defendants within the trial incorporates the ability to provide good

[333] Hoyano and Rafferty (n 20).
[334] Nicola Lacey, 'Punishment, Communication and Community' (2002) 111(442) Mind: A Quarterly Review of Philosophy 392, 395.
[335] Antony Duff, *Punishment, Communication and Community* (Oxford University Press 2001) 110.
[336] Ashworth et al (n 318) 345.
[337] Ibid 49.
[338] Ibid 345.
[339] CPR (n 23), Part 4, rule 3.8(3).

quality evidence which can contribute towards the accuracy of verdicts.[340] As will be discussed throughout the thesis, and focused on in Chapter 9, intermediaries are often central to the participation of vulnerable individuals throughout the criminal process but perhaps most visibly at the trial. Further, an application for a Registered Intermediary may be made where it is considered that their use is likely to improve the quality (completeness, coherence and accuracy) of the evidence given by the witness.[341] These examples suggest that there need not be a trade-off between the aims and values of the trial and indeed the intermediary can be instrumental to both. Although McEwan laments the possibility of a 'contest' between fair trial rights of the accused and accurate fact finding, it is not obvious that the intermediary represents a threat to either of these.[342]

3.4.3 Conflict resolution

A third potential trial aim/value is conflict resolution. This may be linked to accurate fact-finding, in that one way that a conflict can be resolved is through a determination of true facts.[343] Even so, conflict resolution may be considered a trial aim/value in its own right. When the conflict arising from the alleged commission of a criminal offence is resolved, finality and closure can be achieved.[344] The intermediary role, whether working with witnesses or defendants, plays no direct role in the resolution of conflicts between the state and the accused. For example, the neutrality of the intermediary means it ought not to have any direct input into the decision of an accused to plead guilty. Chapter 7 explores how intermediaries sometimes tread a fine line between the facilitation of communication and upholding their neutral stance. But there are ways in which the role may contribute to conflict resolution. The intermediary aids the vulnerable individual to provide testimony which is often vital to the operation and conclusion of the trial process. As will be explored further in Chapter 8, intermediaries sometimes play a key role in ensuring an accused understands the evidence against them prior to trial. On occasion, this can dispense with the need for a trial if there is a resulting guilty plea which assists the resolution of proceedings.[345] The practice of plea bargaining is recognised as a form of dispute resolution within trial proceedings, notwithstanding concerns that there is a fundamental asymmetry between the parties involved.[346] Conversely, an intermediary may slow the progress of a trial if there is a judicial direction to review counsel's questions, recommendations for a

[340] Abenaa Owusu-Bempah, 'The interpretation and application of the right to effective participation' (2018) 22(4) International Journal of Evidence and Proof 321, 327.
[341] YJCEA, s.16(5) and Criminal Evidence (Northern Ireland) Order 1999, art 17.
[342] McEwan (n 251).
[343] Owusu-Bempah (n 254) 20.
[344] Ibid.
[345] As is made clear in Chapter 8, this should be a free choice informed by proper legal advice.
[346] Michael O'Hear, 'Dispute Resolution in Criminal Law' (2007) 91(1) Marquette Law Review 1.

slower pace of questioning and/or interventions during witness examination. However, if the intermediary's input assists the production of the witness' best evidence, then any delays to conflict resolution are arguably justified as a more legitimate trial outcome can be reached.[347]

3.4.4 Legitimacy

The concept of legitimacy lies at the heart of the criminal justice system.[348] In order for criminal justice institutions to operate effectively they must hold legitimate authority in the eyes of those they serve.[349] Recent years have seen greater recognition and awareness of the essential role of legitimacy, trust and public confidence in underpinning the effectiveness of criminal justice practices and institutions.[350] Although the scope of the term is complex and contested, there is general agreement that institutions must be perceived as legitimate by citizens in order to maintain a valid claim on authority.[351] Indeed, legitimacy may also be conceptualised as a trial aim with instrumental value i.e. the need to produce legitimate outcomes as well as have acceptable processes. This is linked to procedural justice theory and the imperative that the trial commands legitimacy in the eyes of the public.[352] The value of legitimacy is useful for the present enquiry for several reasons. Firstly, because the legitimacy of criminal justice is so intrinsically connected to the perceptions of individuals who engage with it, it is suitable for empirical enquiry.[353] How intermediaries experience the social world of the criminal justice system, as well as understand the nature and value of their own role, is pivotal to answering the research questions. A second reason is that legitimacy is generated and sustained at the interactional level by criminal justice actors and the intermediary has a role to play in maintaining legitimacy through their everyday practices.[354]. Roberts and Plesničar suggest that perceptions of legitimacy are shaped by contact with criminal justice professionals which 'colour perceptions of the whole system'.[355] Legitimacy, therefore, is continually 'cultivated' through the actions of these actors in how they present themselves, communicate and engage with others.[356]

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[347] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 51–56.
[348] Adam Crawford and Anthea Hucklesby, *Legitimacy and Compliance in Criminal Justice* (Routledge 2013) 1.
[349] Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2013) 102(1) Journal of Criminal Law and Criminology 119.
[350] Crawford and Hucklesby (n 348).
[351] Ibid.
[352] Mike Hough, Jonathan Jackson, Ben Bradford, Andy Myhill and Paul Quinton, 'Procedural Justice, trust and institutional legitimacy' (2010) 4(3) Policing: a journal of policy and practice 203.
[353] Crawford and Hucklesby (n 348).
[354] Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave 2017 155)
[355] Julian Roberts and Mojca Plesničar, 'Sentencing, Legitimacy, and Public Opinion' in Justice Tankebe and Gorazd Meško (eds) *Trust and Legitimacy* in *Criminal Justice: European Perspectives* (Springer 2015) 33.
[356] Roach Anleu and Mack (n 354) 164.

How does the intermediary cultivate legitimacy? As an outsider to the professionalised world of the criminal justice system, one might question the ability of the intermediary to impact the legitimacy of the trial process. Indeed, based on Becker's 'hierarchy of credibility' it may be assumed that intermediaries are poorly positioned to do so.[357] The recent work of Jacobson et al, which investigates perceptions of legitimacy among Crown Court users, suggests the opposite. The authors identify five inter-related dimensions which affect legitimacy: moral alignment, positive outcomes, fair decisions, respectful treatment and passive acceptance.[358] While there are broad differences between court users in terms of how legitimacy is perceived, the intermediary may positively impact each dimension to varying degrees. Jacobson et al found that court users had a stronger belief in the legitimacy of the court process when it was viewed as a 'fair process' and they were individually 'treated with humanity…consideration and respect.'[359] In relation to witnesses and complainants, the intermediary's status as one of the YJCEA's special measures is key.[360] The special measures were implemented with the twin concern of enabling the production of best evidence and reducing the stress associated with live testimony, but they have also 'increase[d] the standing of victims and witnesses within the court process'.[361] In more concrete terms, there is ample evidence that intermediaries contribute to improved experiences for vulnerable witnesses. Plotnikoff and Woolfson's empirical work has documented countless examples of Registered Intermediaries enabling witnesses to make informed choices, helping to familiarise witnesses with the court environment and improving interactions with court professionals.[362] While a rich discussion of legitimacy is beyond the scope of this section, we can make a simple yet important observation at this stage: intermediaries are demonstrably effective in making the criminal justice system more accessible and navigable for many vulnerable individuals. Considering that disengagement and dissatisfaction with criminal justice processes are symptoms of illegitimacy, intermediaries have the potential to act as a legitimising tool at the coalface of the criminal process.[363]

The legitimacy of the trial depends not only on concern for the welfare of court users - it must also involve granting proper access to proceedings and ensuring individuals are, as far as possible, treated

[357] Howard Becker, *Whose Side Are We On?* (1967) 14(3) Social Problems 239, 242.
[358] Jessica Jacobson, Gillian Hunter and Amy Kirby, *Inside Crown Court: Personal experiences and questions of legitimacy* (Policy Press 2016) 166.
[359] Ibid 184.
[360] Carolyn Hoyle and Lucia Zedner, 'Victims, Victimisation and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology* (4th edn, Oxford University Press 2007) 468-70.
[361] Jacobson et al (n 358) 36.
[362] Plotnikoff and Woolfson (n 86).
[363] Tom R. Tyler, Anthony Braga, Jeffrey Fagan, Tracey Meares, Robert Sampson and Chris Winship, 'Legitimacy and Criminal Justice: International Perspective' in *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation) 9.

as valued participants.[364] The trend towards bureaucratic efficiency in criminal justice raises questions about access to justice and may undermine due process principles.[365] The fair treatment of the accused seems central to this debate and Carlen and McBarnet have written about the marginalisation of the defendant throughout criminal proceedings.[366] When considering Jacobson et al's framework, the dimensions of 'moral alignment' and 'passive acceptance' are primarily concerned with the position of the accused. The authors use the term 'passive acceptance' to describe a general malaise among defendants regarding their situation, their disengagement with the court process but also a 'profound sense of powerlessness'.[367] This resonates with Carlen's concept of the defendant as a 'dummy player' in proceedings and Jacobson et al link the silencing of the defendant with a diminishing perception of legitimacy.[368] Returning to potential trial aims, the manner or way in which a dispute is resolved through the trial reflects the importance attached to its underpinning values. Therefore, the trial as a mechanism for conflict resolution is more legitimate when the accused is treated as an autonomous, right bearing subject (see below for further discussion of autonomy and participation as trial values).

As will be developed in subsequent chapters, intermediaries often view themselves as enabling the accused to engage with proceedings and offering them a voice. By doing so, intermediaries can empower the accused to participate and, consequently, help foster a belief in the legitimacy of a process which may ultimately impose coercive sanctions (see further below in section 4.2.3).[369] This is closely linked to the assumption that legitimate criminal procedures have at their heart a fair adjudicative forum.[370] Backen has noted that vulnerable defendants tend to view proceedings as broadly fairer when an intermediary is present to facilitate communication – procedural fairness being a crucial element in building trust and confidence in the trial process.[371] The dimension of moral alignment, whilst multifaceted, is concerned with understanding the authority of the trial as well as

[364] Nina Peršak, 'Procedural Justice Elements of Judicial Legitimacy and their Contemporary Challenges' (2016) 6(3) Oñati Socio-legal Series 749, 757.
[365] Jennifer Ward, *Transforming Summary Justice: Modernisation in the lower criminal courts* (Routledge 2017) 7.
[366] Pat Carlen, *Magistrates Justice* (Wiley-Blackwell 1976); Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).
[367] Jacobson et al (n 358) 196.
[368] Carlen (n 366).
[369] Jacobson et al (n 358) 199; Kenneth Einar Himma, *Coercion and the Nature of Law* (Oxford University Press 2020) 68.
[370] Kate Leader, 'The trial's the thing: Performance and Legitimacy in international criminal trials' (2020) 24(2) Theoretical Criminology 241 (2020).
[371] Paula Backen, 'They just don't get it: communication and the work of an Intermediary with Vulnerable People in the Justice System' (independently published) 181; Crawford and Hucklesby (n 348) 23.

believing this authority is justified.[372] It is important to stress that the normative parameters of the intermediary role do not extend to ensuring defendants are invested in concepts of justice or morality – indeed there is an argument that this could undermine their commitment to neutrality. However, the intermediary will often prove crucial to a defendant understanding the charges and what consequences may flow from a finding of guilt. Any prospect of a defendant feeling morally aligned with the values of the criminal trial are surely predicated on a basic understanding of the process which threatens censure.

To conclude, we reconsider the rationale for the intermediary's introduction into the criminal trial. As Ellison notes, the limited approach of the adversarial trial in merely 'accommodating' vulnerable witnesses was deemed inadequate and ultimately led to the range of special measures contained within the YJCEA.[373] While the special measures regime is underpinned by the twin aims of securing best evidence and reducing the stress of testimony, its introduction can be seen as part of a broader attempt to address a legitimacy deficit within the trial. That legislative intervention was deemed necessary 'to maintain public confidence in the administration of justice' is recognition that the orthodox adversarial model not only had a welfare problem, but also one of legitimacy.[374] Whether the YJCEA satisfactorily addresses the needs, aspirations, expectations, interests, rights, and emotions of vulnerable individuals is arguably less important than recognition of these values and steps taken to accommodate them.[375] The intermediary thus represents a desire to ameliorate systemic communication deficiencies and, consequently, foster legitimacy. When the criminal process struggles to generate legitimacy, it may delegate to other actors to do so. For example, McConville and Marsh have drawn attention to the efforts to legitimise the 'dirty work' of guilty pleas, partly through delegation of responsibility to defence counsel to communicate sentence discount.[376] As a new criminal justice actor, the intermediary has been delegated the task of facilitating communication by a system that has historically struggled to accommodate vulnerable court users. The trial only amounts to a legitimate communicative enterprise if it seeks to individually engage citizens rather than treating them as a monolith. This reiterates the

[372] Mike Hough, Jonathan Jackson and Ben Bradford, 'Trust in justice and the legitimacy of legal authorities: topline findings from a European comparative study' in Sophie Body-Gendrot, Mike Hough, Mike, Klára Kerezsi, René Lévy, and Sonja Snacken (eds) *The Routledge Handbook of European Criminology (*Routledge 2013) 243.
[373] Ellison (n 7) 60.
[374] Birch (n 41) 226.
[375] Jean-Marc Coicaud, 'Crime, Justice and Legitimacy: A Brief Theoretical Inquiry' in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 37.
[376] Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar Publishing 2014).

centrality of communication within the trial, since a trial procedure which does not adequately communicate *with* and allow communication *from* the accused generates legal uncertainty.[377]

3.4.5 Autonomy

'The autonomous citizen acts as a model for the basic interests protected by liberal principles of justice as well as the representative rational agent whose hypothetical or actual choices serve to legitimize those principles.'[378]

The concept of autonomy is difficult to define and is presented differently depending on the context. Duff et al contend that the term has been 'put to such diverse uses, with such vague or varying meanings…that its utility must now be in doubt'.[379] For example, in American jurisprudence the term has often been used in relation to the accused's control of their own case.[380] Duff's 'moral good' theory justifies punishment of the offender based on respect for individual rationality and autonomy. Most accounts of the criminal process recognise that respect for the individual requires criminal procedure to respect the autonomy, dignity and liberty of the human person. These values are closely linked and, as such, are often considered complementary. Thus, we can say that *dignity* requires a recognition of the intrinsic worth of every individual, that this includes being treated as a self-governing *autonomous* individual who should be at liberty to make choices, *free* of external interference.[381]

At first sight, the role of the intermediary in giving effect to values such as dignity and autonomy seems straightforward. Better treatment of vulnerable individuals lies at the heart of the special measures regime and is recognised as 'a barometer of our moral worth as a society'.[382] Explaining the introduction of the special measures regime to the House of Commons, then Home Secretary Jack Straw spoke of the need to re-establish 'proper dignity and respect' for vulnerable witnesses.[383] By acting as a facilitator of communication, the intermediary provides a voice to individuals who otherwise may not be able to participate in proceedings. Furthermore, the involvement of an intermediary to assess the

[377] Mireille Hildebrandt, 'Trial and 'Fair Trial': From Peer to Subject to Citizen' in Duff et al Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial 2: Truth and Due Process* (Hart Publishing, 2006) 225.
[378] John Christman and Joel Anderson, *Autonomy and the Challenges to Liberalism* (Cambridge University Press 2009) 1.
[379] Duff et al (n 315) 130.
[380] Erica Hashimoto, 'Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case' (2010) 90. Boston University Law Review 1147.
[381] Owusu-Bempah (n 254) 10.
[382] Jacqueline Wheatcroft, 'Witness Assistance and Familiarisation in England and Wales: The Right to Challenge' (2017) 21(1/2) International Journal of Evidence and Proof 158.
[383] Youth Justice and Criminal Evidence Bill, 15th April 1999, Col 385.

vulnerable person and create individualised recommendations to the court is recognition of the human condition. It also recognises the person as capable of autonomy and, therefore, personhood.[384] The utility of autonomy as a value in the present enquiry is twofold: firstly, we can examine how the intermediary role operates to ensure individuals are treated as autonomous agents within the trial, and secondly, we can better understand the nature and scope of the intermediary role itself.

It is useful to reconsider the basis of intermediary involvement with both witnesses and defendants. When assessing a vulnerable witness, a Registered Intermediary is principally concerned with whether their involvement is 'likely to improve the completeness, coherence and accuracy of the witness's evidence.'[385] However, another important (albeit less acknowledged) element of the intermediary role involves firstly assessing whether the vulnerable individual is *capable* of communicating their evidence to the court.[386] The language employed here relates to witness competency and the intermediary will often be central to facilitating an otherwise incompetent witness to give evidence.[387] In *R v. Watts,* it was held by the Court of Appeal that the competency test is satisfied if the witness is able to 'understand the question put to him (or her) and give answers to them which can be understood.'[388] This definition mirrors the statutory definition of the intermediary's function almost word for word.[389]

Although the term autonomy rarely appears in the literature relating to intermediaries or special measures more generally, there is scope for consideration of its use and potential overlap with competency. For example, Christman and Anderson consider autonomy to focus on *competent* self-direction or, in other words, self-governance.[390] In assessing the vulnerable witness' communication, the intermediary must invariably include their ability to understand questions put to them as well as answers given in response. Dubber considers such witness involvement to be an example of 'active autonomy' and although he primarily focuses on the accused, it follows that a witness giving evidence is also being addressed within the trial as a free, autonomous citizen.[391] Dubber claims that autonomy and competency are not mere synonyms, but rather that competency is a pre-requisite to the recognition of autonomy. An incompetent witness, he argues, is incapable of exercising autonomy at

[384] Markus Dirk Dubber, 'The Criminal Trial and the Legitimation of Punishment' in Duff et al (n 238) 85.
[385] MoJ (n 56).
[386] Ibid.
[387] Equal Treatment Bench Book (n 36) 55.
[388] [2010] EWCA Crim 1824 [18]. This is also set out in s.53 of the YJCEA.
[389] YCJEA, s.29.
[390] Christman and Anderson (n 378) 110.
[391] Dubber (n 384). Dubber goes on to discuss 'active' and 'passive' autonomy with specific relevance to the defendant, but the ability to understand and respond to questions applies to both witnesses and defendants.

all.[392] Despite their close association with the concept of competency, intermediaries are prohibited from commenting on whether a witness is competent to give evidence, this being determined solely by the court.[393] Since this restriction is based on concerns for the role's impartiality, it follows that the lack of definitional precision surrounding the term autonomy also raises potential issues. For example, if witness autonomy is viewed as including concerns for welfare and emotional wellbeing, then the boundaries of the intermediary's neutrality may become blurred (see Chapter 7).

The significant proportion of intermediary cases involving child witnesses deserves attention when considering the value of autonomy. As Hollingsworth notes, the legal system does not consider children to be fully autonomous rights holders.[394] She argues for a relational approach which highlights the importance of childhood experiences and relationships and is consistent with respect for individual agency. Reflecting on this, we may ask whether, and to what extent, intermediaries consider issues of autonomy when assessing young witnesses and how the role impacts autonomy through the facilitation of communication. The potential for blurring of lines between competence and autonomy becomes apparent here and, again, raises issues relating to the intermediary's neutrality. The conceptualisation of the role as an objective communication conduit resonates with the requirement that it takes no position on the issue of competency. However, this presupposes that the intermediary assesses communication mechanically, without regard for context or circumstances. In other words, the ability of the child to understand questions and give coherent answers is of sole importance. As will be explored later in the thesis, the notion of intermediaries assessing communication in such a vacuum is a fallacy. Intermediaries are encouraged to gain some understanding of the evidential matrix in a case, particularly involving child witnesses and sexual abuse allegations, to avoid mentioning potential suspects during assessment. In such examples, how is the intermediary expected to assess a child without consideration of its welfare, emotional wellbeing and potential for re-traumatisation? If the child is competent to provide testimony, but court examination may adversely affect him in whatever way, should the child's entitlement to be treated as an autonomous agent be denied? These issues implicate a broad range of considerations including the dignity and autonomy of the child and go beyond the characterisation of competence as a mere 'gateway' to autonomy.[395] In reality, the two are intrinsically linked and this should inform a broader discussion about the normative expectations of the role.

[392] Ibid.
[393] S.53 YJCEA; Advocates' Gateway Toolkit 16 (n 32) 16.
[394] Katherine Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Modern Law Review 1046.
[395] Aoife Daly, 'Assessing Children's Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child' (2020) 28(3) International Journal of Children's Rights 471, 482.

We now consider the autonomy of the accused, which has received considerably more academic attention than that of the witness. Many authors view respect for the accused's autonomy as central to a fair, just and legitimate criminal trial. For example, Owusu-Bempah argues that if defendants are to be treated as free, autonomous, and dignified citizens of a liberal democracy, they must be able to choose whether or not to actively participate in criminal proceedings.[396] McEwan and Dubber both argue that the defendant must be treated as self-governing with autonomy operating as a fundamental trial value.[397] Other authors consider focus on the value of autonomy as misguided. Toone doubts the trial's ability to recognise the accused as an autonomous agent and describes the sustained academic attention on autonomy as 'a rhetorical flourish that sidesteps more difficult questions about inequality and injustice in the criminal justice system.'[398] Similarly, Duff et al eschew use of the term and prefer to focus on the concept of 'responsible citizenship' to explain their normative theory.[399]

In line with Kantian principles, the defendant deserves to be treated as an autonomous, right-bearing subject within the criminal trial.[400] But what is the intermediary's role in upholding these values? Just as with witnesses, the intermediary will often enable a vulnerable accused to give evidence when they may otherwise be unable to. The basis of defendant intermediary appointments and how they differ from witnesses is key: vulnerable defendants may benefit from intermediary assistance to enable their *effective participation* in proceedings. This reflects the position that defendants enjoy a set of procedural rights which has not been extended to complainants and witnesses.[401] Developing a more nuanced understanding of trial values, it becomes clear that autonomy is closely aligned with the value of participation. Within the criminal trial, respect for the accused as an autonomous agent rests primarily on their freedom to choose whether to actively respond to allegations brought by the state and their ability to do so effectively. As a coercive process in which individuals may be required to participate, the principles of dignity, autonomy and freedom dictate that the defendant should, at least, be able to choose whether to actively participate in the criminal process, how to conduct their defence and should be enabled to do so effectively.[402] Indeed, even where the accused exercises their autonomy

[396] Ibid 55.
[397] McEwan (n 251); Dubber (n 384).
[398] Robert Toone, 'The Incoherence of Defendant Autonomy' (2005) 83(3) North Carolina Law Review 621, 623
[399] Duff et al (n 315) 130.
[400] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1996).
[401] Owusu-Bempah (n 254) 28; Ernestine Henriëtte Hoegen and Marion Eleonora Ingeborg Brienen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Productions 2000); Robert Toone, 'The Incoherence of Defendant Autonomy' (2005) 83(3) North Carolina Law Review 621.
[402] Owusu-Bempah (n 254) 182.

or freedom to not actively participate, the trial aims may be achieved. For example, conflict resolution can be achieved through either the participation of the accused's legal representatives or by putting the prosecution to proof.[403] It is also important to recognise that autonomy is not simply a matter of comprehension but also relates to the ability to make evaluative judgements. As Arthur argues, this includes making decisions and engaging in practical reasoning.[404] This requires the combination of cognitive ability (to understand the nature and likely consequences of an action) and the evaluative ability to appraise the action and consequences considering the decision-maker's own preferences, desires, goals, values and standards.[405] As such, the defendant's enhanced participatory role in the criminal trial illuminates our understanding of autonomy. The following section which focuses on the value of participation develops this discussion further.

3.4.6 Participation

Participation is regarded as a 'core element of procedural and substantive justice and of legal values embedded in legal rules'.[406] Participation also has an impact on legitimacy - a transparent and participatory model of criminal justice can foster trust in criminal justice procedures and bridge the gulf between perceived 'insiders' of the system and the general public.[407] By asking what it means to participate, we can begin to conceptualise the different participatory roles that exist within the trial. For example, the term 'lay participation' has been commonly used to mean lay adjudication in the form of the jury as a decision-making body.[408] There is, however, growing recognition that lay participation also includes complainants, witnesses and defendants. It is widely accepted that complainants and witnesses should be supported, informed and treated with respect and dignity, but reforms in England and Wales have not yet granted them a set of procedural rights, including participatory rights, along the same lines as the defendant.[409] For example, neither witnesses nor complainants enjoy a right to be present during the trial, to question witnesses or present evidence to legal representation.[410]

[403] ibid 21
[404] Raymond Arthur, 'Giving effect to young people's right to effectively participate in criminal proceedings' (2016) 28(3) Child and Family Law Quarterly.
[405] Ibid.
[406] Grainne McKeever, 'Comparing Courts and Tribunals through the lens of participation' (2020) 38(3) Civil Justice Quarterly 217, 228; Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals* (Bristol University Press 2020) 1. It's also worth nothing that participation is emerging as an international trial norm irrespective of procedural tradition, see: John Jackson and Sarah Summers, *The internationalisation of criminal evidence: beyond the common law and civil law traditions*. (Cambridge University Press 2012).
[407] Stephanos Bibas, 'Transparency and Participation in Criminal Procedure' (2006) 81(3) New York University Law Review 911; Abenaa Owusu-Bempah, 'Understanding the barriers to defendant participation in criminal proceedings in England and Wales' (2020) 40(4) Legal Studies 69; Duff et al (n 238) 21.
[408] Anthony Musson, 'Lay participation: the paradox of the jury' (2015) 3(2) Comparative Legal History 245.
[409] Owusu Bempah (n 254) 28; Hoegen and Ingeborg Brienen (n 401).
[410] Doak (n 191).

Chapter 8 (Participatory Roles) examines the different participatory entitlements of defendants and non-defendants and demonstrates how these are reflected through the work of registered and non-registered intermediaries.

The question of non-defendant participation goes to the heart of how we conceptualise the trial as an institution.[411] On the face of it, vulnerable witnesses are not eligible for intermediary assistance based on concerns about their participation in proceedings. Instead, they are solely eligible for assistance by virtue of being under 18 or if the court considers that the quality of their evidence is likely to be diminished.[412] It is striking that in the 81-page Registered Intermediary Procedural Guidance Manual there is zero reference to the participation of a vulnerable witness. This contrasts with the use of intermediaries in the family courts where the role's value as an 'enabler' of participation has been acknowledged and indeed lauded.[413] Yet any attempt to separate the Registered Intermediary role from the value of participation appears contrived and even contradictory. It seems to have gone largely unnoticed that the Criminal Practice Directions (CPD)[414] link the value of participation with the imperative of the witness providing their 'best evidence'- the latter recognised as a core concern of the Registered Intermediary role.[415] Also, as per the Criminal Practice Directions (CPD), the court is required to take 'every reasonable step' to facilitate the participation of *all* individuals within proceedings, including witnesses.[416] This can, of course, include the appointment of an intermediary for a vulnerable witness.

Plotnikoff and Woolfson found that the 'every reasonable step' requirement sees intermediaries make various innovative recommendations to courts to enable vulnerable witnesses to participate.[417] This has led to a practice where the requirement is cited as justification for a broader degree of intermediary involvement to ensure the vulnerable individual's communication requirements are met.[418] Participation, based on these anecdotal examples at least, seems less of a mere consequence of the intermediary role and more of an instrument through which intermediaries can justify aspects of their work. While the legislation and procedural guidance avoid directly connecting the intermediary with

[410] Ibid 138.
[411] Duff et al (n 315) 214.
[412] YJCEA, s.16(a)(b).
[413] *Newcastle City Council v WM and Others* [2015] EWFC 42; Penny Cooper, 'Like ducks to water? Intermediaries for vulnerable witnesses and parties' (2016) Family Law 374.
[414] CPD (n 22) 3D.2.
[415] For example: MoJ (n 56).
[416] CPR (n 23), Part 4, Rule 3.8(3).
[417] Lexicon, 'Every reasonable step': a more flexible approach to vulnerable witnesses and defendants Consolidated list of intermediary examples (November 2017) available at: < https://www.intermediaries-for-justice.org/sites/default/files/consolidated-list-of-a-more-flexible-approach-november-2017.pdf> accessed 8 November 2020).
[418] Victims' Commissioner (n 43) 14.

the participatory role of the witness, this is unconvincing. Indeed, since a consistent definition of participation across all criminal justice actors is elusive, there is force in the argument that the intermediary should be central to its conceptualisation and application. As will be discussed further in Chapter 7 (Professional Work), the reasons behind the role's exclusion may be based on professional jurisdictions and attempts to preserve the 'court workgroup'. While it is ultimately the responsibility of the judge to manage proceedings and balance conflicting rights and principles, the intermediary will often play a key role in advising the court on the vulnerable individual's participatory capabilities. The extent to which this is the case and the impact it may have on the intermediary role and its scope will be explored in later chapters.

It is understandable that the defendant assumes a more central role when considering the value of participation within the trial. Questions around how the accused answers the charges brought and whether they elect to provide testimony force us to consider what participation means, why it might be normatively desirable and what instrumental value it may have for the trial's aims. As mentioned above, the participatory rights of defendants are much more firmly established than non-defendants. Fundamentally, the accused enjoys the right to be present at his own trial as well as the right of confrontation.[419] However, these rights are of limited value to the defendant if they cannot participate effectively.[420] It is a long-standing principle in criminal law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part.[421] In *SC v UK*, the ECtHR explained that the right 'includes, inter alia, not only the right to be present, but also to hear and follow the proceedings' and 'presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed'.[422] Chapter 8, which focuses on participatory roles, explores how the work of intermediaries is often central to ensuring the effective participation of the accused and how this is qualitatively different to what is termed 'witness work'. While it is not claimed that intermediaries unilaterally ensure effective participation of defendants, it is common case that they can play a vital role through the facilitation of communication.

Returning to some of the main accounts of the trial, the value of the accused's participation features prominently. Duff recognises that while a purely instrumental trial enquiry might benefit from the defendant's engagement, their participation is valued as more than a means to an accurate verdict- it

[419] The right of confrontation under Art.6 of the Convention includes the defendant's right to 'examine or have examined witnesses against him. Also see: Widder (n 17).
[420] Owusu-Bempah (n 254) 609.
[421] Jacobsen and Talbot (n 116) 8.
[422] *SC v UK* (2005) 40 EHRR 10 [29].

is essential to justice.[423] This resonates with the communicative account of the trial which conceptualises it as calling the accused to account for their wrongdoing and seeks to justify the judgment to them. According to this account, not only is the defendant to be treated as an autonomous, rational moral agent deserving of a participatory role, but he owes an *obligation* to communicate and explain his conduct.[424] This has profound implications for the value of participation and its conceptualisation. Hodgson defends this account of the trial by suggesting that it better respects the accused as a responsible citizen.[425] Such a suggestion is challenging, especially when considering the accused's participation at the sentencing stage. Requiring an offender to offer an apology to express remorse for his wrongdoing involves expecting him to represent his own actions as wrong or morally blameworthy. As Duff admits, there is a risk that such coercion fails to respect the offender as an autonomous member of a liberal polity.[426] There are surely questions over whether the defendant's participation in the trial attains the same value if it is coerced by the state. At the very least, the state should *facilitate* communication between parties as well as to the court to enable an apology to be offered.

A main difficulty with the communicative theory of the trial is that it struggles to accommodate the accused who chooses not to participate.[427] As noted earlier, a communicative dialogue is underpinned by a degree of reciprocity which is lacking when the defendant is either incapable or unwilling to engage. Conceptualising the trial as a mechanism for calling the state (rather than the defendant) to account arguably better accommodates the vulnerable defendant. Owusu-Bempah argues that if defendants are to be treated as free and dignified citizens of a liberal democracy, they must be able to choose whether to actively participate in criminal proceedings.[428] This account focuses on 'active' participation which involves 'mental effort or voluntary physical movement on the part of the defendant'.[429] A relevant consideration within this discussion is the role of the defence counsel who Duff argues may help 'secure' the defendant's participation.[430] Duff suggests that in some circumstances, participation by the defendant in the trial might be *more* effectively secured by communicating through counsel rather than in his own voice.[431] It is interesting to consider how Duff would envisage the intermediary fitting into this model and whether the role may also be capable of

[423] Duff (n 322) 115.
[424] Duff et al (n 315) 207.
[425] Jacqueline Hodgson, *French Criminal Justice* (Hart Publishing 2005) 21.
[426] Duff (n 333) 110.
[427] Owusu-Bempah (n 254) 54.
[428] Ibid 55.
[429] Ibid 2.
[430] Duff et al (n 315) 211.
[431] Ibid.

'securing' the defendant's participation. Of course, central to Duff's position is that defence counsel represents the accused and scrutinises the prosecution case on their behalf. Thus, a defendant who is incapable of following proceedings may be held to have effectively participated if their legal representation has tested the prosecution evidence and satisfactorily represented the accused's position. The intermediary's position is evidently different for two main reasons. Firstly, the intermediary is not a representative of the vulnerable accused. Indeed, depending on the terms of the appointment, the intermediary may only assist for the period of testimony which may be too peripheral to 'secure' participation in Duff's terms. Secondly, unlike the lawyer in Duff's account, the intermediary is unable to prioritise participation over communication. While effectively facilitating communication will often lead to an enhanced level of defendant participation, the end does not necessarily justify the means. This does, however, reveal a paradox within the intermediary role's praxis: while judges may only appoint a defendant intermediary to ensure effective participation, the role itself is not principally concerned with this right unlike the accused's lawyer who may indeed exercise it by proxy.

How we think about the defendant's participation in trial proceedings should be informed by his position as a self-governing, autonomous agent. This view is represented by Owusu-Bempah's normative account of the criminal process which calls for the recognition of the accused's personal right to follow proceedings based on respect for individual autonomy.[432] In cases where the accused is eligible, intermediaries will often be central to this value being protected. Lamentably, since the case of *R v Rashid,* full trial appointments are increasingly rare with many vulnerable defendants unable to access intermediary assistance when not under oral examination. In Northern Ireland, the role of the court defendant supporter plainly aids participation since the accused is better able to understand and follow proceedings. There are, however, legitimate questions about whether a defendant with complex communication needs can effectively participate without intermediary assistance for the duration of his trial. The decision of the Divisional Court in *OP* is disappointing in this regard as it expressly prioritises the defendant's participation during oral examination.[433] The upshot of this is that the mental effort required to follow the trial and understand proceedings from the dock is treated as a lesser form of participation. By holding that 'an adult with experience of life and the cast of mind apt to facilitate comprehension' can essentially substitute for the intermediary when the defendant is not giving evidence, the Divisional Court tacitly recognised as much.[434]

[432] Owusu-Bempah (n 254) 182.
[433] *OP* (n 30) [41].
[434] Ibid [35].

Finally, it must be desirable that the defendant's right to hear and follow proceedings cannot be exercised by proxy through an intermediary. Such an instrumental conception of the intermediary role risks prioritising the achievement of trial aims, such as accurate fact finding and conflict resolution, over respect for the accused's autonomy. It is unfortunate that the right to effective participation does not require that the accused should understand or be capable of understanding every point of law or evidential detail, given the right to legal representation.[435] While this may be impossible to realise in practice, the courts have gone too far in suggesting that the defendant does not need to hear/follow proceedings if a lawyer can do it for them.[436] Where autonomy and participation of defendants (and other lay people) are valued, legal representation cannot be viewed as a panacea to participation issues. As will be explored in Chapter 8, the scope of intermediary involvement with vulnerable defendants suggests that defence legal representatives are poorly equipped to unilaterally 'secure' the right to effective participation. A key question, which is explored in later chapters, is where the intermediary fits into this participation equation and how a multifaceted conception of participation accommodates the role.

3.5 Conclusion

This chapter has examined the intermediary role alongside some of the potential aims and values of the criminal trial. The trial acts as a useful point of reference for examining the intermediary's work and its relationships with other criminal justice actors. As the 'focal point of the criminal process', the trial invariably reflects or mirrors the overarching aims and underpinning values of the criminal justice system.[437] This should not, however, diminish the importance of intermediary work at other stages, such as the police station and locations where assessments take place. Indeed, later chapters argue strongly for the extension of intermediary provision to earlier stages of the criminal process as well as the sentencing stage.

Theorisation of the trial must be viewed against the shifting emphasis towards what has been termed 'modified adversarialism' and the intermediary as a special measure is symptomatic of this shift. In terms of the various normative accounts of the trial, it is too simplistic to assume that one neatly accommodates the intermediary role. Instead, it is more accurate to say that aspects of different accounts resonate with the role and its work. We have seen how legitimacy, autonomy and participation intertwine with the objectives of ensuring accurate verdicts are reached, conflicts are

[435] Owusu-Bempah (n 254) 71.
[436] As suggested in *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994).
[437] Ashworth et al (n 318) 345.

resolved, and the defendant is held accountable.[438] It seems clear that the intermediary role has the potential to positively impact these aims and values when working with both witnesses and defendants. The legitimacy of the trial as an institution is strengthened if individuals within it are treated with dignity, as autonomous agents, should they choose to participate or not. Of course, since the intermediary role operates entirely at the direction of the judge and is more broadly constrained by resource limitations, there is a risk that its full utility is not realised. These themes, which thread throughout the thesis, are important since they impact the scope and nature of the intermediary role but also its ability to generate legitimacy and professional recognition.

Finally, an important issue, which is beyond the scope of this research, is how respect for the values discussed is this chapter is apportioned between witnesses and defendants and how this impacts our broader view of the trial as an institution. This can only be properly achieved by the development of a normative framework which clearly articulates the relationship between trial aims and values.[439] The present chapter does preparatory work for further theorising of the trial by casting the intermediary as a role which can (potentially) act in furtherance of its broad aims and values. While a grounded theory of the intermediary role is generated and explained in later chapters, the present chapter lays some theoretical foundation and informs the analysis of the empirical evidence.

[438] ibid 346.
[439] Duff et al (n 238) 7.

Chapter 4: The intermediary - a typology of roles

4.1 Introduction

The defendant, aged 22 with a moderate learning disability, has been charged with multiple drug offences. He has been assessed by an intermediary pre-trial who has recommended several strategies to facilitate communication and support the defendant to remain calm and engaged at different points throughout his upcoming trial. For example, in the court report, the intermediary has recommended the use of simple language, regular breaks and the availability of pen and paper so the defendant can note down any questions when in the dock. At the Ground Rules Hearing (GRH), the judge accepts the intermediary's court report and makes the relevant directions. The judge permits the intermediary to attend all meetings between the defendant and his legal team and assist for the period of evidence-giving. It is agreed that both lawyers will submit their questions to the intermediary for review prior to examination. It is also agreed, that, when necessary, the intermediary will intervene by raising their hand during examination if the questions posed are inappropriate or the defendant is unable to understand what is being asked. As it turns out, the intermediary is required to intervene relatively infrequently as both lawyers adhere to the rules agreed. After the trial concludes, the judge also requests intermediary support for a pre-sentencing meeting with probation.[440]

In the above example, the utility of the intermediary was well understood by the lawyers and the judge. This could fairly be described as an example of best practice as the intermediary was properly recognised as a skilled, independent communication expert. It is, however, unlikely that the above example could have occurred in the early years of intermediary practice. As noted in Chapter 2, the 'bare bones' of s.29 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) left ample scope for interpretation of what the intermediary role would involve and how it would be integrated into the criminal justice system.[441] The core functions and responsibilities of intermediaries were first published by the Ministry of Justice (MoJ) in the Registered Intermediary Procedural Guidance Manual. Now updated every few years, the Procedural Guidance Manual comprehensively outlines the expected involvement of a Registered Intermediary from initial assessment, to the Achieving Best Evidence (ABE) interview, to writing a report for the court and involvement at court.[442]

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[440] This scenario is based on an example provided by commercial intermediary provider, Triangle. See: Triangle, 'Guidance on who needs an intermediary and who decides; suspects and defendants' <https://triangle.org.uk/page/who-needs-an-intermediary-defendants> accessed 27th June 2022.

[441] Birch (n 41) 249.

[442] Of course, the Registered Intermediary Procedural Guidance Manual technically does not apply to defendant intermediaries working outside the Witness Intermediary Scheme (WIS).

Since the introduction of intermediaries, there has been little empirical research into their role in practice which has contributed towards problems of definition and scope. Further, the limited research conducted has tended to start with an in-built assumption of the intermediary's function without engagement with other articulations of the role. Cooper and Wurtzel, for example, write that the intermediary has become a 'facilitator transparently advising the police and courts and intervening in the event of miscommunication usually to advise the questioner how better to communicate with the witness'.[443] This definition is multi-faceted and contains arguably three of four different roles or functions. Judges have also grappled with the question of what the role of the intermediary entails. As explained in Chapter 1, recent case law reveals a discord between the judiciary and intermediaries as to how the parameters of the role should be understood.[444] Thus, despite widespread recognition of the importance of understanding the role of the intermediary, a consistent picture has not emerged.

This chapter maps various depictions of the intermediary role and seeks to bring some order to how it is understood. A typological analysis is presented using three 'types' created by the author: 'the communicator', 'the supporter' and 'the intervener'. The typology seeks to identify some of the particular functions of the intermediary and formally categorise them. This involves broadly mapping the intermediary's functions and subsequently narrowing the focus using various descriptors or 'types'. A subsequent analysis of the chosen types should then clarify the intermediary role and ensure the typology will have been 'carried out for definite formal ends'.[445] The chapter draws the reader's attention to the various overlaps and inconsistencies in how the role is represented in the literature and in the case law and the typology acts as an important reference point for discussion in the later analysis chapters. The various roles and functions ascribed to the intermediary can help the reader understand the empirical data and its analysis. The chapter also identifies several salient questions about the nature and scope of the intermediary role which are also addressed in the analysis chapters.

Before considering the three types which I have created, it is useful to firstly consider the intermediary's status as an 'outsider' in the social world of the criminal justice system. Rather than being discussed as a distinct type in its own right, this label provides some insight into issues of power and status which thread throughout the thesis.

[443] Cooper and Wurtzel (n 38) 44
[444] *Grant-Murray* (n 71); Also see: John Taggart, 'Intermediaries- a role in need of clarification?' (2021) Archbold Review.
[445] Sam Jacoby, 'Type versus Typology' (2015) 20(6) The Journal of Architecture 931.

4.2 The 'court workgroup'

Chapter 3 examined the position of the intermediary within the structure of the criminal trial. Locating the intermediary within the larger organisational structure of the criminal process is an important precursor to the analysis presented in this chapter and the thesis more broadly. As a complex political and social institution, the criminal court has been depicted as a closed community in which the 'court workgroup' operates together to process criminal cases. Its core members, the judge and both prosecution and defence lawyers, share strong organisational ties as well as educational and professional qualifications.[446] The goal of 'maintaining group cohesion' and the instrumental objective of 'reducing uncertainty' act to ensure that most communication in court occurs between lawyers and the judge.[447] Through iterative practices and repetitive case handling, a shared understanding emerges where these primary participants strive to find common ground. This close-knit group of courtroom actors are considered 'the regulars' or the 'courthouse community' whereas the residual actors are viewed as outsiders.[448] This portrayal of the criminal court as being controlled by this exclusive workgroup creates difficulties for the integration of other designated peripheral actors.[449] For example, language interpreters experience unease during criminal proceedings and the outsider status afforded to them has received academic attention.[450] Nartowska's describes the courtroom as a theatre in which all of the roles have been rehearsed while the interpreter is 'forced to improvise'.[451]

As will be developed in later chapters, the location of the intermediary within the court influences the role's perceived status and the extent of its involvement within proceedings. Rock characterises the court's organisation as a collection of concentric rings with the judiciary at the inner recesses and actors becoming increasingly peripheral on the outer reaches.[452] Probation officers and social workers, for example, often provide invaluable assistance to the court at sentencing, yet ordinarily take no part in the general communication and interaction between the bench and lawyers.[453] How the exclusivity of

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[446] Rasmus Wandall, *Decisions to Imprison: Court Decision-Making Inside and Outside the Law* (Routledge 2016) 77.
[447] James Eistenstein and Herbert Jacob, *Felony Justice- An Organisational Analysis of Criminal Courts* (Little Brown and Co 1977) 24.
[448] James Eistenstein, Roy Flemming and Peter Nardulli, *Contours of Justice: Communities and Their Courts* (Little Brown and Co 1988).
[449] Marcia Lipetz, *Routine Justice: Processing Cases in Women's Court* (Transaction Publishers 1984) 6.
[450] Jieun Lee, 'Conflicting views on court interpreting examined through surveys of legal Professionals and court Interpreters' (2009) 11(2) Interpreting: International Journal of Research and Practice in Interpreting 35; Zubaidah Ibrahim and Roger Bell, 'Court Interpreting: Malaysian Perspectives' in Louise Brunette et al (eds), *The Critical Link 3. Interpreters in the Community* (Amsterdam, Philadelphia: Benjamins 2003) 211-212.
[451] Karolina Nartowska, 'Court Interpreter: Lawyer, Psychiatrist, Director or Actor?' in Kierzkowska Danuta (ed) *New Tasks for Legal Interpreters and Translators in the Enlarged Europe* (Polish Society of Sworn and Specialised Translators 2014) 59.
[452] Rock (n 299) 181.
[453] Helen Johnston, 'Court Duty Solicitors' (1992) Legal Action 11.

the court workgroup affects the intermediary role's scope and content is a theme that appears throughout the thesis.

4.3 Typology as a conceptual framework

While labelling the intermediary as an outsider amounts to a form of classification, it is a rudimentary one. It makes no attempt to understand conflicting perceptions of the role nor how they might overlap, share common ground or indeed be contradictory. Any assessment of the intermediary role must occur within the wider setting of the criminal justice system. Due to the multitude of actors involved, each with their own goals, agendas and expectations, it is useful to analyse the intermediary role in relative and comparative terms.[454]

This chapter constructs a typology which can be viewed as a classification scheme for the various roles the intermediary assumes. In her comparative analysis of domestic courts, Young notes the potential of typologies in classifying 'previously disjointed features, and present clusters of analysis that were previously kept apart'.[455] As an under-researched role within the criminal justice system, such a description resonates with a typological analysis of the intermediary. As noted in Chapter 2, the historical development of the role, as well as later articulations of its ambit, lack clarity and precision. Diverging perceptions of the intermediary ought not to be side-lined in the construction of a typology but rather should form an integral part of it. Other typologies, focusing on inter-organisational relationships and the changing roles of actors within the criminal courts, have accepted the issue of role conflict as a key component of their research.[456] Indeed, O'Mahony et al identified potential conflict in roles resulting from some intermediaries 'wearing more than one professional hat'.[457] This conflict and its potential impact on the intermediary as a professional role is developed further in Chapter 6.

The use of typologies indicates reasoning by analogy as a formal means of comparison.[458] The use of such methods of classification have traditionally been the preserve of the biological sciences with naturalists such as Charles Darwin devising a system of evolutionary classification. Such research,

[454] Nina Perask, *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (Routledge 2014) 182.
[455] Katharine Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) 195.
[456] Stephen Davidson, 'Planning and co-ordination of social-services in multi-organisational contexts' (1976) 50 Social Services Review 117.
[457] O'Mahony et al (n 98) 160.
[458] For example, Scott argues that various buildings such as Courts, Parliament and Theatres are closely related typologically see: Luke Scott, 'Court: The Place of Law and the Space of the City (2016) (1) Arena Journal of Architectural Research 5.

strictly speaking, involved the use of taxonomies which seek to categorise phenomena into mutually exclusive and exhaustive sets.[459] Typologies, conversely, employ arbitrary or *ad hoc* criteria and the categories selected are neither mutually exclusive nor exhaustive.[460] One of the fundamental characteristics of any typology is that it is reduced to formal, manageable categories and this should lead to the creation of a coherent framework for comparison.[461] This effort to classify necessarily involves the identification of similarities and differences, an exercise which should allow us to make sense of the diversity of the intermediary role and its widely diverging depictions.[462]

A range of justifications for the use of typologies is apparent across various disciplines,[463] but in this research the rationale is relatively simple: to bring some degree of reconciliation to the variety of roles ascribed to the intermediary by the academic literature, legislation and case law. The 'categories' or 'types' which feature in my typology are not intended to be exhaustive.[464] An attempt to account for all the variables involved in the role confronts one with a methodological problem. Based on the wide range of phenomena to account for, the boundaries between the types are likely to be fluid and so delineation of clear-cut categories is not expected.[465] It must be remembered that typologies are not natural things and are created by their authors for their own purposes. The three types employed have been chosen based on recurring themes from the literature, but also because they are more easily analysed against other actors within the criminal justice system. Other types could feasibly be added but those that have been selected will be individually explained and their selection justified. For this reason, the typology employed should not be considered definitive, although it is intended to be comprehensive.[466] The typology will act as a conceptual framework enabling us to 'comprehend, understand and explain complex social realities' that are involved in the performance of the intermediary role.[467] It does not seek to provide rules for classification but rather to gain a better understanding of the characterisations of the intermediary.[468]

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[459] Harold Doty and William Glick, 'Typologies as a unique form of theory building: toward improved understanding and modeling' (1994) 19(2) Academy of Management Review 230, 232.
[460] Kevin Smith, 'Typologies, taxonomies, and the benefits of policy classification' (2002) 30(3) Policy Studies Journal 379.
[461] Amie Kreppel, 'Typologies and Classifications' in Shane Martin, Thomas Saalfeld and Kaare Strom (eds), *The Oxford Handbook of Legislative Studies* pg 87
[462] Bistra Alexieva, 'A Typology of Interpreter-Mediated Events' (1997) 3(2) The Translator 153,
[463] Doty and Glick (n 454) 230.
[464] Perri 6 and Christine Bellamy, Principles of Methodology: Research Design in Social Sciences (SAGE Publishing 2011) 145.
[465] Alexieva (n 462) 156.
[466] Donald Black and Mary Pat Baumgartner, 'Toward a Theory of the Third Party' in Keith O'Boyum and Lynn Mather (eds), *Empirical Theories About Courts* (Longman 1983) 84.
[467] Kluge (n 106) 14.
[468] Doty and Glick (n 459) 231.

The next section considers the first type in my typology: the intermediary as a 'communicator'.

4.4 Type one: The communicator

'The role of the intermediary is to support effective communication to enable vulnerable defendants and vulnerable witnesses to participate effectively in the criminal justice system.'[469]

One of the prevailing descriptors of an intermediary across disciplines relates to its involvement in communication and usually the facilitation of communication. *The Oxford English Dictionary* defines a communicator as 'a person who is able to convey or exchange information, news, or ideas, especially one who is eloquent or skilled'. This an instructive starting point. Whether this involves human actors or artificial beings, the intermediary is often depicted as someone or something that provides a channel for communication.[470] As explained in Chapter 2, from its earliest prototype in the context of the criminal justice system, the intermediary was envisioned as a role that would facilitate communication. The development of the interlocutor, as first proposed by the Pigot Committee, into what became the intermediary was a process that continued to have communication at its core. In 1998, *Speaking up for Justice* envisaged the role a 'communicator or intermediary' and the omission to distinguish between the two suggests that either title could have been included in the subsequent legislation.[471] Most crucially, s.29 of the YJCEA outlines that the function of the intermediary is to 'communicate' questions put to the witness and any answers given in reply.

4.4.1 The task of communication – when and how?

As noted in the introductory chapter, intermediaries work across the criminal justice system and their primary responsibility is to 'enable complete, coherent and accurate communication'[472]. It is, however, striking how little research has been conducted into what these functions involve in practice and how intermediaries reflect on them.[473] It seems uncontroversial that the settings in which intermediaries work can have a significant bearing on the nature of the assistance the role provides. Mulcahy and Rowden highlight the unique communication challenges created by different criminal justice 'spaces'

[469] The Advocate's Gateway (n 68) 8.
[470] For example, a financial intermediary refers to an institution that acts as a middleman between two parties in order to facilitate a financial: <https://corporatefinanceinstitute.com/resources/knowledge/finance/financial-intermediary-transactions/>
[471] Speaking up for Justice (152) 59.
[472] MoJ (n 56) 8.
[473] Cooper and Mattison (n 42) 367.

and it follows that intermediaries must adapt their practices accordingly.[474] Typological analysis of court interpreters has similarly considered the importance of 'place' in affecting the nature of communication assistance. This notion of 'situation types' not only requires differing forms of communication because of their setting but because of the various actors involved.[475] These classifications have often utilised types such as 'court interpreting' and 'community dialogue interpreting' which are typologically separate and demand different approaches from the interpreter.[476] Similarly, intermediaries are employed across the criminal justice system - from working with vulnerable witness during ABE interview to providing assistance during courtroom examination. The social setting in which the intermediary operates must be appreciated alongside any attempt to understand the role. The ritualistic, formalised social setting of the criminal court may demand particular communication skills whereas other settings may not - do intermediaries assume a formal communicatory role in criminal proceedings and a less formal one elsewhere? More importantly for the present research, there has been no empirical research focusing on the situationally dependent communication challenges intermediaries face and how this may impact the scope of the role.

4.4.2 Investigative stage

Although the range of special measures introduced by the YJCEA are commonly viewed as solely courtroom based, the intermediary is the exception. Any questioning of a vulnerable witness 'however or wherever conducted' can utilise an intermediary and this includes any examination that takes place prior to the courtroom.[477] The need for intermediaries at the police station has been widely recognised and Registered Intermediary training now specifically includes working alongside interviewing police officers.[478] Good practice dictates that Registered Intermediaries conduct an assessment of a potentially vulnerable witness prior to ABE interview.[479] Their role at this stage involves discussing with the interviewing police officer any limitations the witness may have, assist with planning the interview and monitoring the interview itself.[480] This communication with law enforcement, to ensure that

[474] Linda Mulcahy and Emma Rowden, *The Democratic Courthouse* (Routledge 2020).
[475] Marshall Morris, *Translation and the Law* (John Benjamins Publishing 1995) 313.
[476] Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (The University of Chicago Press 1990); Nancy Schweda-Nicholson, 'Training for Refugee Mental Health Interpreters', in Cay Dollerup and Annette Lindegaard (eds) *Teaching Translation and Interpreting 2. Insights, Aims and Visions* (John Benjamins Publishing 1994) 207-210.
[477] YCJEA, s.29
[478] JUSTICE, 'Mental health and a fair trial: A Report by JUSTICE' (Justice 2017).
[479] Plotnikoff and Woolfson (n 37) 34. The intermediary is expected to provide a preliminary report to the interviewing officer which tends to be oral if the assessment and interview occur on the same day or can be written if the latter occurs on a subsequent day see: The Advocate's Gateway (n 68) 14.
[480] Henderson (n 8) 156.

vulnerable individuals are able to be properly assessed, is often overlooked. Before intermediaries can help to assist communication between the police and interviewee, their own communication channels with the police must be established.[481] Co-operation between intermediaries and interviewing officers has been cited as the basis for effective interview planning and an improved understanding of the intermediary role.[482]

While the task of facilitating communication underpins the work of both registered and non-registered intermediaries, the 'two tier' system impacts where and how this takes place.[483] Registered Intermediaries for witnesses can be requested by the police where required, but it falls on defence representatives to source a non-registered intermediary from a private provider.[484] The process through which intermediaries are sourced is important and it is perhaps not surprising that non-registered intermediaries rarely attend vulnerable suspects at the police station.[485] Unlike the MoJ in England and Wales, the DoJ in Northern Ireland arranges and funds intermediaries to attend suspects and witnesses at the police station. Vulnerable suspects in Northern Ireland may therefore be identified much sooner and anecdotal evidence suggests intermediaries are increasingly attending suspects in custody.[486] There has been no empirical research to date examining how the intermediary role at interview (ABE/suspect interview) differs between registered and non-registered intermediaries.

The extent to which engagement with the police affects the role of intermediaries as communicators warrants empirical research. High levels of engagement between police and probation officers, for example, have been described as forging a 'partnership model' involving close communication.[487] Carlen similarly wrote of a 'police/probation alliance' and her empirical work revealed fears among probation staff of 'the dangers of being compromised' by the close ties.[488] The fear of being viewed as an agency of social control, rather than one which assists people, was based on established communication channels and the mutual sharing of information.[489] If non-registered intermediaries are considered to be outsiders in that they are externally sourced and funded, then it is plausible that they engage and communicate differently with police. As will be discussed in later chapters, the way in which

[481] Plotnikoff and Woolfson (n 37) 48.
[482] Cooper (n 14).
[483] Henderson (n 8).
[484] The Advocate's Gateway (n 68).
[485] Plotnikoff and Woolfson (n 37); Victims' Commissioner (n 43).
[486] Personal communication with defence solicitor (28th September 2017).
[487] Joel Miller, 'Contemporary Modes of Probation Officer Supervision: The Triumph of the "Synthetic" Officer?' (2015) 32(2) Justice Quarterly 314.
[488] Carlen (n 366) 52.
[489] Ibid.

intermediaries conceptualise their communicative role influences how they view their neutrality, professional status and impact on participation.

4.4.3 Communication in the courtroom

> '*the remit of an intermediary is greater than just the questions to be asked during cross-examination. It encompasses anything which may affect communication and understanding in the widest sense*.'[490]

The intermediary is commonly represented as a court-based role. Intermediaries owe their primary duty to the court and applications for the use of an intermediary are made to the court.[491] While the criminal trial has been termed 'a communicative forum', numerous barriers to communication within the court are well recognised.[492] The isolation of participants through their placement and relative spacing contributes to what Carlen has termed 'a chronic breakdown in communication'.[493] The physical organisation of the court can inhibit participation and negatively impact the defendant's ability to communicate with his legal representatives.[494] The use of the dock in particular often leads to 'delayed' or 'failed' communication which can negatively impact the ability of the defence to properly put their case.[495] Intermediaries must therefore contend with various pre-existing communication issues built into the fabric of the courtroom. As well as the physical layout of the court, the 'ceremonial, disciplined and staged'[496] theatre of the trial may affect the role's communicative function.

The intermediary's communicative role in a case is ultimately decided pre-trial at the GRH.[497] The Criminal Practice Directions require the court to invite representations from the parties and the intermediary and to establish ground rules for questioning.[498] This case management procedure was designed to facilitate a 'more intense consideration of issues by bringing together intermediaries, lawyers and judiciary to resolve how best to communicate with vulnerable witnesses at trial'.[499] The GRH is viewed as an opportunity for the intermediary to explain the role to the court and clarifying the

[490] Backen (n 371) 117.
[491] MoJ (n 56).
[492] Duff et al (n 315) 3.
[493] Carlen (n 366) 23.
[494] Linda Mulcahy, 'Architects of Justice: The Politics of Courtroom Design' (2007) 16(3) Social and Legal Studies 383.
[495] Mulcahy and Rowden (n 474) 296.
[496] Rock (n 299) 27.
[497] GRHs are now a requirement in all intermediary cases as per Criminal Procedure Rule 3.9(7).
[498] 3.9(7).
[499] MoJ, 'Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence' (London 2014) 4.

boundaries of questioning is considered good practice.[500] The need for the intermediary to explain its role will invariably depend on the judge's experience of GRHs, but it is the responsibility of the court to invite the intermediary to discuss their recommendations.[501] Amendments to the 2015 Criminal Practice Directions (CPD) were introduced to ensure that the question is not whether a GRH *should* happen in an intermediary case but *how* it should be conducted.[502]

The available empirical research relating to GRHs suggests that intermediaries feel their participation and communication are best achieved through informal means. This is evidenced by a preference for 'open, collegial discussion'[503] and 'discussion rather than formality'[504] which emphasise a collective responsibility for good communication. Intermediaries consider that their recommendations are better understood when the shackles of formal court proceedings are discarded, and they can communicate on their terms.[505] Flexibility from the bench allows the intermediary to tailor their recommendations and focus on bespoke communication strategies.[506] Good practice guidelines produced by the Advocates Gateway describe the GRH as a 'discussion' and further stipulate that the intermediary ought not to take the witness box or make any sort of declaration.[507] Cooper and Farrugia and Plotnikoff and Woolfson all found a mixed response from intermediaries, advocates and lawyers as to their experience of GRHs.[508] However, one common thread in the findings was that the intermediary's ability to execute their communication function is significantly impacted by the willingness of advocates to engage and judges to enforce agreed rules. As suggested in Chapter 3, this reveals how intrinsically linked the intermediary's role is to the coercive power of the judge to enforce the court report's recommendations. In addition, a judicially approved set of communication rules may give the intermediary increased legitimacy when dealing with the advocates in a case.

The intermediary is most associated with facilitating communication at trial as envisaged by the YJCEA. A significant body of research has established that lawyers, particularly in cross examination, can use complex language which is inappropriate for vulnerable witnesses.[509] In the absence of guidance

[500] Sir Brian Leveson, 'Review of Efficiency in Criminal Proceedings' (Judiciary of England and Wales, January 2015) [257].
[501] CPR (n 23) Rule 3.9(7).
[502] Cooper (n 41) 21.
[503] Plotnikoff and Woolfson (n 37) 113.
[504] Cooper n (41) 14
[505] Plotnikoff and Woolfson (n 37) 114; Backen (n 371) 51.
[506] Penny Cooper and Laura Farrugia, 'Ground Rules Hearings' in Cooper and Norton (n 9) 412
[507] The Advocate's Gateway, 'Ground Rules Hearings and the fair treatment of vulnerable people in court: Toolkit 1' (1 December 2016) <https://www.theadvocatesgateway.org/news/toolkit-1%3A-ground-rules-hearings> accessed 5 May 2020.
[508] Cooper and Farrugia (n 506).
[509] Kirsten Hanna et al, 'Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-examination Fair?' (2012) 19(4) Psychiatry, Psychology and Law 530; Rachel Zajac et al, 'I don't think that's what really happened: The effect of cross-examination on the accuracy of children's reports (2003) 9(3) Journal of

outlining how intermediaries are expected to fulfil the role at trial, it is left to be worked out on a case-by-case basis with the judge.[510] For example, Cooper and Wurtzel advocate a broad communicative role with the intermediary advising on appropriate vocabulary and other linguistic difficulties but also intervening when they consider breaks would be useful or to allow the witness time to remain calm and attentive.[511] This contrasts sharply with Ellison's prediction that the role would 'perform a relatively passive translator function 'reinterpreting' lawyers' complex language into a more developmentally appropriate and therefore accessible form.'[512] Yet while the intermediary may be afforded latitude, their ability to facilitate communication during examination is heavily dependent on the direction of the trial judge. This is exemplified by the case of *R v Grant Murray.*[513] As previously noted, the Court of Appeal emphasised that intermediaries may 'provide assistance to a witness or defendant as *directed by the judge* [emphasis added].'[514] Further, the comment from the bench that the intermediary had 'misunderstood their role' suggests a preconceived notion of the communicative function of the intermediary. But inconsistency among judges as to the scope of the intermediary role during witness examination (or indeed trial proceedings more generally) is clearly concerning. For example, the Victims' Commissioner recently found a striking difference in perceived effectiveness of intermediaries among magistrates/District Judges (20%) compared to Crown Court judges (67%). These figures suggest that intermediary function may in practice differ not only between registered/non-registered intermediaries but also between those in lower and higher courts.[515]

4.4.4 Beyond the witness box

Section 29 of the YJCEA, the statutory basis for intermediary appointments, is silent about when intermediary assistance may begin or end. The intermediary's involvement with a witness is predicated on the latter's communication impairment and determining how long this assistance should last is crucial. The previous section noted the intermediary's communicative role during testimony, but does this role automatically cease once questioning concludes? The answer to this question impacts the extent to which the intermediary can be said to facilitate communication. As noted in the introduction chapter, 'evidence only' appointments for defendants arise when the judge permits intermediary

Experimental Psychology 187; Joanne Morrison, Jill Bradshaw and Glynis Murphy, 'Reported communication challenges for adult witnesses with intellectual disabilities giving evidence in court' (2021) 25(4) The International Journal of Evidence & Proof 243.

[510] Plotnikoff and Woolfson (n 37) 187.

[511] Penny Cooper and David Wurtzel, 'Intermediaries' in Cooper and Norton (n 9) 367.

[512] Ellison (n 7).

[513] *Grant-Murray* (n 71).

[514] ibid [199].

[515] Victims' Commissioner (n 10) 1.

involvement solely for testimony. The current situation is that appointment of an intermediary for a defendant's evidence will be 'rare', but for the entire trial 'extremely rare'.[516]. As Hoyano and Rafferty have pointed out, no equivalent practice direction exists for prosecution or defence witnesses and no reason is given for the specific focus on the defendant.[517] The case of *R v Rashid* affirms the thrust of the CPD and reinforces that the basic competencies advocates ought to negate the need for an intermediary.[518]

The 'rarity provisions' of the Criminal Practice Directions (CPD) have a significant impact on the conceptualisation of the intermediary as a communicator. In essence, they suggest that the type of communication in which the intermediary should be involved is restricted solely to communicating questions put and answers given in reply. The 'unseen and often unrecognised' role of the non-registered intermediary in assisting legal advisers to take instructions before and during the trial is undermined.[519] Further, if a vulnerable defendant ultimately elects not to testify in his own defence, there are legitimate questions about how the intermediary will be involved in facilitating communication. As noted in Chapter 3 and discussed further in Chapter 9, the communication assistance given by intermediaries to vulnerable defendants can be viewed through the lens of participatory rights. This argues that the intermediary assumes a qualitatively different communicatory role with defendants than witnesses, based on the former's right to effective participation in proceedings.

Finally, framing the 'communicator' as the first type in the typology emphasises how fluid and unstable the process of categorisation can be. Court actors are responsive to each other but maintain independent identities and are all communicators within the social setting of the criminal court.[520] The process of administering cases and maintaining the efficient operations of the criminal court requires constant communication and affirmation of iterative practices. Yet as an outsider to the exclusive court workgroup, the intermediary is not only involved in communication but actively facilitates it when assisting vulnerable individuals. By labelling the intermediary a communicator we are not excluding the possibility that lawyers, judges and other actors may also fall under this umbrella category. Indeed, the Pigot Committee saw parallels between the interpreter and the interlocutor and thus both roles can be considered communicatory in nature. But Anderson's description of the interpreter as someone who

[516] CPD (n 22) 3F.13.
[517] Hoyano and Rafferty (n 20) 99.
[518] *Rashid* (n 15).
[519] Ibid.
[520] John Hagen, 'Ceremonial Justice: Crime and Punishment in a Loosely Coupled System' (1979) 58(2) Social Forces 508.

exercises 'power as a result of monopolization of the means of communication'[521] clearly does not apply to the intermediary. Even when appointed to assist a vulnerable individual, the intermediary must operate under the supervision of the judge and their communicatory function is tempered in this respect.[522] The intermediary may possess the requisite tools to enable communication, but it does so at the direction of the judge who ultimately directs the extent of their involvement.

4.5 Type two: The supporter

> *'Intermediaries…do not support the vulnerable witness or defendant, but rather assist the prosecution/ defence/ judge by supporting communication between these parties and the vulnerable person*.'[523]

The next type raises the vexed issue of neutrality – to be discussed extensively in Chapter 7. It has been explained in earlier chapters that the intermediary is consistently presented as the occupant of an objective, neutral role. Both the MoJ and DoJ make clear in their respective procedural guidance manuals that the intermediary owes its duty to the court, not the prosecution or defence.[524] This differs significantly from the duty owed, for example, by a barrister to their client requiring that their best interests are pursued.[525] Intermediaries facilitate communication, but can they also be considered 'supporters' of the vulnerable witness/defendant, and, if so, can they provide support while remaining neutral? Reference to the Oxford English Dictionary again proves instructive. The word support has a number of definitions including being 'actively interested in and concerned for the success of [something/someone]' as well as meaning to 'give approval, comfort, or encouragement to'.[526] If the intermediary executes a support function, this may undermine the notion that the intermediary is 'an independent person, a communication specialist [appointed] to assist with two-way communication in court'.[527]

A useful starting point in considering the support function of the intermediary is recognition that this label has consistently been rejected by practitioners and the judiciary. Extolling the 'fresh insights into

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[521] Bruce Anderson, 'Perspectives on the Role of Interpreter', in Richard W. Brislin (ed) *Translation: Applications and Research* (Gardner Press 1976) 208-228.
[522] As outlined in *R v Grant Murray* (n 71).
[523] IFJ, 'Intermediaries: A Voice for the Voiceless' <https://www.intermediaries-for-justice.org/sites/default/files/all_about_intermediaries.pdf> (accessed 3 July 2020).
[524] MoJ (n 29) [3.14].
[525] Barristers also have an overriding duty to the Court to act with independence in the interests of justice which may at times conflict with the best interests of the client see: Bar Standards Board, The Bar Standards Board Handbook (version 4.6, 31 December 2020).
[526] *Oxford English Dictionary* (Oxford University Press 2017).
[527] Taken from an example judicial direction to the jury contained in: Equal Treatment Bench Book (n 36) 5.18.

the criminal justice process' which intermediaries have brought, the former Lord Chief Justice of England and Wales, Lord Judge, firmly rejected the suggestion that intermediaries are witness supporters.[528] The Advocate's Gateway similarly state that matters relating to witness welfare are not the concern of the intermediary.[529] The MoJ and DoJ also make it clear that intermediaries are not to support vulnerable individuals in a way that could compromise their neutrality. But is it possible for an intermediary to execute their role without acting as a support to the vulnerable individual? It may be questioned how a purely communicatory role without a support function operates in the emotionally charged world of the criminal justice system. Furthermore, those who qualify as intermediaries are almost always professionals in their own right with experience in health care roles such as speech and language therapy, social work, occupational therapy and nursing.[530] The meaning and significance of support and indeed neutrality in these respective fields can differ significantly from what is expected of an intermediary.

4.5.1 Registered v non-registered intermediaries

While Registered and non-registered intermediaries are governed differently, their core functions are depicted as equivalent.[531] Following on from the first type discussed above, intermediaries working with both witnesses and defendants assess communication needs and then seek to facilitate communication. However, when we consider whether intermediaries provide a support role, there may be some divergence. This relates not just to how intermediaries are perceived by members of the court workgroup, but also to how individuals executing the role conceptualise its content. The discussion below provides context to the discussion in later chapters wherein the concepts of 'witness work' and 'defendant work' are developed.

Firstly, the structural imbalance between the state and the defendant in terms of both power and resources may impact how intermediaries approach a support function. For example, research suggests that non-registered intermediaries often perceive the vulnerable defendant to be in particular need of support and, in turn, this can generate sympathy verging on solidarity. O'Mahony et al's research into the developing professional identity of defendant intermediaries reveals a conflict between the

[528] Rt.Hon. The Lord Judge, Lord Chief Justice of England and Wales, 'Vulnerable Witnesses in the Administration of Criminal Justice' (17th Australian Institute of Judicial Administration Conference, 7 September 2011) 15.
[529] The Advocate's Gateway, 'Intermediaries' < http://www.theadvocatesgateway.org/intermediaries> (accessed 3 April 2018).
[530] For a breakdown of the different occupational backgrounds of intermediaries in both Northern Ireland and England and Wales see the Methodology chapter.
[531] For example, the CPR (n 23) considers intermediaries as a collective group when outlining their duties to the court: rule 18.30.

impartiality of the role and an innate human connection with many vulnerable defendants.[532] The type of support which intermediaries saw themselves as providing included 'assurance' and 'comfort'.[533] This often resulted from a feeling that no support was forthcoming from elsewhere.[534] Most intermediaries were qualified health professionals who routinely demonstrated support in that area and struggled to make the transition to the impartial, neutral role of the intermediary.[535] Cooper's research echoes these concerns with one intermediary perceiving a 'responsibility' not to abandon a defendant when no other support was available.[536]

The findings of O'Mahony et al and Cooper reflect a general inequality in support which both groups receive throughout the criminal process.[537] 'The Witness Service', for example, organises court familiarisation visits and provides waiting rooms for privacy from defendants and their friends and family. The moral and emotional support provided by volunteers have been recognised by witnesses as contributing to a more positive experience of the trial process.[538] The support begins when witnesses arrive at court and can include everything from practical help, such as completing expenses forms to information about court and legal processes.[539] All of these measures are of general availability and the support that vulnerable witnesses may receive by way of special measures is additional. Defendants, however, receive comparatively little support. While vulnerable complainants and witnesses are supposed to be identified by the police when a criminal file is created, no equivalent protection exists for suspects who rely instead on the discretion of the court later in the process.[540] Further, suspects do not have a 'link person' who will be present with the intermediary through assessment and subsequent contact.[541] Police officers fulfil such a role when dealing with witnesses and act as 'the conduit for the whole process'.[542] It is also the case that many duty solicitors who attend to vulnerable suspects are unlikely to be aware of any vulnerability and thus do not insist on the provision of any special measures.[543] Considering the broad inequality in support, it is perhaps not surprising that intermediaries may feel suspects/defendants deserve extra support.

[532] O'Mahony et al (n 98) 155.
[533] Ibid.
[534] Ibid 161.
[535] Ibid.
[536] Cooper (n 57) 12.
[537] Jacobson and Talbot (n 116).
[538] Jacobson et al (n 356) 143
[539] Clare Frances Roulstone, 'Inside the Social World of a Witness Care Unit: Role-conflict and organisational ideology in a service (2015 PhD, LSE) 26.
[540] Her Majesty's Inspectorate of Constabulary (HMIC), 'PEEL: Police Effectiveness 2015 (vulnerability)' (December 2015) 10.
[541] Backen (n 371) 48.
[542] Ibid.
[543] Fairclough (n 303).

Another theme emerging from the support role assumed by non-registered intermediaries relates to a wider issue of status. Defendants may be considered 'dummy players'[544] in the criminal process and the inequality in available support reflects the relative handicap of those facing trial.[545] As noted above, intermediaries operate outside the court workgroup and assume a peripheral status compared to the inner circle of legal professionals.[546] The relationship between the bench and intermediaries during the course of a criminal case can also provide insights into how the outsider status is created and sustained. Backen suggests that intermediaries sense a lack of acceptance of their role in response to judicial reticence of their involvement.[547] The sense of having to 'fight the defendant's corner'[548] seems to ally some intermediaries with the defendant based on their common status as outsiders. A broader imbalance between defendants and witnesses in terms of access to special measures and court facilities may also be a contributing factor.[549]

It is important to recognise that many non-registered intermediaries who work with defendants are also on the MoJ register. How these intermediaries perceive their role when assisting victims and complainants, and how any support function may differ is germane to my research questions.[550] Plotnikoff and Woolfson gathered data from 20 intermediaries working with all types of witness, including defendants. The authors concluded that non-registered intermediaries require 'broader and more in-depth understanding of the legal process and terminology than when working with witnesses, as they must be able to give simple explanations throughout the trial'.[551] This finding is based on the view that defendants occupy a unique position in the criminal trial which is fundamentally different from other witnesses. In particular, as has already been noted, under Article 6 of the ECHR, the defendant is entitled to the right of effective participation.[552] This includes not just the right to be present, but also to hear and follow the proceedings, which includes the possibility of explaining his/her own version of events.[553] The range of work defence intermediaries undertake is broad and may include

[544] Carlen (n 366) 81.
[545] Ibid.
[546] Abraham Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession' (1967) 1(2) Law and Society Review 15, 32.
[547] Backen (n 371).
[548] Plotnikoff and Woolfson (n 37) 276.
[549] Plotnikoff and Woolfson (n 86) 106.
[550] Cooper's research reveals a concern among Registered Intermediaries of a 'free for all' around intermediaries for defendants. It was felt by some respondents that using 'unregulated non-registered intermediaries could affect the good name and credibility that RIs have built up': Penny Cooper, 'Tell Me What's Happening 3: Registered Intermediary Survey 2011' <https://www.city.ac.uk/__data/assets/pdf_file/0008/126593/30-April-FINAL-Tell-Me-Whats-Happening-3.pdf> (accessed 22 March 2019) 11.
[551] Plotnikoff and Woolfson (n 37) 275.
[552] The appointment of non-registered intermediaries is based on the court's inherent jurisdiction to ensure that the defendant has a fair trial pursuant to Article 6 of the ECHR.
[553] *SC v UK* (n 422) [29].

explaining charges and other witness statements, helping lawyers take instructions and informing decisions about whether to testify. Further, they may help facilitation of guilty pleas by ensuring defendants understand the nature of legal advice given. The relative lack of support given to defendants raises the possibility that they *require* more support and this is what defendant intermediaries recognise and act upon. The temptation for non-registered intermediaries to 'cross the boundary into a support role [and] stand up for a defendant'[554] may be evidence of this.[555]

4.5.2 *OP* and the court defendant supporter

In the case of *OP,* the Court of Appeal sought to outline the core functions of the intermediary, as well as clarify what the role does *not* involve.[556] The Court discerned two distinct forms of support which witnesses with communication difficulties may require during a trial. The first involves 'general support, reassurance and calm interpretation of unfolding events'[557] which need not necessarily be provided by an intermediary but is 'readily achievable by an adult with experience of life'.[558] The second requires 'skilled support and interpretation' of questions which often only an intermediary will be qualified to perform.[559] Clearly, the court felt that the intermediary executes a fundamentally different role during testimony than is required for the remainder of the trial. This approach has been criticised by Hoyano who argues that 'sympathy and compassion cannot compensate for the cognitive defects of defendants with comprehension as well as communication difficulties'[560]. In other words, a vulnerable defendant with communication difficulties needs assistance not just during evidence but also in attempting to follow and understand the trial as a whole.

How does the *OP* decision relate to the intermediary role as a supporter? The bifurcation of roles sets aside a level of assistance that a defendant will require outside the witness box and explicitly refers to this as involving support among other things. However, what is significant about *OP* is that this task does not necessarily require a professional communication expert, such as an intermediary, but rather involves helping the vulnerable individual to cope with understandable human emotions, such as 'uncertainty…nervousness and agitation.'[561] Any support the intermediary provides may therefore only

[554] Plotnikoff and Woolfson (n 37) 276.
[555] An extensive victimology literature exists, including a consideration of the victim as the 'forgotten actor of the criminal justice process' see: Hoyle and Zedner (n 360) 419.
[556] *OP* (n 30).
[557] Ibid [35].
[558] Ibid.
[559] Oxford English Dictionary (n 526).
[560] Laura Hoyano, Commentary on *R (on the application of OP) v Secretary of State for* Justice (2015) 1 Criminal Law Review 79, 82.
[561] *OP* (n 30) [35].

occur in the witness box under the supervision of the judge who decides on the propriety of intervention. Where an intermediary is appointed on this 'evidence only' basis, the inability to give additional support outside the witness box may minimise the role and push it towards 'outsider' status, to use Rock's terminology.

The Law Commission, however, has strongly supported specialist assistance throughout to ensure defendants are 'able to understand and follow proceedings.'[562] The *R v Rashid* decision recognised the importance of this right but identified actors beyond the intermediary who can help ensure it is upheld. For example, the court stressed the communicative responsibility of trial advocates who must ensure the vulnerable defendant is 'fully able to participate in every aspect of the trial' when not giving evidence.[563] Further, if this approach fails then the trial judge 'as part of the usual trial management'[564] can intervene to correct the error. *R v Rashid* arguably represents a reallocation of the support function from the 'outsider' intermediary to the inner recesses of the court workgroup. The movement away from broader intermediary involvement may be a symptom of managerialism whereby judges assume an increased managerial role underpinned by the aim of improving the efficiency of the adjudication process, as discussed in Chapter 3.[565]

Developments in Northern Ireland, where the DoJ oversees the provision of intermediaries for defendants and witnesses, provide an insight into how such a secondary support role can operate. The court defendant supporter is a new role created by the DoJ as part of its own Pilot Project into the use of Registered Intermediaries. The role provides assistance to the vulnerable defendant when they are not being orally examined. Beyond brief mention in the DoJ policy documents, not a great deal is known about the operation of the role.[566] This is unfortunate because, through understanding the nature of the court defendant supporter, we could better understand the nature and scope of the intermediary role. Cooper considers that, much like the intermediary, the court defendant supporter does not represent the defendant and thus it must be inferred it also assumes a neutral and impartial role.[567] The DoJ scheme essentially carves up the defendant's interaction with the criminal trial into i) the period when he/she provides oral testimony and ii) everything else. This is a mirror image of the court's decision in *OP* and significantly limits the intermediary's interaction with a defendant compared to a

[562] Law Commission (n 37) [2.50].
[563] *Rashid* (n 15) [82].
[564] Ibid [82].
[565] Brown, Iontcheva Turner and Weisser (n 247); Ward (n 365) 6; Jon'a Meyer and Paul Jesilow, *Doing Justice in the People's Court: Sentencing by Municipal Court Judges* (State University of New York Press 1997) 30
[566] DoJ, 'Northern Ireland Registered Intermediaries Schemes Pilot Project Phase II Review' (DoJ 2016).
[567] Penny Cooper and Clare Allely, 'You can't judge a book by its cover: evolving professional responsibilities , liabilities and 'judgecraft' when a party has Asperger's Syndrome (2017) 68(1) Northern Ireland Legal Quarterly 35, 52.

'full' appointment, as was previously the norm. However, the language employed by the DoJ to describe the function of the court defendant supporter is vague. In its Pilot Project Review, it noted that helping the defendant understand what was happening in the trial, as well as providing emotional support, were two key features.[568] Feedback from one defence solicitor that a court defendant supporter was 'integral in helping our client understand what [was] going on around him'[569] would suggest a general level of support short of the specialist communicative assistance provided by intermediaries.

It would be wrong to conclude that positive feedback regarding court defendant supporters necessarily means that defendants only require a general level of support as explained in *OP*. On the contrary, it is fair to say that volunteers allocated to vulnerable defendants during the DoJ Pilot Project did not possess the specialist communicative skills of intermediaries. This is confirmed by the fact that the role is expected to be filled by 'a person known to the defendant or a volunteer appropriate adult'.[570] Merely because volunteers can offer some support, particularly emotional support, does not mean that communication expertise is not required. Although anecdotal evidence from the DoJ found some practitioners believed the general support contributed towards the right to a fair trial, this must be questioned.[571] A defendant's ability to engage with criminal proceedings is one of the criteria against which a trial's fairness is judged[572] and in some cases mere reassurance and emotional support may not be sufficient. Plotnikoff and Woolfson suggest that specialist communication techniques including the use of cue cards and visual timetables will often be required for particularly impaired defendants during the whole trial process.[573] It is difficult to imagine how court defendant supporters could provide equivalent support. How intermediaries may impact the defendant's right to effective participation is developed further in Chapter 8.

In summary, it seems clear that the intermediary can be categorised as a 'supporter' if we take the narrow definition of supporting communication. In practice, they may assume a broader supportive role when doing defence work, although this raises issues relating to neutrality. What that support role entails and the extent to which the intermediary can provide support is largely dependent on the terms of appointment and the functions of other actors. For example, *R v Rashid*, building on *OP*, placed a duty on the defence advocate to ensure that their lay client was fully able to participate in every aspect of the trial.[574] The overlap between the advocate and this assisting adult is not immediately clear, but

[568] DoJ (n 563) 13.
[569] Ibid.
[570] Law Commission (n 37) 43.
[571] DoJ (n 107) [13].
[572] *R v Cox* [2012] EWCA Crim 549.
[573] Plotnikoff and Woolfson (n 37) 269.
[574] David Wurtzel, 'Intermediaries for defendants: recent developments' (2017) 6 Criminal Law Review 463.

it is to the exclusion of the intermediary who will only in very rare circumstances be present for the whole trial.[575] But if a court defendant supporter in Northern Ireland is allowed, how does this affect the division of roles? Who is better equipped to help the defendant participate throughout proceedings - defence counsel or the court defendant supporter? Defence lawyers may have a role in explaining complex legal vernacular, but defendants with particularly complex communication needs may require intermediary assistance to ensure their effective participation.

4.6 Type three: The intervener

> *'The first time I saw an intermediary intervene in cross-examination, I thought it was wonderous. But the miracle is what goes on if they don't have to intervene at all.'*[576]

In Chapter 3, the notion of the increasingly managed criminal trial was discussed whereby issues between the parties are narrowed as part of a drive towards efficiency. An element of this, as reflected in the CPD, is that judges are required to proactively intervene in the management of criminal cases both before and during trial.[577] In *Lubemba*, Lady Justice Hallett emphasised the *duty* on judges to intervene during the examination of vulnerable witnesses or defendants to avoid misapprehension or confusion.[578] Against this background, the purpose of judicial intervention extends beyond the need to ensure individuals 'feel they have…their voices heard'[579] and that the fairness of proceedings is upheld.

As explored in Chapter 3, the introduction of the intermediary may broadly be seen as contributing to a more interventionist approach to the trial and a shift in the approach/understanding of the purpose of cross-examination. Intervention in the criminal process can take various forms. Identifying the judge as an intervener highlights the fluidity and overlapping nature of roles. Probation officers, interpreters and lawyers all intervene in different ways and for different reasons. The intermediary may also be labelled an intervener. During their training, intermediaries are taught to assess the witness's communication needs and abilities, advise the questioners and intervene if miscommunication occurs.[580] The CPD note that one of the core functions of the intermediary role is to:

[575] CPD (n 22) 3F.13.
[576] Quote from a Judge in: Plotnikoff and Woolfson (n 37) 303.
[577] McEwan (n 251).
[578] *R v Lubemba* (n 283), *R v JP* [2014] EWCA Crim 2064 [44-45].
[579] Benjamin Alarie and Andrew James Green, 'Interventions at the Supreme Court of Canada: Accuracy, Affiliation and Acceptance' (2010) 48(3) Osgoode Hall Law Journal 381.
[580] Cooper and Mattison (n 42) 354.

> 'actively assist and intervene during questioning. The extent to which they do so (if at all) depends on factors such as the communication needs of the witness or defendant, and the skills of the advocates in adapting their language and questioning style to meet those needs.'[581]

It is notable that the intervention function of the intermediary is intended to foster collaboration between the parties and the judge.[582] The manner and timing of possible intermediary interventions should be discussed and agreed prior to police interview and witness testimony in court. Interventions, thus, should take nobody by surprise and they ought only to be made in the interests of facilitating communication. The cooperation which underpins this approach is evident from initial intermediary contact with the police who request their assistance to help improve the quality of evidence.[583] Later at the GRH, the intermediary must be involved in shaping the approach to questioning and this is supposed to be done in a cooperative manner.[584] How the intermediary should alert the court if the witness has not understood a question or needs a break ought to be established at this stage.[585] This provides the opportunity for the intermediary to legitimise their interventions prior to examination and protects their ability to do so without retort of the judge or advocates. When intermediaries do intervene during examination, it will usually be because the directions agreed at the GRH are not being adhered to.[586] Ultimately, the judge has the power to decide if this balance is being struck and judges appear increasingly willing to remind advocates of what was agreed.[587] In fact, the Equal Treatment Bench Book reminds the judiciary of its 'paramount duty to control questioning'[588] and judicial intervention may occur regardless of any input of the intermediary.

Despite the focus on collaboration, the intermediary's ability to intervene is dependent on the judge. Cooper cites an exchange between an intermediary and a judge where the latter directed that intervention should occur 'as little as possible and only as a last resort'.[589] Recent case law illustrates the evolving intermediary-judicial dynamic and the overlapping responsibilities to intervene. The *R v Grant-Murray* case saw an appeal based, inter alia, on the failure of a trial judge to uphold intermediary interventions during a defendant's testimony.[590] The words of the intermediary that she felt like an 'enemy of the court' due to her interventions being overruled revealed a fractious relationship with the

[581] CPD (n 22) 3F.1
[582] Plotnikoff and Woolfson (n 37) 303.
[583] MoJ, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on Using Special Measures' (London 2011) [2.44].
[584] Equal Treatment Bench Book (n 36) 14.
[585] The Advocate's Gateway (n 507) 9.
[586] Collins et al (n 302).
[587] Plotnikoff and Woolfson (n 37) 205.
[588] Equal Treatment Bench Book (n 36) 15.
[589] Cooper (n 14).
[590] *Grant-Murray* (n 12).

bench.[591] Dismissing the intermediary's frustrations, the Court of Appeal made clear that the intermediary's intervention role is a qualified one. Paragraph 199 of the judgment could be described as an attempt to correct any misassumption that intermediaries may intervene at will but rather must be subject to judicial scrutiny. The court noted that intermediaries will execute their intervening role '*as directed by the court*'[592] and while they provide advice they must 'not dictate to anyone what is to happen'.[593] In concluding that the intermediary 'may have misunderstood' her role the court sought to recalibrate the balance of power and asserted its position as the ultimate decision-maker.

The authority of an actor to intervene within criminal proceedings is closely related to the issues of status and position. By emphasising judicial control of proceedings, *Grant-Murray* echoes the intermediary's relatively subordinate status in the social organisation of the court. The reminder of the intermediary's limited interventionist function reinforces its outsider status and places it outside what Carlen calls the 'in group'. Members of this exclusive group are involved in an implicit network of signs, gestures and cues which routinely transmit messages between actors in a 'complex information game'.[594] Carlen considers the example of the probation service who, along with the judiciary, participate in this game which when played successfully legitimates, secures and masks their institutional power.[595] This is achieved by understanding the tacit rules of court interaction but also by being in a supportive communicative network with the bench in which 'nods and winks can facilitate quick action'[596]. Unlike intermediaries, the interventions of probation officers are not only legitimised by pre-court alliances but may also be viewed as contributing to the efficiency of the court workload.[597] This is in stark contrast to intermediaries who are often maligned for court interventions which threaten the 'smooth running of the ritual' of the trial.[598] A shake of the head towards the bench may save valuable time when a defendant is deemed unsuitable for probation, yet an intermediary invention asking for a question to be rephrased may be viewed as disrupting the timetable of a case.[599] The ability of actors to intervene is therefore at least partly predicated on a sense of familiarity and even collegiality built up with the bench.

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[591] Ibid [198].
[592] *Grant-Murray* (n 12) [99] (emphasis added by the court).
[593] ibid [199].
[594] Carlen (n 366) 76.
[595] ibid 80.
[596] Ibid.
[597] Scott MacDonald and Cynthia Baroody-Hart, 'Communication between Probation Officers and Judges: An Innovative Model' (1999) 63(1) Federal Probation 42, 48.
[598] Duff et al (n 377) 239.
[599] For example, Backen recalls a judge telling her to 'just get on with it. This country is broken, and we don't have time for such matters' see: Backen (n 371) 37.

A final word on the interventionist role relates to the 'two tier' provision that has emerged. The differences in regulation and appointment of intermediaries have been explained above, but the difference in the ability to act as an intervener may be particularly profound. Intermediaries, whether registered or non-registered, must take and follow direction from the bench. But it is noticeable that Registered Intermediaries can intervene much earlier within the criminal process and with the support of the police. It is the police who request Registered Intermediary assistance and appreciation of how the two roles can work together productively is growing.[600] The fact that Registered Intermediaries can collaborate closely with police in preparing for interview means that vulnerable witnesses can access an intervener to help ensure their communication needs are understood. What Cooper calls a 'collaborative approach' is much harder to achieve for non-registered intermediaries as this early exposure to the police is not possible in the same way.[601] Suspects are rarely given access to intermediaries and thus non-registered intermediary intervention will often occur for the first time at court. The lack of intermediary intervention to facilitate communication may negatively impact the defendant's ability to engage and participate with the overall process.[602]

4.7 Conclusion

Identifying the intermediary as an outsider to the court workgroup gives us limited insight into the content and scope of the role. Similarly, the labels of 'communicator', 'supporter' and 'intervener', while telling, also reveal little when considered in isolation. This chapter reveals the overlapping nature of the different roles that can be ascribed to the intermediary and how the role is relational and multifaceted. To this extent, the parameters of the intermediary role appear heavily dependent on the practices of the established court workgroup, in particular the judge. The 'two-tiered' provision of intermediaries has also been explored. The discussion in this chapter suggests that intermediaries working with defendants assume the roles of communicator, supporter and intervener differently to those working with witnesses. The umbrella term of 'intermediary' is therefore arguably of limited utility while such discrepancies exist between the sub-categories that comprise it. The differences between registered and non-registered intermediaries extend beyond semantics and have been shown to exist at all stages of the criminal justice process. This provides important context for the concepts of 'witness work' and 'defendant work' which are developed in more detail in later chapters.

[600] Victims' Commissioner (n 43) 19.
[601] Penny Cooper, 'Children, Justice and Communication' (Centre of Forensic Interviewing Conference, University of Portsmouth 4th May 2017) 3.
[602] McBarnet (n 366) 76.

Finally, the three types outlined in this chapter require further elaboration and theoretical development. This is based largely on the lack of empirical research focusing on comparative experiences of registered and non-registered intermediaries. The types developed in this chapter will not be 'tested' in the field but are instead foundational for understanding the intermediary role's scope and parameters. It is possible that different types could emerge from further empirical research and that these may align more with one type of intermediary work than the other. Consistent with the principles of grounded theory, the typology presented in this chapter amounts to an analytical tool rather than providing a normative steer.[603] The generation of a theory to aid understanding of the intermediary role requires an openness to unexpected findings and a commitment to abductive reasoning rather the use of a hypothetico-deductive method.

[603] Melanie Nind and Sarah Lewthwaite, 'A conceptual-empirical typology of social science research methods pedagogy' (2020) 35(4) Research Papers in Education 467, 468.

Chapter 5: Methodology and methods

5.1 Introduction

This project explores the work of the intermediary and examines the role within the criminal justice system. This research objective is relatively broad and one could adopt a range of methodological approaches. One could critically examine legal texts relating to the intermediary and seek to synthesise key features to establish a position about the role. Such an approach would treat existing rules, principles and precedents as authoritative sources which traditionally act as the building blocks of such doctrinal work.[604] I Initially considered taking this approach and focusing on the disparity of intermediary provision between defendants and witnesses/victims and to raise questions about the human rights implications of the status quo. For example, are defendants who cannot access the same intermediary provision as witnesses being denied the right of effective participation? While this is a valid question explored within the thesis, it became apparent that a different approach was needed.

A few months into my research, I began to ask questions that the doctrinal sources struggled to answer. For example: How do intermediaries feel about their role, its content and scope? Do intermediaries feel integrated into the criminal justice system? As I began to appreciate the intersection between the legal rules that created the intermediary and how the role is executed in practice, the socio-legal nature of my research became clear. In the words of Denzin and Lincoln, I embarked on a journey to 'make sense of, or interpret, phenomena in terms of the meanings people bring to them.'[605] A socio-legal approach applies social theories and methods to the study of law and its institutions in their social, cultural and historical contexts. This allows for an assessment of their effectiveness, but also whether actors in their own legal settings are accomplishing what the law prescribes.[606] By examining the role of the intermediary, this research project examines 'law's reality' through empirical research and contextualises law in the social and political conditions as experienced by those performing the role.[607]

In this chapter I outline the decision to conduct a qualitative empirical study and explain why this approach is suited to answering the research questions, as set out in Chapter 1. I will discuss grounded theory and how this methodological choice affects data collection and analysis. Further, theoretical

[604] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 8.
[605] Norman Denzin and Yvonna Lincoln (eds), *The SAGE Handbook of Qualitative Research* (3rd edn, SAGE Publishing 2005) 3.
[606] Reza Banaker and Max Travers, *Law and Social Theory* (Hart Publishing 2013).
[607] Keith Hawkins, 'Prologue: Donald Harris and the Early Years of the Oxford Centre' in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon Press 1997) 4.

sampling, a central precept of classic grounded theory, will be explained and its use in the research justified. This sampling method is essential to the development and refinement of a theory that is 'grounded' in data.[608] I will also discuss sampling, the process of participant recruitment, issues encountered and how they were ultimately resolved. I then present my choice to adopt semi-structured interviews as my primary method and discuss ethical issues that I faced in conducting this research. I also identify and discuss some limitations of the research. Finally, it is important to state the intention of this chapter is not to present the research project as something imbued with clinical precision. Instead, the aim is to illustrate that whilst planning and forethought were required, so too was flexibility and reflexivity.

5.2 Qualitative methodology

Generally speaking, qualitative methodology 'is a commitment to seeing the social world from the point of view of the actor' and tends to involve close human involvement.[609] Such designs also tend to centre on verbal, visual and other non-statistical data with a view to improving how we view and, in turn, understand social phenomena and human behaviour.[610] Qualitative methods allow meaning to be decided by participants rather than the researcher, and this resonated with the fact that my project was not seeking to verify any normative conception of the intermediary role.[611] Further, the issues I sought to explore mapped onto many of the generally accepted hallmarks of qualitative research. For example, Maxwell contends that qualitative research involves the researcher striving to better understand three main things about the study population. Firstly, the meanings and perspectives of those being studied, secondly, how these perspectives are shaped by cultural, physical and social contexts and, lastly, the processes involved in maintaining or altering these phenomena and relationships.[612] While these features are not exhaustive of what qualitative research entails, they align with my desire to explore and understand a new criminal justice role and the myriad factors involved in its performance.

It was clear from the start that my research would not involve collecting any quantifiable data. Quantitative research places emphasis on causal relationships between variables with less concern for

[608] Julianne Oktay, *Grounded Theory* (Oxford University Press 2012) 24.
[609] Alan Bryman, 'The debate above quantitative and qualitative research: A question of method or epistemology' (1984) 35 The Journal of Sociology 75, 77; Nicholas Walliman, *Social Research Methods* (SAGE Publishing 2006) 37.
[610] Colin Robson, *Real World Research* (2nd edn, Blackwell Publishing 2015).
[611] Arun Kumar, Sharma, *Developing the Underdeveloped: A Socio-psychological Study* (Northern Rock Book Centre 1989) 37.
[612] Joseph Maxwell, *Qualitative Research Design: An Interactive Approach* (SAGE Publishing 2013) 8.

social settings/contexts or indeed the processes involved. Conversely, the social settings within which the intermediary operates were at the heart of my interest in the role from the beginning. Investigating perceptions of place, the nature of relationships and relative status of this new actor would not be accommodated by a quantitative approach. Further, I wanted to get a rich understanding of the processes that shape the role rather than focus squarely on specific outcomes.[613]

It is also worth considering that qualitative research is allied, or at least conducive to, a postmodernist ideology that 'privileges the socially constructed, reflexive embodied, emotional nature of daily life'.[614] Such an outlook places a premium on the socially constructed nature of reality as well as the intimate relationship between the researcher and those subjects being researched.[615] As noted above, I sought individual social experiences, and explored how these are created and given meaning by participants. But a core component of this approach is acceptance that the researcher is as much a part of the social world being studied, and that competing versions of reality exist. Yet the postmodernist thread underpinning qualitative research does not necessarily undermine any epistemic claims that are made. While discovery of objective reality or truth may be unattainable on a postmodern view, the principle of multivocality treats all voices as equally valid and brings forward divergent experiences.[616] Based on my empirical data, attempts can still be made to explain phenomena through individual experiences without staking a claim as to absolute truth or objective reality.

Lastly, the lack of academic attention to the intermediary role made a qualitative form of investigation appropriate. Qualitative forms of inquiry are useful when seeking to develop knowledge in an under-researched area.[617] Intermediaries, as relative newcomers to the criminal justice system, have found their voice neglected. Given this, it is appropriate that a project seeking to gain some preliminary insights into an under-researched actor should be qualitative in nature. Taking this further, the procedures that underpin qualitative research are characterised as inductive and emerging.[618] This links with the fact that my data collection was not theory-driven nor trying to prove or disprove a particular claim or set of claims. Rather, my early chapters highlight some theoretical understanding and a base knowledge of issues surrounding the intermediary role. Together, these were sufficient to generally

[613] Matthew Miles and A Huberman, *Qualitative Data Analysis: A Sourcebook of New Methods* (SAGE Publishing 1984) 132.
[614] Joseph Kotarba and John Johnson, *Postmodern Existential Sociology* (AltaMira Press 1992) (blurb).
[615] Denzin and Lincoln (n 603) 8.
[616] Rosanna Hertz, *Reflexivity and Voice* (SAGE Publishing 1997).
[617] Uwe Flick, Ernst von Kardoff and Ines Steinke, *A Companion to Qualitative Research* (SAGE Publishing 2004) 21.
[618] John Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publishing 2012) 22.

frame the research questions but, crucially, allowed for induction and reflexivity throughout the data collection and concurrent analysis.

5.3 Grounded theory

The methodology of grounded theory best accommodates the approach to research I have outlined above. Grounded theory seeks to 'close the gap between theory and method' and allows for the conceptualisation of emergent social patterns from research data.[619] The methodology was initially designed to create theories which are empirically derived from real-world situations and are intended to be applicable to 'real work settings'.[620] This approach is consistent with an openness and a desire to adhere to the inductive method. This essentially means a preparedness to let the study/data collection evolve as it becomes apparent what participants feel is important. Underpinning this methodological approach is the belief that theory derived from data is more likely to resemble the 'reality' of social phenomena and will consequently 'fit' the situation being studied and explain the behaviour observed.[621]

The flexibility and legitimacy of grounded theory have seen it appeal to qualitative researchers with divergent theoretical and substantive interests. By its very nature, grounded theory lends itself to being shaped and often varied depending on the area of research and demands of the field. I decided to adopt a version of grounded theory which applies the traditional strategies of Strauss and Corbin but within a constructivist paradigm. Charmaz contends that such a constructivist approach allows 'discovered' reality to arise from the interactive process and its temporal, cultural, and structural contexts'.[622] Resulting theories are thus *constructed* through past and present involvements and interactions with people, perspectives, and research practices.[623] From an epistemological perspective, constructivism propounds the view that reality is constructed by individuals by assigning meaning to their

[619] Barney Glaser, 'The Grounded Theory Perspective: Its Origins and Growth' (2016) 15(1) The Grounded Theory Review 4.
[620] Oktay (n 606) 5.
[621] Anslem Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd edn, SAGE Publishing 1998) 12.
[622] Kathy Charmaz, 'Grounded theory: Objectivist and constructivist methods' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, SAGE Publishing 2000) 524. For further explanation of how Charmaz' version of grounded theory is distinct see: Jane Mills, Anne Bonner and Karen Francis, 'The Development of Constructivist Grounded Theory' (2006) 5(1) International Journal of Qualitative Methods 25.
[623] Charmaz (n 106) 10.

environment.[624] The outcome is that the researcher never actually reveals an exact picture of the phenomena being studied, but rather an interpretative portrayal of the studied world.[625]

Charmaz's approach to grounded theory positions the researcher as part of the world being studied and views them as an integral part of the process of theory construction. Even before data collection, I had an interest in discovering more about the intermediaries I encountered in my legal practice as a barrister. I did not come to the topic as a *tabula rasa*, but rather as a researcher tuned to a particular orientation and open to novel insights from the data.[626] Charmaz writes that researchers 'are not passive receptacles into which data are poured' but instead 'make assumptions about what is real, possess stocks of knowledge, occupy social statuses, and pursue purposes that influence their respective views and actions'.[627] It follows that the constructivist approach requires researchers to immerse themselves fully in the data in a way that embeds the narrative of the participants in the final research outcome.[628] As I spent some years working in the criminal courts, it is to be expected that I have my own understanding of court dynamics, hierarchies and division of roles. I have met intermediaries, heard former colleagues discuss intermediaries and have attended conferences where I was the only non-intermediary. In the words of Becker, I had developed my own 'imagery' of the world which I was seeking to study and had orientated the direction of my research based on this construction.[629] Yet Charmaz's version mandates that researchers constantly remind themselves to keep the participant's voice and meaning visible in the work's theoretical outcome and that the written outcome be evocative of participants' lived experiences.[630]

Grounded theory, as a methodological process, involves the progressive identification, re-working, re-interpretation and integration of categories of meaning from data. These principles are well outlined in Charmaz's constructivist version which, as Gibson and Hartman note, emphasises 'understanding and the promotion of interpretation [and] producing redescriptions of participants' lives'.[631] Charmaz makes

[624] Jenna Breckenbridge, Derek Jones, Ian Elliott and Margaret Nichol, 'Choosing a Methodological Path: Reflections on the Constructivist Turn' (2012) 11(1) Grounded Theory Review 64, 65.
[625] Kathy Charmaz, 'Grounded theory' in Jonathan Smith, Ron Harre, & Luk Langenhove (eds) *Rethinking methods in psychology* (SAGE Publishing 1995) 27-49.
[626] Antony Bryant, *Grounded Theory and Grounded Theorizing: Pragmatism in Research Practice* (Oxford University Press 2017) 121.
[627] Charmaz (n 106) 15.
[628] Mills et al (n 620) 31
[629] Howard Becker, *Tricks of the Trade* (The University of Chicago Press 1998) 22.
[630] Kathy Charmaz, 'Grounded theory' in Jonathan Smith, Rom Harré, Luk Langenhove (eds.) Rethinking Methods in psychology (SAGE Publishing 1995); Kathy Charmaz, 'Qualitative interviewing and grounded theory analysis' in Gubrium J., Holstein J. (eds.), *Handbook of interview research: Context and method* (SAGE Publishing 2001).
[631] Barry Gibson and Jan Hartman, *Rediscovering Grounded Theory* (SAGE Publishing 2013) 51.

clear that this approach to grounded theory must treat the research process itself as a social construction. This involves using grounded theory strategies to respond to 'emergent questions, new insights, and further information and simultaneously constructing the method of analysis, as well as the analysis'.[632] Underpinning these elements of the methodology is that it involves both the process of category identification and integration (as method) and its product (as theory). Firstly, as a *method* the researcher is provided with coding guidelines on how categories can be identified and how to uncover links between categories and relationships between them. Secondly, *theory* can be considered the end-product of this process; it provides an explanatory framework with which to understand the phenomenon under investigation.[633]

Charmaz's interpretation of grounded theory is refreshingly accommodating as it allows for different perspectives, purposes, and practices to influence how sense can be made of a method.[634] The methodological strategies she advocates should, consequently, be viewed as flexible guidelines rather than rigid prescriptions.[635] Like any craft, researchers may emphasise different elements but, taken together, share commonalities within the constructivist bracket. Charmaz provides a set of tools which allows researchers to develop 'an analytic handle' on their work, and 'taken to their logical extension, a theory of it.'[636] One overarching theme is that grounded theory is not a methodology to be used in a linear fashion. For example, the hypothetico-deductive process of data collection, analysis and subsequent reflection does not fit easily with the construction of a theory. It is, instead, expected that the researcher will be pulled in different analytical directions along the journey. There may initially be a focus on ideas which form the basis of a paper or project but with a return to the data later and unfinished analysis in another area.[637]

5.4 Sampling

Becker, in an essay on sample, observes: 'We can't study every case of whatever we're interested in, nor should we want to'.[638] Becker contends that the logic of sampling seeks to persuade the reader that the studied population meaningfully represents the whole from which it is drawn.[639] In other words,

[632] Kathy Charmaz, 'Constructivism and the Grounded Theory Method' in James Holstein and Jaber F Gubrium (eds), *Handbook of Constructivist Research* (Guildford Press 2008) 403.
[633] ibid.
[634] Ibid 12.
[635] Robert Thornberg and Kathy Charmaz, 'Grounded Theory and Theoretical Coding' in, Uwe Flick (ed) *The SAGE Handbook of Qualitative Data Analysis* (SAGE Publishing 2013) 154.
[636] Ibid.
[637] Charmaz (n 620) 10; Ylona Chun Tie, Melanie Birks and Karen Francis, 'Grounded theory research: A design framework for novice researchers' (2019) 7 SAGE Open Medicine 1.
[638] Becker (n 627) 67.
[639] ibid 67.

the reader should be satisfied that while 'full and complete description' of the phenomena being researched is unachievable, justifiable steps have been taken towards selection of those individuals included in the sample.[640]

From the outset, I was interested in collecting data from intermediaries working in the criminal justice system (as opposed to family courts, employment tribunals or civil courts). When familiarising myself with the extant literature, in particular the relevant case law, it became clear that focusing solely on the voice of the intermediary could produce a limited, or even potentially skewed picture of the role. I knew that the role involved interaction with a range of other actors including the police, solicitors and barristers, court staff and judges. Each of these actors could have provided valuable insights. This echoes an underlying theme of Carlen's study of magistrates' courts in which all those involved in the 'manufacture of justice' (the 'Courtroom Workgroup' as theorised by Eisenstein and Jacobs)[641] play their part in shaping and maintaining the smooth operation of the court's workload.[642] In the end, the time constraints of the project prevented the interviewing of every potential stakeholder. I decided that, as well as speaking to intermediaries, judges could provide valuable insights. An intermediary's appointment to any case reaching a criminal court requires judicial approval, so I knew that judges played a central role in setting the terms and nature of the role's involvement in a case. In terms of the intermediary's court-based role, the literature and case-law suggested that the bench wields considerable influence over the intermediary involvement during questioning of witnesses.[643] As discussed below, accessing judges in England and Wales proved unsuccessful. In December 2019, towards the end of my interview schedule with intermediaries and judges, I also decided that it was important to try and speak to some police officers. This is because intermediaries can be appointed to facilitate communication with vulnerable witnesses in ABE interview and suspects at police interview – although the latter is rare.

Most sampling in qualitative research involves some element of purposive sampling. This classically involves choosing participants, or data, based on the fact that they possess particular characteristics or knowledge of the area of interest.[644] Even in a grounded theory study, researchers have to make initial

[640] Ibid 76
[641] Eisenstein and Jacob (n 447).
[642] Carlen (n 366).
[643] For example, the MoJ Intermediary Guidance makes clear that: "The RI should always remember that they are making recommendations only and it is the judge who decides whether to put in place the special measures". Also see: *Grant-Murray* (n 12), Plotnikoff and Woolfson (n 37) and Backen (n 371).
[644] Jane Rithie, Jane Lewis and Gillian Elam, 'Designing and selecting samples' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publishing 2003) 78.

sampling decisions during the planning phase. For my project, as noted above, this involved identifying intermediaries and judges as potential interviewees. These groups, of course, could not be said to be representative of the population and thus any findings were never going to be generalisable. Instead, a purposive sample in this sense targeted those who could speak about my areas of interest. Intermediaries and judges therefore represented 'information-rich cases' for analysis.[645]

A key methodological concern in any qualitative project is what has been described as the 'social visibility' of the target population.[646] Researching prisoners or drug addicts, for example, could be problematic for many reasons but their relative 'invisibility' for research purposes makes accessing these populations challenging.[647] Compared to other actors in the criminal justice system, intermediaries are relatively unknown and have been traditionally challenging for researchers to access.[648] Backen's experiences of working as an intermediary at all levels of the criminal justice system reinforces this lack of public understanding and suggests that the title 'intermediary' does little to help.[649] Accessing intermediaries has proved challenging for other researchers in the past. For example, O'Mahony et al experienced difficulties accessing defendant intermediaries due to the low numbers practising.[650] Similarly, in their research into perceptions of the criminal justice process, Jacobson et al conducted almost 150 interviews with court professionals and court users, only 3 of whom were intermediaries either registered or non-registered. The authors recruited all participants through opportunistic or snowball sampling, but the peripatetic nature of intermediary work makes it difficult for a sense of collegiality to develop.[651]

Unlike Plotnikoff, Woolfson and Cooper, I did not have access to the Witness Intermediary Scheme Matching Service.[652] I realised that I would have to identify other means of accessing my target population. I began my search by contacting a number of organisations which represent the interests of intermediaries. The first of these was 'Intermediaries for Justice (IFJ)' which describes itself as 'the

[645] Michael Patton, *Qualitative Research and Evaluation Methods* (3rd edn, SAGE Publishing 2002) 228.
[646] Patrick Biernacki and Dan Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' (1981) 10(2) Sociological Methods and Research 141, 144.
[647] Ibid.
[648] See: Plotnikoff and Woolfson (n 37) and Victims' Commissioner (n 43).
[649] Backen (n 371) 14.
[650] O'Mahony et al (n 98).
[651] Backen (n 371).
[652] Penny Cooper, 'Tell Me What's Happening 3: Registered Intermediary Survey 2011' <https://www.city.ac.uk/__data/assets/pdf_file/0008/126593/30-April-FINAL-Tell-Me-Whats-Happening-3.pdf> accessed 22 March 2019); Penny Cooper, 'Tell Me What's Happening 2: Registered Intermediary Survey 2010' <https://www.city.ac.uk/__data/assets/pdf_file/0006/92499/Tell-Me-Whats-Happening-2-RI-Survey-2010-FINAL-VERSION-14062011.pdf> accessed 22 March 2019.

professional body for intermediaries who work in the justice system'.[653] IFJ represents intermediaries working with all categories of witness (including defendants) and so was able to disseminate information to all of its members about my research. Within hours of the request being sent, I received several enthusiastic emails from intermediaries seeking to participate in my research. As the days went on, a steady stream of further emails came through from those willing to talk about their work and individual experiences. Further requests were sent via the 'Registered Intermediaries Online' portal which is operated by the NCA and is an information sharing platform for those who work in a registered capacity. In Northern Ireland, interviews were arranged in collaboration with the Intermediaries Schemes Secretariat (ISS) which disseminated information to all Registered Intermediaries on my behalf.

In Northern Ireland, four judges were interviewed (two District Judges who sit in the magistrates' court and two Crown Court judges) through the Lord Chief Justice's Office. These judges were selected based on their experiences of working with intermediaries in the criminal justice system. I was unable to secure access to judges in England and Wales, as the Judicial Office rejected my application (see 'accessing judges for research' below).

Of the 27 intermediaries whom I interviewed, 20 were based in England and Wales and seven in Northern Ireland. In terms of the representativeness of the sample, over one third of the total intermediary cohort in Northern Ireland were interviewed.[654] In England and Wales, it is more difficult to ascertain precise numbers, since I sought to interview intermediaries who had worked in both a registered and a non-registered capacity. It is difficult to be sure how many practising intermediaries fall into this particular category. When interviews commenced in November 2018, there were 115 intermediaries on the MoJ register actively taking cases.[655] Based on anecdotal evidence from the field, it is estimated that less than half of those intermediaries would be in a position to comment on working in a registered and non-registered capacity. Therefore, one can say with reasonable confidence that the 20 interviews conducted amounted to a significant percentage of the target population. Interviews in England were conducted in all nine administrative regions. No intermediary resident in Wales replied to any interview requests but several interviewees had attended court in Wales. Interviewees had a mixture of experience with some working in the role for over 11 years and others qualifying less than a year prior to interview. One feature of the intermediary population is that the majority come from a

[653] Intermediaries for Justice, 'About IFJ' < https://www.intermediaries-for-justice.org/vision-and-aims> accessed 12 March 2020.
[654] DoJ (n 563) 11.
[655] E-mail correspondence from IFJ to author (April 26 2018).

speech and language therapy background. While taking account of this, intermediaries from other backgrounds, such as social work, nursing and psychiatry, were included to get as broad a view of experiences as possible. Of the 27 intermediaries interviewed, 15 came from a speech and language therapy background, three from social work, three from nursing, two from occupational therapy, two from psychology, one from teaching and one worked with deaf people as a Sign Language Interpreter.

As noted above, towards the end of my data collection I tried to speak to a number of police officers to get their perspective on the intermediary role at ABE and police suspect interview stage. I was able to interview two police officers in January 2020 with the help of a contact in the Ministry of Justice. Unfortunately, the beginning of the Covid-19 pandemic in March 2020 meant that I was unable to continue with these interviews.

5.5 Theoretical sampling

Since grounded theory operates inductively, sampling must be tailored to the development of a conceptual theory. For my purposes, this initial sampling involved targeting intermediaries who have worked with both witnesses and defendants. I also focused on interviewing members of the judiciary with experience of cases involving intermediaries.

If initial sampling is where the researcher starts, then theoretical sampling informs the direction of travel. This means that the sampling must be continually directed by the emerging theory; the researcher must follow up leads as they arise in the data and progressively focus data collection to refine and integrate the theory.[656] Glaser and Strauss advocate an approach whereby the analyst 'jointly collects, codes, and analyses his [sic] data and decides what data to collect next and where to find them, in order to develop his theory as it emerges'.[657] This aspect of grounded theory appealed to me since the researcher is empowered to analyse the data collected and decide where to find further data to help build the developing theory.

I am confident that my sampling was directing by the emerging theory. I was alert to early leads which directed me where to go, whom to ask or observe, and what kind of data to collect next.[658] This allowed me to pursue new interviewees, follow alternative lines of questioning and steer interviews towards different themes. For example, after my first few interviews I realised that there was a latent tension

[656] Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine 1967) 617.
[657] Ibid 45.
[658] Ibid.

between intermediaries from a speech and language therapy background and those from other backgrounds such as social work, teaching and nursing. Several intermediaries from a speech and language therapist background were concerned about other professionals carrying out aspects of the role. This convinced me to speak to a rich pool of intermediaries with different professional backgrounds so I could tease out the nature of this tension and what it might mean for the performance of the role. Similarly, different themes emerged in early interviews which required further investigation in later interviews. For example, the issue of intermediary neutrality consistently emerged in early interviews and I felt this needed to be discussed and developed further. By the end of my data collection, the issue of neutrality emerged as a core theme and is explored in Chapter 7.

5.6 Memo-writing and coding

Memo writing is a key component of theory development and has been described as the 'distillation process' through which the researcher transforms data into theory.[659] The researcher is expected to continuously write memos which are essentially informal, analytic notes which capture connections and suggest future directions for data collection. It was through my memo writing that I developed a written record of the emerging theory. Charmaz writes that researchers should use early memos to record what is happening in the data, what people are saying and what people are doing.[660] I wrote memos after each interview (normally on the train home) and also between interviews when analysing the data. At the beginning, these were rudimentary but more advanced memos allowed me to compare categories and sub-categories as well as identifying beliefs and assumptions in the data.[661]

[659] Antony Bryant and Kathy Charmaz (eds), *The SAGE handbook of current developments in grounded theory* (SAGE Publishing 2019) Chapter 12.
[660] Charmaz (n 106) 81.
[661] Ibid.

Figure 1 below is an example of a memo drafted immediately after my interview with E&W-16:

> Memo 34
> Intermediary gave a very clear depiction of her status as an outsider – not being actively involved in the post-court chat with family/lawyers. Touches on her neutrality and need to stay separate and detached.
>
> Intermediary also felt she had something of a mission in the CJS – possibly as an advocate for change/better communication.
>
> Also obvious she sees differences in registered/non-registered role. Does this affect the way in which intermediaries facilitate communication?
>
> Tension between SLT intermediaries and others. This intermediary something of an intermediary 'purist' i.e., believes SLTs are better equipped to do the role. Is there scope for specialisation within the role so different professional backgrounds can be accommodated?
>
> The 'partnership with police' concept from earlier interviews didn't fit with this intermediary's experiences. Need to possibly reconsider approach for future interviews.

Figure 1 – Example memo from my research

According to grounded theory, the data needed to be coded, analysed, re-coded and reanalysed.[662] I adopted an inductive approach when identifying themes and generating codes. This means that the coding was data driven, with the codes emerging within the data itself.[663] I began the coding process with open coding which occurs when 'conceptual labels are placed on discrete happenings' and reflects a 'process of breaking down, examining, comparing, conceptualising and categorising the data'.[664] More simply, Urquhart indicates that 'open coding is about attaching labels to your data [which] are subsequently grouped into larger codes, as the aim is to build a theory based on them'.[665] Some of my early open codes were: 'importance of partnership with police', 'lack of support for defendants', 'broad role of communication', 'misunderstanding of role by professionals', 'need for individualised assistance' and 'struggling with court environment'. While I began to compare codes with other codes, I also compared different participant responses. The coding then became more focused as the codes took shape and the theory began to emerge. I established links between codes where relationships became apparent, and some codes were consolidated or merged with others. I also continued collecting data

[662] Glaser and Strauss (n 654).
[663] Svend Brinkman and Steiner Kvale, *Interviews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publishing 2015) 228
[664] Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research* (SAGE Publishing 1990) 61.
[665] Cathy Urquhart, *Grounded Theory for Qualitative Research: A Practical Guide* (SAGE Publishing 2013) 24.

during the analysis and re-analysed my data as codes and themes emerged and developed. Some of the more nuanced codes which were developed by sticking closely to the data were: 'needing a new challenge', 'training', 'role specialisation', 'autonomy', 'partnerships', 'outsider status', 'skilling up', 'professional rapport', 'different processes for witness/defendant', 'advisory', 'changing culture', 'managing people', 'intervention', 'emphasising neutrality' and 'previous profession'. These were eventually distilled into four core codes of: i) neutrality ii) professionalism iii) participation and iv) communication. After revising all of the codes again, I realised 'communication' threaded into the other three remaining core codes and could be incorporated within them. As such, the three codes of i) neutrality ii) professionalism and iii) participation were settled on and are explored further in the analysis chapters.

5.7 Data Collection

5.7.1 Scoping interview

Prior to commencing my interviews, I conducted a scoping interview with an intermediary in Northern Ireland in November 2018. This was an important first step in the entire research design and assisted in planning and modifying my approach to the main interviews.[666] The scoping interview was integral to the design of my Topic Guide which I subsequently created with the help of the LSE Methodology Department. It also helped me to identify some of the broad issues involved with the intermediary role and to 'test the water' in terms of interview technique and style. For example, I realised that the most logical way to conduct subsequent interviews was to ask intermediaries about their role in a clear chronological manner from initial assessment through to the conclusion of their involvement at trial.

I initially introduced myself as a qualified barrister during the scoping interview, but this created a noticeable sense of separation and formality. At several points the interviewee spoke about the conduct of barristers and made comments such as: 'you know what you are all like!' and 'that's just how you are trained!'. This experience taught me the importance of self-presentation and the potential effect on the interviewee's responses to questions. I decided that in subsequent interviews I would explain my background as a criminal barrister but also clearly explain my motivation for conducting the research i.e., that the intermediary role is poorly understood and requires more research. I also emphasised my relatively junior standing at the Bar and the fact that my generation of barristers are often more aware of the need for careful handling of vulnerable witnesses and defendants. This proved to be an effective

[666] Johan Malmqvist, Kristina Hellberg, Gunvie Möllås G, Richard Rose and Michael Shevlin, 'Conducting the Pilot Study: A Neglected Part of the Research Process? Methodological Findings Supporting the Importance of Piloting in Qualitative Research Studies' (2019) *International Journal of Qualitative Methods* 1.

technique as interviewees could see that I understood the workings of the criminal justice system but that I was also sympathetic to their role and wanted to better understand it.

5.7.2 Interviews

In qualitative research, interviews are one of the most common methods used to generate data. The interview can be viewed as the 'construction site of knowledge' and the researcher can be regarded as constituting knowledge through conversation and social practice.[667] An approach to interviewing which places 'priority on the phenomena of study and seeing both data and analysis as created from shared experiences and relationships with participants and other sources' naturally led me to view people as my source of data and the interview as the appropriate method.[668] Selecting interviews as my method of enquiry also fits with the notion of 'intertwining of researcher and participants' in the co-production of data and knowledge.[669]

Interviewing also fits grounded theory methods particularly well and the resulting data can provide insights into social worlds, discourses, communications and individual experience.[670] Researchers seeking theory that is grounded in the data embark on their journey with the hope that participants will illuminate the topic with their own experiences. In this sense, interviewing is itself an emergent technique and suited my commitment to allowing the emerging data to shape the direction of the research.

5.7.3 In depth, semi-structured interviews

The sort of questions I wanted to pose to participants required rich, developed responses and could be described as 'in depth'. By this I mean that I wanted participants to describe and reflect on experiences to an extent that seldom occurs in daily life.[671] Building on Lofland and Lofland's conception of an intensive interview permitting an 'in-depth exploration of a particular topic', Charmaz and Belgrave consider that such an interview style should be participant focused.[672] They argue that this form of interviewing provides an 'open-ended, detailed exploration of an aspect of life in which the interviewee

[667] Nigel King and Christine Horrocks, *Interviews in Qualitative Research* (SAGE Publishing 2010) 7.
[668] Charmaz (n 106) 330.
[669] Bryant and Charmaz (n 657) 430.
[670] Kathy Charmaz and Linda Belgrave, 'Qualitative Interviewing and Grounded Theory Analysis' in Jaber F. Gubrium, James A. Holstein, Amir B. Marvasti & Karyn D. McKinney (eds), *The SAGE Handbook of Interview Research: The Complexity of The Craft* (SAGE Publishing 2012) 351
[671] Charmaz (n 106) 53.
[672] Charmaz and Belgrave (n 668) 348.

has substantial experience and, often, considerable insight.'[673] The use of in-depth interviews suited the fact that I was in a position to formulate some research questions around the topic of intermediaries and identify potential interviewees, but not much more.[674] This approach also allowed me to get an initial sense of the subject area and to begin to understand relevant systems and processes. Perhaps most importantly, I was able to reflect on the boundaries of my own knowledge of the area and identify what type of information could be gathered through an in-depth interview.[675] By doing this, the in-depth method allows access to, as well as an understanding of, events that I would not be privy to as a researcher.[676] Early research suggested that a lot of the intermediary's work tends to be done in private, often working with vulnerable people. While I could observe aspects of the work in open court, I would not be in a position to enquire into the meaning intermediaries attach to their experiences or how they perceive their work or surroundings. Related to this, it was important to bear in mind that my research questions revolved around the 'how' and 'why' of the intermediary role upon which only someone executing that role could expand. In-depth, intensive interviews are considered better suited to answering such questions than rigid, structured interviews which offer little to no explanation as to why patterns of behaviour or opinion exist.[677]

In-depth interviews can be conducted in various ways, but I decided that using a semi-structured approach was best suited to gaining a rich understanding of intermediaries and their work.[678] My interviews were semi-structured in the sense that they were steered by themes and topics.[679] While there are no guidelines as to the number of interview questions, the more questions asked the more structured the interview invariably becomes. I was conscious when preparing for my interviews not to 'determine the agenda' and inhibit the ability of participants to tell their stories.[680] A semi-structured interview format may develop during data collection, and this is particularly true when using grounded theory. For example, my scoping interview allowed me to pursue general themes without many specific, focused questions and it was important to listen to the interviewee and ask for clarification or more detail at certain points. More focused interview questions are generally used at a later stage of data

[673] Ibid.
[674] Greg Guest, Emily Namey and Marilyn Mitchell, 'In-depth Interviews' in Greg Guest, Emily Namey and Marilyn Mitchell (eds) *Collecting Qualitative Data: A Field Manual for Applied Research* (SAGE Publishing 2013) 117.
[675] Ibid.
[676] Victor Minichiello, Rosalie Aroni, Eric Timewell and Loris Alexander, *In-Depth Interviewing* (Longman 2000) 70.
[677] Ibid 117
[678] Minichiello et al (n 674) 68.
[679] Michael Lewis-Beck, Alan Bryman, Tim Futing-Liao, *The Sage Encyclopaedia of Social Science Research Methods* (SAGE Publishing 2004) 1020.
[680] Rosalind Bluff, 'Grounded theory: the methodology' in Immy Holloway (ed), *Grounded Research in Health Care* (Open University Press 2005) 152.

collection when the researcher has gained more insight and can steer the conversation towards particular areas.[681]

One important consideration was which location for interview would ensure confidentiality, and a relaxed atmosphere to develop rapport.[682] One difficulty that arose in relation to intermediaries was that they do not have an obvious space or work setting. Unlike GPs who work in their own practice or teachers who inhabit a single school building, intermediaries are relatively nomadic. They are often required to carry out assessments in people's homes or hang around courthouses and, even then, there is scant provision for them compared to lawyers, judges and witnesses. As with venue, the timing of the interview needed to be chosen with care. I was aware that intermediaries do not work standard hours and thus planning interviews in advance would pose some problems. Three interviews took place in around the LSE campus which was convenient for some intermediaries who had a case in London or had other reasons to be in London. Two interviews took place at a court location due to intermediary preference. For the remainder of the interviews, I travelled to the hometown of each intermediary and mostly met in people's homes or a quiet place where confidentiality could be maintained. For example, four interviews took place outside in a park when the weather allowed. I maintained complete flexibility regarding location and timing to fit around each interviewee's schedule. The four judicial interviews took place in chambers which provided a private, quiet environment.

While an in-depth interview should resemble a conversation when viewed externally, it can, in fact, often be a carefully planned event.[683] A thoughtfully developed set of guidelines helps ensure that each individual interview amounts to a meaningful addition to the data and that key topics and questions are not overlooked in the give and take of discourse.[684] I created a 'Topic Guide' with assistance from the LSE Methodology Department.[685] This outlined the key subjects that needed to be covered in the interview but allowed a degree of flexibility to pursue topical trajectories when required. Considering the time constraints of each interview, it was best to concentrate on areas where interviewees could discuss their own experiences and reflections as opposed to theoretical issues.

[681] Kathleen Duffy, Colette Ferguson and Hazel Watson, 'Data colleting in grounded theory- some practical issues' (2004) 11(4) Nurse Researcher 67, 70.
[682] Judith Green and Nicki Thorogood, *Qualitative methods for health research* (2nd edn, SAGE Publishing 2009) 111.
[683] Guest, Namey and Mitchell (n 672) 115.
[684] ibid.
[685] See Appendix A.

5.8 Ethics

Ethical approval was secured in line with the LSE ethics policy. None of the participants in my research was considered vulnerable and thus ethical approval from the LSE Research Committee was not required. Instead, my PhD supervisors signed-off my research ethics in line with LSE protocols based on their intimate knowledge of the project and the participants involved. I also completed a 'Data Management Plan' in line with the LSE's Research Data Management guidance. This covers the collection, organisation, use, storage, contextualisation, preservation and sharing of research data. The purpose of the Plan is to 'focus resources, identify responsibilities, and highlight potential problems with sharing and long-term preservation of research data'.[686]

I recorded my interviews with a dictaphone rather than solely relying on handwritten notes. The advantages of using such a recording device are obvious in that it ensures 'accuracy, captures colourful anecdotes and, most importantly, frees the researcher to engage in the interview rather than furiously attempt to transcribe it'.[687] Many researchers opt against using a recording device for reasons including the protection of identities and the fear that participants are suspicious or uneasy of such technology.[688] I had delivered a presentation on the early stages of my research to a group of intermediaries in Belfast in August 2018 and had received permission to audio record their questions and subsequent discussion. It was clear to me that the intermediaries in attendance were comfortable with the audio recording and had no concerns with me anonymously using any data collected. I did, however, recognise the virtues of taking some written notes during the interview. Fujii contends that taking notes can sometimes encourage people to say more as it suggests that their statements are important enough to write down.[689] Audio files were immediately transferred to a password-protected computer and de-identified.

The interviews were digitally recorded, and I transcribed them myself to help spot potential avenues of exploration missed during interview.[690] My laptop had full drive encryption and met the baseline security requirements. These are: explicit password to log on; Full device encryption; Password to log on or the hard drive encryption key is complex (8 digits minimum length and a combination of upper and lower case characters, numbers, Non-alphanumeric characters); Actively operates anti-virus

[686] LSE 'Research Data Management Plan <http://www.lse.ac.uk/Library/Research-support/Research-Data-Management/What-is-a-Data-Management-Plan-and-how-do-I-write-one.> accessed 4 November 2018.
[687] Matthew Beckmann and Richard Hall, 'Elite interviewing in Washington DC' in Layna Mosley (ed) *Interview Research in Political Science* (Cornell University Press 2013) 203.
[688] Catrina MacKenzie, Sylvia Moffatt, Jimmy Ogwang, Peter Ahabyona & Raja Sengupta (2017) 'Spatial and temporal patterns in primary school enrolment and exam achievement in Rural Uganda' (2017) 15(3) Children's Geographies 334.
[689] Lee Ann Fujii, *Interviewing in Social Science Research: A Relational Approach* (Routledge 2017) 7.
[690] Charmaz (n 106) 70.

software; Actively operates a software firewall (enables the built-in firewall option in the operating system); Keeps the operating systems up to date by installing security patches as soon as they are released; Keeps other software up to date by implementing security patches as soon as they are released; Applies a screen saver (e.g. after 5 minutes' inactivity); Enables the 'remotely wipe data' option if available; Exercises reasonable care to prevent the shoulder surfing attack (can consider applying a privacy screen filter). I also kept a research diary where I recorded my thoughts and reflections immediately after each interview. I ensured that the notes relating to each interview were anonymised and are kept away from any personally identifying data. These notes did not contain any 'sensitive personal data' as per the Data Protection Act. I keep these notes in a locked filing cabinet in my own home office to which only I have the key.

During transcription, I removed any references to specific courts or police stations, colleagues, and names of clients or witnesses in order to keep the identities of the respondents, and those involved in their cases, confidential. All interviewees were provided with an information sheet prior to interview and signed a consent form agreeing to their participation in the research.[691] I anonymised each interviewee and have used the prefix 'NI-' to identify interviewees in Northern Ireland and 'E&W-' for those based in England and Wales. I used 'CCJ-' to denote Crown Court judges and 'MCJ-' to denote judges in the magistrates' court. This anonymisation helps ensure that there is no way to identify a participant from the information provided during interview.

Most intermediaries are female, which is not surprising since the professions from which they are drawn tend to be female dominated e.g., speech and language therapy and social work. When in the field, I was made aware that there are only a handful of male intermediaries in practice. Although I interviewed three male intermediaries (one in Northern Ireland and two in England and Wales) I have decided to refer to all interviewees with a female pronoun. This is in order to protect the identities of male participants who may be more easily identified.

5.9 Limitations

As discussed in more detail below, the lack of interviews with judges in England and Wales is a fair criticism of the sample. Efforts were made to access the views and perspectives of judges sitting in the Crown Court and magistrates' court but the Judicial office of England and Wales refused three applications. Interviewing more police officers would also have brought different perspectives to the dataset but, as explained above, the Covid-19 pandemic made this impossible.

[691] See Appendix B.

The choice of semi-structured interview as the main research method may be criticised. While knowledge of the social world beyond the interview interaction can be obtained, respondents may be 'concerned to bring the occasion off in a way that demonstrates his or her competence as a member of whatever community is invoked by the interview topic'.[692] Indeed, in Chapter 7 (Paradox of Neutrality), it is revealed that while intermediaries speak confidently about their adherence to neutrality, they often transgress it through their practices. This opens an interesting line of enquiry about how and why interviewees construct their accounts of experiences in the ways that they do.[693] As such, this potential limitation was not only recognised but harnessed in a way that positively contributed to my analysis of the data collected.

5.9.1 Accessing judges for research interviews

While my interviews were carried out broadly as planned, the inability to interview magistrates and judges in England and Wales was an obvious limitation in the research. Three separate applications were made to the Judicial Office for judicial participation as per the relevant guidelines contained on the website. Disappointingly, despite addressing each issue raised by the Judicial Office in my third resubmission, no proper explanation was given as to why the research could not proceed.

The participation of judges in England and Wales in my research could have brought important insights. As the demand for intermediaries increases, there is a serious need for better understanding of the role's scope, content and relationship with judges and lawyers. The reluctance of the Judicial Office to allow me, as an early career researcher, to access judges for empirical research was disappointing. Limiting access to the judiciary for research purposes to a select group of researchers does little to address the paucity of research into the intermediary role. The response of the Office of the Lord Chief Justice in Northern Ireland to my application was much more encouraging. Indeed, I was subsequently asked by the Department of Justice in Northern Ireland to conduct empirical research into the potential use of intermediaries in family courts. This sort of collaboration between academics, government departments and the judiciary is mutually beneficial and must be encouraged.

Finally, cooperation between legal researchers, lawyers and the judiciary is vital to the analysis of the law, legal phenomenon, and relationships between these and wider society. Legal research is becoming much more interdisciplinary in nature and is accompanied by an increased use of empirical research

[692] Jody Miller and Barry Glassner, 'Interviews and Focus Groups' in David Silverman (ed), *Qualitative Research* (3rd edn, SAGE Publishing 2011) 132.
[693] Linda Mulcahy, 'What do you do when your Research Subjects lie to you?' (Frontiers of Socio-Legal Research Blog , Oxford Centre for Socio-Legal Studies, 26th May 2021).

methods, including qualitative interviewing. Larouche notes the need to 'recast' the connection of legal scholarship with reality, which includes fostering closer ties with legal practice and beyond.[694] This requires a willingness to engage with research projects such as the present one.

5.10 Conclusion

This chapter has explained the design of the research project and the methods adopted to answer the research questions. It has justified the use of qualitative methods of enquiry and explained the choice of grounded theory methodology. Grounded theory influenced both how I gathered *and* analysed the qualitative interview data in order to generate a theory of the intermediary role and its scope and content. This chapter has also outlined the importance of reflexivity and the understanding that perspectives and belief systems influence how a researcher views and works with the data. Strauss advocates 'a highly self-conscious approach to the work of research' and I have explained how my own professional background influenced my approach to the research project.[695] In subsequent chapters, I reflect on the individual accounts of interviewees and attempt to generate an understanding of the intermediary role and its position within the criminal justice system. Grounded theory and the reflexivity underpinning it are central to the co-constructed social realities which are developed and explored throughout the thesis.[696]

[694] Pierre Larouche, 'A Vision of Global Legal Scholarship' (2012) Tilburg Law Review 206, 215
[695] Anselm Strauss, *Qualitative Analysis For Social Scientists* (Cambridge University Press 1987) 9.
[696] Katja Mruck and Günter Mey, 'Grounded theory methodology and self-reflexivity in the qualitative research process' in Bryant and Kathy Charmaz (n 657) 470-496.

Chapter 6: Professional work - jurisdictions and boundary work

6.1 Introduction

Thirteen years after their introduction through the YJCEA, intermediaries are increasingly visible throughout the criminal justice system in England and Wales and Northern Ireland.[697] The nature of the intermediary's work involves interaction with numerous actors - many of whom fill established roles, including the police, lawyers and the judiciary. Despite the differences between these established actors, in terms of responsibilities and status, they share one commonality: all are traditionally considered to be 'professionals'. Definitions of what constitutes a 'professional' vary widely but have tended to centre on traits such as high levels of skill, a recognised body of knowledge and existence of an organising body.[698] Scholars have tended to view the 'professionalisation' of the criminal justice system as an incremental process with various roles identified by government as requiring greater accountability, modernisation and improved efficiency.[699] Individual criminal justice roles have taken steps towards professionalisation at different points and also to different degrees.[700] For example, the push towards professionalisation of the police has been well documented[701] and lawyers are frequently depicted as one of the 'traditional' professions.[702] Indeed, the 'court workgroup' articulated by Eistenstein and Jacob is a theoretical construct made up exclusively of legal professionals, namely lawyers and judges.[703]

This chapter helps to answer the research questions by looking at intermediary work in context and focusing on how the work relationships that intermediaries develop impact its role and status. After addressing the professional status of the intermediary, this chapter then focuses on the work tasks of the intermediary and how control over that work is established and maintained. This discussion begins by recognising the intermediary as an 'outsider' to the world of criminal justice and explains the

[697] Since 2010, there has been a 430% increase in requests for Registered Intermediaries through the WIS. See: MoJ (n 21).
[698] Ackroyd provides an instructive summary of the 'historically important and theoretically distinct' approaches to the professions: Stephen Ackroyd, 'Sociological and organisational theories of professions and professionalism' in Mike Dent et al (eds), *The Routledge Companion to the Professions and Professionalism* (Routledge 2016) 15.
[699] Paula Brough, Jennifer Brown and Amanda Biggs, *Improving Criminal Justice Workspaces: Translating theory and research into evidence-based practice* (Routledge 2016) 66-67.
[700] Ibid.
[701] Robert Mark, *Policing a Perplex Society* (George, Allen and Unwin 1977); Tracey Green and Alison Gates, 'Understanding the Process of Professionalisation in the Police Organisation' (2014) 87(2) The Police Journal: Theory, Practice and Principles 75.
[702] Christopher Brooks, *Lawyers, Litigation and English Society since 1450* (The Hambledon Press 1998) 149.
[703] Eisenstein and Jacob (n 447).

relevance of this label to the role's work and its content. The substantive discussion which follows focuses on two main theoretical constructs. The first is Abbott's work on *interprofessional jurisdictional disputes* which details how professions operate in dynamic social settings which shape and define individual professional roles and their content. Abbott describes this concept of jurisdiction as 'the link between a profession and its work'[704] and the 'central phenomenon of professional life'.[705] This approach considers how jurisdictions are both expanded and defended, and how professionals stake claims to certain bodies of expert knowledge within an 'interacting system, an ecology'.[706] Jurisdictional conflicts characterise social processes, but how these jurisdictional boundaries are created, maintained and are liable to shift can be examined using Gieryn's conception of *boundary work*.[707] Boundary work outlines how professionals demarcate the boundaries which represent status, autonomy and claims over professional resources. Acting as a resource to legitimise actions and status, boundary work occurs through strategies employed to impose order and stability around the professional work.[708] The chapter concludes by reflecting on the various conflicts which the intermediary faces in trying to secure and maintain jurisdiction. It asks if the role's jurisdictional conflicts will result in a 'jurisdictional settlement' whereby intermediaries accept a more limited role with distribution of some of their work tasks among other criminal justice actors.[709]

6.2 The question of 'professional' status

The professional status of the intermediary, and what that label may entail, is not clear. The terms 'professional' and 'professionalism' are used by both the DoJ and MoJ when describing the organisation of intermediaries and the standards expected of their work.[710] Further, the penultimate chapter of Plotnikoff and Woolfson's seminal book on intermediaries is entitled 'A new profession' with the opening line noting that intermediaries 'have emerged as a new professional identity'.[711] Many, therefore, seem to take for granted that the intermediary is a professional role. However, this is not necessarily an uncontentious position. A rich literature on the 'sociology of the professions' analyses professions as modes of social organisation and as the locus for other social processes and dynamics,

[704] Abbott (n 109) 20.
[705] Ibid.
[706] Ibid 33.
[707] Gieryn (n 110) 781-795.
[708] Hauke Riesch, 'Theorizing Boundary Work as Representation and Identity' (2010) 40(4) Journal for the Theory of Social Behaviour 452
[709] Abbott (n 109) 72; Andrew Abbott, 'Jurisdictional Conflicts: A New Approach to the Development of the Legal Professions (1986) 11 (2) American Bar Foundation Research Journal 187.
[710] DoJ, (n 49); MoJ (n 56).
[711] Plotnikoff and Woolfson (n 37) 281; The Victims' Commissioner has also stated that the intermediary has gone from a 'new role to a new profession in the CJS': Victims' Commissioner (n 43) 19.

allowing scope for an enquiry into the professional status of the intermediary. Nonetheless, while an understanding of professional identity is a key component of this body of work, this chapter focuses on mapping what an intermediary does rather than what they are, as an examination of the content of the intermediary's work is best suited to answering the research questions underpinning the thesis.[712] In fact, seeking to define a 'profession' and analysing the intermediary against the resulting definition is potentially 'unnecessary and dangerous', since it distracts from the content of the role's work and how intermediaries think about, act towards and ultimately justify their work.[713] As a result, I accept that the intermediary can be viewed as a professional without enquiring too deeply into what that means.

Relevant to the professional status of the intermediary is the variety of occupational backgrounds from which practitioners come. Many of the intermediaries whom I interviewed spoke about their previous professional roles and the experience of bringing their existing skill set to a new work environment. How these diverse backgrounds may shape, or even hinder, the emergence of a new professional status is complicated by the fact that many practitioners carry out their role as an intermediary 'on the side', in addition to their main professional role. Indeed, several intermediaries spoke passionately about the importance of being recognised as professionals and felt aggrieved when this did not happen:

> '[Judges] have started to expect a psychologist or psychiatrist to recommend us. That's another problem we have, they are wasting money on a psychological report because they want a 'professional' to decide whether we're needed or not. They're not recognising ***us*** as professionals.' [E&W-17] [emphasis added]

It does not seem that this view is widely held amongst judges, however. For instance, one magistrate I interviewed indicated that the intermediary's status as a professional had been all but secured:

> 'Now, everybody is clear they are professional experts who are providing an independent role within the trial.' [MCJ-2]

This thesis is centred around an enquiry into the *role* of the intermediary as opposed to the profession, its structure, organisation and even any 'collective ideological persuasion'.[714] The research questions underpinning the thesis are concerned with understanding the parameters of the intermediary role, how it is perceived by other key criminal justice actors but also, crucially, how intermediaries experience

[712] See, for example Evett's view that 'to most researchers in the field it no longer seems important to draw a hard and fast line between professions and occupations but, instead, to regard both as similar social forms that share many common characteristics.': Julia Evetts, 'Short Note: The Sociology of Professional Groups' (2006) 54(1) Current Sociology 133.
[713] Abbott (n 109) 58.
[714] Ibid 54.

their role. These questions require an analysis of the intermediary's work within a dynamic social context rather than treating any intermediary 'profession' as a static entity or a fixed social structure.[715]

While this chapter does not seek to question the intermediary's status as a professional, it *is* concerned with whether intermediaries are engaged in what Abbott calls 'professional work'. It is the conduct of this work which determines the parameters of inter-professional jurisdiction between the intermediary and the police, lawyers, judges and others.[716] By drawing on concepts such as 'jurisdiction' and 'boundary work' we can examine the content and context of intermediary work, the expertise which underpins it and the interdependent nature of the network of actors in the criminal justice system. Could such an inquiry be a precursor to a full examination of the intermediary's professional status? Quite possibly, yes. But merely labelling the intermediary a professional tells us very little about how its practitioners are involved in a process of negotiation, conflict and exchange with other criminal justice actors. Examination of these processes is fundamental to understanding the complexity of the role and how its content and character are dependent on relational work processes.

6.3 Jurisdictions and boundary work

6.3.1 Jurisdictions

Abbott views professions as operating in a complex system of interdependence and he evaluates the link — which he terms 'jurisdiction' — between occupations and their work. The notion of jurisdiction relates to the 'control' occupations assert over certain task areas. In the case of the intermediary, this concerns how practitioners assert control over tasks, such as assessment, interview planning and formulation of recommendations in the court report.[717] Later in the chapter, we will see how this control is effected through the components of 'diagnosis, 'inference' and 'treatment'. The importance of the control or 'jurisdiction' claimed over work tasks is hard to overstate. If, when and how intermediaries may be said to carry out 'professional work' is defined by the jurisdiction they assert over this work.[718]

The focus on jurisdiction is conceptually useful as intermediaries operate in dynamic social settings in the criminal justice system with potential overlaps between respective work tasks. For example, Jackson highlights the expanding role of prosecutors into pre-trial investigatory functions and notes more

[715] Roy Suddaby and Daniel Muzio, 'Theoretical Perspectives on The Professions' in Laura Empson et al (eds) *The Oxford Handbook of Professional Service Firms* (Oxford University Press 2015) 30.
[716] Abbott (n 109) 58.
[717] See Chapter 1 for an overview of the intermediary's main tasks.
[718] Abbott (n 109) 2-9.

generally how 'quasi' roles can emerge when jurisdictions overlap.[719] With specific reference to the criminal court, Young explains that jurisdictional boundaries of the 'court workgroup' are closely guarded by its members as threats to its work tasks emerge.[720] Are the work tasks of the intermediary susceptible to encroachment from others and does the intermediary similarly engage in encroachment when staking claims to jurisdiction? This question is key to understanding the nature of the intermediary's work and whether the role enjoys 'jurisdiction' or 'control' over it. Abbott's 'systems model' acts as a cogent framework for examination of how respective jurisdictions are both expanded and defended. Asserting that these jurisdictional boundaries are perpetually disputed, Abbott argues that this conflict occurs because professions are in constant competition for control over work tasks.[721]

Two main reasons underpin the decision to focus on Abbott's systems model. Firstly, it is concerned primarily with the content of the work carried out by occupational groups. This aspect of Abbott's model resonates with the rich data I gathered about the intermediary role and the 'common work' of its practitioners.[722] Abbott's theory is also relational at its core. My interview data tells a story of a new actor in the hierarchical, ritualistic criminal justice system and explores how resulting conflicts with other actors are constitutive of the role. Secondly, Abbott explains that his model extends beyond analysis of the professions and 'offers a way of thinking about divisions of labour in general'.[723] This allows for an examination of intermediary work without the need to explore the role's professional status. Abbott ignores addressing the issue of *when* groups can be said to have coalesced into professions and instead focuses on *why* new groups may arise and how they disturb the system. [724] The systems model therefore allows a focus on 'the contents of professional activity [and] the larger situation in which that activity occurs'.[725]

6.3.2 Boundary work

The conceptualisation of 'boundaries' spans a range of disciplines and is recognised as an integral part of social theorising.[726] Beyond consideration of how boundaries merely demarcate, Klein urges a more

[719] John Jackson, 'The effect of legal culture and proof in decisions to prosecute' (2004) 3 Law, Probability and Risk 109.
[720] Richard Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 Common Law World Review 203.
[721] Abbott (n 109) 2.
[722] Ibid 187.
[723] Abbott (n 109) 317.
[724] Pamela Tolbert, 'Review of the book The system of professions: An essay on the division of labor' (1990) 35(2) Administrative Science Quarterly 410.
[725] Abbott (n 109) 2.
[726] Michèle Lamont and Virag Molnar, 'The Study of Boundaries in the Social Sciences' (2002) 28 Annual Review of Sociology 167.

inward focus on how boundaries themselves are maintained and may be permeated and deconstructed.[727] An understanding that boundaries are not stable, but inherently contingent and relational, acts as a useful point of departure when considering professional work. Concepts such as 'boundary negotiation' and 'boundary crossing' have been utilised in theorisations of workplace relations and are useful in mapping how the jurisdiction of the intermediary is contested.[728]

If Abbott's concept of jurisdictions explicates conflicts over interprofessional domains, then 'boundary work' is the activity performed in constructing and negotiating the boundaries that mediate interaction. Changes between professional work tasks (for example, prosecutors assuming some investigatory functions as explained above) tend to occur most often at the 'edge of professional jurisdictions'.[729] Examining these boundaries, their edges and how they are crossed, aids understanding of inter-professional jurisdiction and how it is secured and maintained. Gieryn explains how the concept of boundary work is widely applicable as boundary demarcation 'is routinely accomplished in practical, everyday settings'.[730] It has proven particularly useful when researching emerging groups seeking to 'communicate their subject [and] establish their own credibility to talk authoritatively about their subject'.[731] This description fits well with the position of intermediaries as an occupational group. Building on this, we can examine how the intermediary uses boundary work as 'strategic practical action' to monopolise professional authority and expertise. [732]

Both concepts of jurisdiction and boundary work are complimented by 'knowledge claims': claims through which professionals control knowledge and skill which act as 'important currencies of competition'.[733] Knowledge claims play a key role in achieving jurisdictional control and 'represent an important vehicle through which professions can rhetorically play out their professional struggles'.[734] Such knowledge claims, and how they are demonstrated, thread throughout the three components of professional work discussed below (diagnosis, inference and treatment). How intermediaries perform boundary work and how they assert knowledge claims within the criminal justice system is key to securing what Abbott terms 'exclusive jurisdiction' over their work. This sees occupational groups aspire

[727] Julie Thompson Klein, *Crossing Boundaries:* Knowledge, Disciplinarities, and Interdisciplinarities (University of Virginia Press 1996) 1.
[728] Jo Angouri, Meredith Marra and Janet Holmes, 'Introduction: Negotiating Boundaries at Work' in Jo Angouri, Meredith Marra and Janet Holmes (eds), *Negotiating Boundaries at Work: Talking and Transitions* (Edinburgh University Press 2017) 1-18; Andrew Abbott, 'Things of Boundaries' (1995) 62(4) Social Research 857.
[729] Andrew Abbott, 'Things of Boundaries' (1995) 62(4) Social Research 857.
[730] Gieryn (n 110) 781.
[731] Riesch (n 708) 454.
[732] Gieryn (n 110) 23.
[733] Abbott (n 109) 102.
[734] Kristine Hirschkorn, 'Exclusive versus everyday forms of professional knowledge: legitimacy claims in conventional and alternative medicine' (2006) 28 Sociol Health Illn 28 533.

to achieve full control over work tasks which they justify based on expertise and exclusive knowledge.[735] Why is this concept of exclusive jurisdiction important? Firstly, the use of the word exclusive suggests legitimacy - i.e. that the intermediary has been able to achieve control of its tasks through successfully persuading other actors of the role's expertise.[736] Further, since jurisdiction is exclusive, movement in the jurisdiction of one profession invariably affects those of others. Therefore, by securing exclusive jurisdiction over its work tasks, the intermediary causes disturbances in inter-professional jurisdictional relations. This 'chain of effects' is particularly important to understanding the nature of the jurisdictional settlement that the intermediary achieves with other criminal justice actors which is addressed in section 6.8 of this chapter.[737]

6.4 Intermediaries as outsiders

The criminal justice system, with the courthouse and the criminal trial at its centre, has been described as 'hidden from outsiders' view'.[738] Despite most hearings being technically open to the public, much case preparation and inter-professional dialogue occurs in conference rooms, judicial chambers and via private phone calls and emails.[739] The spatial configuration of the court building and the arcane rituals and language employed by its inhabitants tend to exclude rather than include.[740] Perhaps unsurprisingly, almost every intermediary interviewed identified in one way or another as an 'outsider' in this work environment. Feelings of detachment from proceedings and hostility from others were common and very often recounted with genuine dissatisfaction:

> 'It is really hard…and you often feel like a spare part…But where do we belong? We don't. I feel really uncomfortable sometimes.' [E&W-7]

Intermediaries gave various reasons for identifying as outsiders, including a lack of understanding of established rules of procedure as well as the functions of criminal justice personnel:

> 'Weird, mind blowing. It is very intimidating and it's a bit like church, there are rules where you sit, stand up at a certain time, who you can speak to. I had never been in a court before, didn't know the difference between the magistrates' court and Crown Court. You know, stuff that now I just

[735] Abbott (n 109) 192.
[736] Abbott (n 109) 188.
[737] ibid 192.
[738] Bibas (n 234) 34.
[739] Ibid; Rock (n 299) 261.
[740] Mulcahy and Rowden (n 474) 18; Carlen (n 366) 111; Jacobson et al (n 356) 65.

take for granted. I remember those pennies dropping and thinking 'blimey, I didn't know that.' [E&W-2]

'At the beginning I didn't know the difference between prosecution and defence, so that gives you an idea of my understanding of the legal world. There was a lot of reading to do before we had any training. It didn't make a lot of sense at the time to be honest…I didn't have any knowledge, I don't have any family members working as lawyers or anything…We had to read the Equal Treatment Benchbook, the Criminal Order Act, the Justice Act. And I certainly had no understanding of the police process either, I don't know anyone in the police so it was a really steep learning curve.' [NI-3]

Some intermediaries spoke about feeling detached from proceedings despite their involvement being agreed at a GRH. This included feeling more like a spectator than an active participant and often feeling their presence was unappreciated or resented. These sentiments were particularly strong among those who tend to work primarily with defendants.[741] E&W-3, one of the few intermediaries who initially worked exclusively with defendants and then later joined the Registered Intermediary register, spoke passionately about how negative attitudes towards defendants transmitted to the defendant intermediary:

'There's a lot more resistance for intermediaries for defendants than for witnesses… I feel like because there is such a push to minimise how involved intermediaries are with defendants, you feel you are almost analysed and under the spotlight to demonstrate exactly the worth of the role…There is open hostility sometimes, which you don't get when you work with witnesses.' [E&W-3]

Outsiders to criminal justice 'see the system quite differently' and often have very different interests, knowledge and relative power.[742] Intermediaries, as the above quote illustrates, feel alienated by the 'theatre' (NI-4) and 'pomp and circumstance' (E&W-7) of their new work environment. Recognising that the intermediary initially entered the criminal justice system as an outsider is an important starting point for the analysis to follow in this chapter. Whether intermediaries continue to warrant this label is at least partially dependent on how their work is perceived and how they stake claims in the competitive

[741] This chimes with Abbott's work examining social work as a profession and his conclusion that association with 'politically controversial' clients such as 'criminals, the poor and the mentally ill' damages the group's standing: Andrew Abbott, 'Boundaries of Social Work or Social Work of Boundaries?' (1995) 69 (4) *Social Service Review* 545, 561.
[742] Bibas (n 234) 34.

field of the criminal justice system. The varied occupational backgrounds of the intermediaries I interviewed are reflected in Table 2 below.

Table 2 – Occupational background of intermediary interviewees

Occupation	Number
Speech and Language Therapist	15
Social Worker	3
Nursing	3
Occupational Therapist	2
Psychologist	2
Teaching	1
Sign language interpreter	1

Using the terminology of Abbott, intermediaries entered the criminal justice system to address a 'problem' for which criminal justice insiders lacked 'effective treatment'.[743] Abbott explains that when a 'problem has bewildered a profession for some time…it tends to become fair game for outsiders'.[744] In terms of the intermediary, this 'problem' related to the difficulties vulnerable individuals faced when giving oral testimony. Chapter 3 explained how the adversarial system and the professions that work within it long struggled to accommodate the needs of vulnerable witnesses.[745] Thus, for many, the court experience was 'confusing, intimidating and demeaning'.[746] In broad terms, the special measures introduced by the Youth Justice and Criminal Evidence Act (YJCEA) sought to help vulnerable and intimidated witnesses give the best possible evidence in criminal proceedings. [747] As further explained in Chapter 3, the special measures regime may also be seen as part of a broader attempt to address a legitimacy deficit within the criminal trial. As one of these measures, the intermediary was well positioned to capitalise on this opening and convert it into a 'professional problem'.[748] Did this problem have to be solved by an external agent such as the intermediary? This is an important question when considering the interdependence of criminal justice actors. Outsiders can be impugned for their lack of knowledge only if insiders can be said to already possess such a knowledge base.[749] It was recognised as early as 1987, during the passage of the Criminal Justice Bill, that the specialist skills required to help

[743] Abbott (n 109) 50
[744] Ibid.
[745] Pigot Report (n 115).
[746] Ellison (n 7) 1; Penny Cooper and Linda Hunting, *Access to Justice for Vulnerable People* (Wildy, Simmonds and Hill Publishing 2018); Kate Brown, *Vulnerability and Young People: Care and social control in policy and practice* (Policy Press 2015) 10; Rock (n 299).
[747] Camilla MacPherson, 'The Youth Justice and Criminal Evidence Act 1999: achieving best evidence' (2001) 41(3) Med Sci Law 230.
[748] Abbott (n 109) 59.
[749] Ibid 254.

elicit evidence from children must be sourced from outside the criminal justice system.[750] The 'lack of skills among lawyers' meant that whoever was chosen to fulfil this role would almost certainly be an 'outsider' to the internal workings of the justice system.[751]

It is worth considering briefly how the intermediaries whom I interviewed talked about the premise for the role's introduction and the criminal justice system's treatment of the vulnerable. Many viewed what Mulcahy and Rowden term the 'remote, foreign and elite' elements of the criminal justice as reified in the difficulties vulnerable people face.[752] Given their occupational backgrounds, all intermediary interviewees were acutely aware of the types of communication problems people face, although many were shocked by the inaccessibility of the language used in court day-to-day. Some intermediaries admitted to being impressed by the arcane world of the criminal court with one being 'enamoured with the romance of it all' (E&W-7). Responses of this kind suggest a degree of paradoxical reasoning - on one hand the antiquated world of wigs and gowns was alluring while on the other it was sorely in need of modernisation. Despite some nostalgic sentiments, there was a consensus among interviewees that the criminal justice system had failed to adapt to the vicissitudes of courtroom testimony.

With the above in mind, we can now ask: what impact has the introduction of this outsider had on the pre-existing social structures of the criminal justice system? Abbott contends that when a new entrant enters such a field there is inevitably 'jostling and readjustment'.[753] Indeed, when a new actor such as the intermediary appears 'requiring professional judgement or a new technique for old professional work',[754] then the system must necessarily react. The next section considers how the existing boundaries of the criminal justice system have been disturbed by the introduction of the intermediary and how the network of actors has responded accordingly.

6.5 Boundary disturbance

The previous section gave a brief insight into the feelings and perceptions of the intermediary as an 'outsider'. This section develops this analysis and recognises that the introduction of an outsider into a new work setting causes disruption, upheaval and uncertainty. In the case of the intermediary, its new 'task area' threatened to weaken existing jurisdictions throughout the criminal justice system. In the

[750] See Chapter 3.
[751] HC Deb 20 June 1988, vol 135, col 871.
[752] Mulcahy and Rowden (n 474) 8; Jacobson, Hunter and Kirby (n 356).
[753] Abbott (n 109) 33
[754] ibid 89.

words of Abbott, jurisdictional boundaries are perpetually in dispute and the system must 'absorb' the disturbance(s) in seeking to regain balance.[755]

The existence of boundaries in the criminal justice system helps regulate inter-professional relationships as well as allowing individuals to perform their roles within 'procedurally correct boundaries'.[756] It is a complex social world where both physical and non-physical boundaries dictate who sits where, who speaks to whom and how much involvement in proceedings individuals will have.[757] To begin to understand the effects of external influences on the role, it is important to return to the point that the intermediary identifies (and is identified) as an outsider. These perceptions are fundamental to understanding how both intermediary roles have adapted and continue to adapt to a world with firmly established rules and traditions. But when changes are introduced which upset cultural norms, resistance from established criminal justice actors normally follows. Young describes how these established actors 'patrol and defend' established boundaries.[758] This mirrors Abbott's notion of competitive struggles for jurisdiction and we can examine how the intermediary as an outsider acts to disrupt existing jurisdictional arrangements. These themes are germane to how intermediaries construct and maintain boundaries in order to demarcate their own 'independent…self-contained area of knowledge' and how they seek recognition in claiming jurisdiction over it.[759]

As sites of contestation, boundaries demarcate distinctive bodies of knowledge and expertise.[760] The criminal justice system contains complex social networks in which professionals with claims to specialist knowledge exchange not only with each other but with clients and the public. The stability of professional role boundaries within the criminal justice system (and particularly within the court) has been well rehearsed. Eisenstein and Jacob describe the 'common task environment' of the 'courtroom workgroup' where specialised functions are orientated towards shared goals.[761] Boundaries are collectively drawn which ensures that 'everyone quickly fits into his accustomed place and in which the principals readily understand each other's work. Even novices readily fit into the work routine of a courtroom'.[762] The pre-court environment, and in particular the evidence gathering procedures, is also carved up primarily between the police and prosecution in a way that McConville et al argue amounts

[755] Ibid 215.
[756] Stina Bergman Blix and Åsa Wettergren, *Professional Emotions in Court: A Sociological Perspective* (Routledge 2018) 86.
[757] Sida Liu, Boundaries and professions: Toward a processual theory of action (2018) 5(1) Journal of Professions and Organization 45, 47.
[758] Young (n 718) 218.
[759] Valérie Fournier, 'Boundary Work and the (un)making of the professions' in Nigel Malin (ed), Professionalism, Boundaries and the Workplace (Routledge 2000) 67, 69; Abbott (n 109) 59.
[760] Liu (n 757) 49.
[761] Eisenstein and Jacob (n 447) 10.
[762] ibid 29-30.

to the collaborative venture of 'case construction'.[763] Similarly, Sanders highlighted how the prosecution prepare cases 'hand in glove' with the police where boundaries inevitably overlap and intertwine.[764] The boundaries demarcating the work of individual actors give rise to jurisdictional claims which, at least according to the workgroup, are mutually recognised in pursuance of collective goals.

For intermediaries to construct boundaries they must stake jurisdictional claims. Abbott defines this as a claim for 'the legitimate control of a particular type of work' which entails 'first and foremost a right to perform the work as professionals see fit'.[765] However, a number of intermediaries discussed being unsure about where the role seemed to fit among the established practices and routines of the criminal justice system. Equally from the other side, the lack of understanding of the intermediary role and its function from other criminal justice actors has been a consistent theme in the research carried out to date.[766] It became clear in my interviews that this made identification and performance of what might crudely be called 'intermediary work' very difficult:

> 'It was awkward because the barristers I worked with didn't have any idea what my role is, I was not totally convinced by my role, and similarly with police, you were requested but that officer might not think they need you.' [E&W-6]

> 'It was almost like I have landed in this box and nobody has a clue what to do. It was like someone had dropped me in...There was no lead from the prosecution or from the bench and I was standing there thinking: 'how long will I be standing here…' and that was really bizarre…I came away thinking: 'did they know what my role was and why I was there?' [E&W-20]

Interactions between legal practitioners and intermediaries in the early stages of both schemes in Northern Ireland and England and Wales reflected an even greater lack of understanding. Despite the Registered Intermediary Scheme (RIS) covering both witnesses and defendants from the outset in Northern Ireland, interviewees found that solicitors were sometimes completely unaware of what an intermediary was or what the role entailed:

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[763] Mike McConville, Andrew Sanders and Roger Leng, *The Case for The Prosecution* (Routledge 1991) 11.
[764] Andrew Sanders, 'A Community Justice. Modernising the Magistracy in England and Wales (Institute of Public Policy Research, 2000)'; Andrew Sanders, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) Journal of Law and Society 324.
[765] Abbott (n 109) 60.
[766] Victims' Commissioner (n 43) 27; Joyce Plotnikoff and Richard Woolfson, 'Registered Intermediaries in Action: Messages for the CJS from the Witness Intermediary Scheme Smartsite (NSPCC and Ministry of Justice) 5 ; Letter from National Police Chiefs' Council, National Crime Agency and CPS Lead for Victims and Witnesses to Dr Philip Lee, Justice Minister (5 March 2018).

> 'I think there was a definite lack of awareness of what we do from solicitors. One solicitor didn't know about RIS and asked me 'What is it you do again?' He then said a few weeks later: 'I definitely need a Registered Intermediary' so he made an application.' [NI-6]

Defendant intermediaries in England and Wales found the boundaries of the role particularly difficult to gauge when dealing with solicitors. In the absence of any specific guidance on the point, many intermediaries working in a non-registered capacity felt that solicitors struggled with one particular question: how much information about the case does the intermediary need to know prior to an assessment? Initially, many defendant intermediaries were swamped with mountains of medical evidence with little idea of their relative ethical position or how much reliance they could place on the provided material:

> 'I have had whole bundles arrive at the office for somebody in a trial in 3 weeks' time and I have never met them, never said I can do it, and the trial is in Bristol. I am not going to Bristol for a fortnight. And there is highly confidential information that just rocks up, so I think 'GDPR hasn't reached the legal world…It's unnecessary…some solicitors seem unable to distinguish or differentiate what I might need.' [E&W-2]

These examples demonstrate how construction of boundaries posed a challenge as the content of the role had yet to be developed, shaped and tested through practice. As 'new players' in the criminal justice world, the lack of precedent for the role provided scope for its parameters to be tested.[767] Similar experiences have been found among interpreters, for example, who often encounter 'attitudinal resistance'[768] to their practices as well as challenges in managing expectations of their role.[769] The autonomous nature of interpreting and lack of prior knowledge of the subject of their assignment also draws parallels with intermediary work.[770] At its heart, boundary construction is about distinguishing from other professionals, but both Registered and non-registered intermediaries were initially constrained from doing so in an unfamiliar environment.[771] This contrasts sharply from the norms, attitudes and common understandings which accumulate and are inculcated in the courtroom workgroup over a long period of time.[772] But it was not just intermediaries who initially struggled with the parameters of the role's professional boundaries. Other actors appeared unsure as to how the role

[767] Plotnikoff and Woolfson (n 37) 3.
[768] Sandra Hale, 'Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey (Australasian Institute of Judicial Administration 2011) 3.
[769] Helen Colley and Frédérique Guéry, 'Understanding new hybrid professions: Bourdieu, *illusio* and the case of public service interpreters' (2015) 45 Cambridge Journal of Education 113.
[770] Ibid 121.
[771] Liu (n 757) 48.
[772] Young (n 718).

may encroach upon or challenge their own individual jurisdictional domains. One Magistrate commented:

> 'When it first came out, I can remember a complaint, or an issue being raised in the Crown Court where a Registered Intermediary had felt they had got a particularly hard time and there was clearly a lack of understanding of the role from everybody. Everybody had felt that when they looked at it there was a lack of understanding of the role.' [MCJ-2]

E&W-6, E&W-20 and MCJ-2 were reflecting on the encroachment of a new actor into a system with well-defined work tasks and boundaries. As Rock explains, there is an 'abiding preoccupation with the conflict, danger and threat to confidentiality represented by outsiders'.[773] As a member of the 'courtroom workgroup', MCJ-2's remarks signal an appreciation of the 'conflict, uncertainty and inefficiency' that the introduction of a new actor can engender.[774] More generally, these comments point to concerns and anticipation as to how the introduction of the intermediary role may impact inter-jurisdictional competition over tasks. Timmermans terms this an instance of a 'conflictual jurisdictional relationship' when traditional actors are 'confronted with the incursions of an emerging profession on its jurisdiction'.[775] Blok et al offer a variant notion of the 'proto-jurisdiction' to explicate how professions navigate 'emerging task arenas' by renegotiating work routines among themselves.[776]

But is the intermediary seeking to make claims as to a new jurisdictional task entirely? Abbott explains that 'Professions develop when jurisdictions become vacant' and such vacancy can arise through creation or abandonment by others.[777] It is difficult to say that the intermediary has filled a jurisdictional vacuum because others have left to 'improve their status' as McKenna suggests.[778] For example, when elite British solicitors moved increasingly away from property-conveyancing, other professional groups sought to claim that vacant jurisdiction.[779] As noted above, the recognition of the need to improve the experience of vulnerable witnesses ultimately led to the YJCEA 1999 and the intermediary was just one of a panoply of special measures introduced. Police, lawyers and judges have always 'communicated' with vulnerable individuals, but none have abandoned any discrete jurisdictional task which made way

[773] Rock (n 299) 261.
[774] Young (n 718) 220.
[775] Stefan Timmermans, 'The cause of death vs. the gift of life: boundary maintenance and the politics of expertise in death investigation' (2002) 25(5) Sociology of Health & Illness 550, 570.
[776] Anders Blok, Maria Lindstrom, Maria Meilvang and Inge Pedersen, 'Ecologies of Boundaries: Modes of Boundary Work in Professional Work Boundaries (2019) 42(4) Symbolic Interaction 588.
[777] Abbott (n 109) 3.
[778] Christopher McKenna, 'The System of Professions: An Essay on the Division of Expert Labor' (Book Review) (2006) 80(1) Business History Review 141, 142
[779] Ibid.

for the intermediary role. But it must be borne in mind that the sort of 'emerging tasks' that Lindstrom considers are distributed among locally situated actors who are often collectively concerned with implementing 'organizational strategies'.[780] This was not the case with the introduction of the intermediary. Instead, the inability of traditional criminal justice actors to perform a function adequately meant that it was deemed either inappropriate or impossible for them to distribute the task among themselves. It is obvious that the intermediary's introduction was premised on the expectation that it would possess a skillset that had not hitherto been utilised in the criminal justice system. We may therefore say that the new jurisdictional tasks that the intermediary performs came about not through abandonment, but through an opening created by legislative reform.

Despite the creation of new jurisdictional tasks for the intermediary to assume, my interview data suggests that the role has a disruptive influence on existing jurisdictions. The intermediary possesses the ability to stake its own jurisdictional claims but how other actors perceive these claims is central to their legitimacy. As will be discussed below, the 'vacancy' which was created for the intermediary is at times contested by others who question and scrutinise the nature of the jurisdictional claims the intermediary makes. What must now be considered is *how* such claims emerge. Jurisdictional claims are staked only through the demonstration of an 'independent and self-contained field of knowledge'.[781] This serves to legitimise the work and sustain the jurisdiction claimed.[782] Just as the judges and lawyers in Eisenstein and Jacob's 'court workgroup' identify specialist tasks to be executed, the intermediary role has sought to carve out control over certain tasks.[783] An examination of how the intermediary claims or holds 'jurisdiction' over its tasks requires examination of the content of the role's 'professional work'.[784] The 'problem' which the intermediary was introduced to remedy, i.e. the criminal justice system's failure to adequately accommodate the needs of the vulnerable, is shaped into coherent jurisdictions and resulting claims.[785] These claims are underpinned by three acts of professional practice which frequently overlap and intermesh: diagnosis, inference and treatment.[786] The next section will discuss each of these in turn.

[780] Matthew Kraatz and Emily Block, 'Organizational implications of institutional pluralism' in Royston Greenwood , Christine Oliver, Roy Suddaby and Kirsten Sahlin (eds), *Sage Handbook of Organizational Institutionalism* (SAGE Publishing 2008) 243.
[781] Nigel Malin, *Professionalism, Boundaries and the Workplace* (Routledge 1999) 69.
[782] Abbott (n 109) 52-57.
[783] Abbott (n 109) 62.
[784] Ibid 59.
[785] Abbott (n 109).
[786] Ibid 40.

6.6 Professional work

What is it that intermediaries 'do' as professionals and on what basis can they justify their control over it? We can refine this question and ask it in a more abstract way: how does intermediary work constitute a professional field of expertise which amounts to a legitimate area of knowledge?[787] Whether or not intermediaries operate autonomously in a field which is independent and self-contained is central to understanding how claims of jurisdiction can be made.[788] The three 'parts' of professional tasks identified by Abbott are i) diagnosis, ii) inference and iii) treatment. Together, these embody the essential cultural logic of professional practice and constitute the tangible work in which professionals engage.[789]

6.6.1 Diagnosis

Diagnosis is a 'mediating act' whereby information is taken into the professional knowledge system and assembled into a picture that can then be classified.[790] For intermediaries, the act of diagnosis takes place at the assessment stage. The assessment has come to be described as what 'underpins intermediary recommendations about adapting questioning techniques and procedures at the police station and at court'.[791] As discussed in Chapter 7 (Paradox of Neutrality), assessment tends to take place 'backstage' in more informal environments away from the traditional trappings of the criminal justice system. The first cohort of intermediaries selected and trained by the Home Office were shown how to compile a court report based on their individual assessment of the vulnerable person and their communication needs. However, a surprising discovery from my interviews was that Registered Intermediaries in both jurisdictions spoke of a complete lack of formal training from either the DoJ or MoJ on assessment techniques. The four official Registered Intermediary Surveys conducted by Cooper since 2009 detail the use of intermediaries in court, their interaction with lawyers, judges and court staff, with almost no mention of what many intermediaries see as the focal point of their role. It seems that Registered Intermediary training initially focused more on preparing the intermediary for entrance into the legal world than the practical reality of assessment techniques.[792] Whether this was the intention or not, familiarising new recruits with the procedures of the criminal justice system was tacit recognition of their outsider status and the inevitable challenges this label would bring.

[787] Fournier (n 757) 69.
[788] Ibid 70.
[789] Abbott (n 109) 40
[790] Ibid.
[791] Plotnikoff and Woolfson (n 37) 39.
[792] Cooper (n 72).

The scope of the intermediary's diagnostic role is recognised in the official procedural guidance manuals. The relevant MoJ guidance requires Registered Intermediaries to identify whether their involvement is likely to 'improve the completeness, coherence and accuracy of the witness's evidence'.[793] The DoJ in Northern Ireland adopts an almost identical requirement.[794] This phraseology allows for a mix of individuals from different backgrounds to perform the role without having to make a formal medical diagnosis. For many, this contrasts sharply with the requirements of their other professional positions where such a diagnostic role is crucial. As has been noted above, the eligibility criteria is different for a defendant intermediary than a Registered Intermediary. For defendants, an appointment can be made to ensure that 'every reasonable step is taken to facilitate the defendant's participation' in proceedings.[795] In addition, the assessment practices of non-registered intermediaries are completely free from official scrutiny notwithstanding the fact that individuals from a wide range of backgrounds execute the role.[796]

How then is diagnosis conducted? While intermediaries perform their own individual assessment, the 'end user' who has requested their services is often unsure of the nature or scope of the individual's vulnerability. The police officer or the instructing solicitor will have flagged a potential vulnerability - albeit based on limited professional knowledge or expertise of communicative disorders.[797] Therefore, by the time a referral reaches an intermediary, an informal type of diagnosis has already taken place. It was concerning how little those intermediaries I interviewed knew about this process since their involvement officially begins when they are 'matched' to a case by the NCA. Despite evidence of ad-hoc training organised by some regional police forces, there seems to be no nationally coordinated effort to determine how intermediary training of police may improve effective screening of individuals with communication problems. A 'triage' system, whereby intermediaries provide telephone advice to police when screening, has been suggested by Pettitt et al, but has not been adopted by the MoJ or NCA.[798] Unfortunately, even if an issue is flagged by police, there is often such poor understanding of the intermediary's function among criminal justice professionals that vulnerable individuals are not

[793] MoJ (n 56) 13.
[794] DoJ (n 49).
[795] CPD (n 22) 3F.21.
[796] Cooper and Wurtzel (n 38) 20.
[797] John Pearse, 'Police Interviewing: The identification of vulnerabilities' (1995) 5(3) Journal of Community and Applied Social Psychology) 147; Roxanna Dehagani, *Vulnerability in Police Custody: Police Decision Making and the appropriate adult safeguard* (Routledge 2019); Iain McKinnon, Julie Thorp and Don Grubin, 'Improving the detection of detainess with suspected intellectual disability in police custody' (2015) 9(4) Advances in Mental Health and Intellectual Disabilities 174.
[798] Bridget Pettitt, Sian Greenhead, Hind Khalifeh, Vari Drennan, Tina Hart, Jo Hogg, Rohan Borschmann, Emma Mamo and Paul Moran, 'At risk, yet dismissed: The criminal victimisation of people with mental health problems' (Victim Support/Mind 2013); Victim's Commissioner (n 101) 46.

given suitable support.[799] One of the most problematic examples of this is police officers not knowing what the intermediary role involves and not requesting their services, even in cases involving very young children.[800] The MoJ Procedural Guidance Manual for Registered Intermediaries explicitly recognises that 'no set procedure' for assessments exists and that 'the form and content…will depend on the witness's communication needs and the Registered Intermediary's skill set.'[801] This guidance reflects the reality that intermediaries come from a wide variety of backgrounds and the differences in approach to 'diagnosis' were evident in my data:

> 'It's broader than most people initially think… it's the conversations you have with the professionals who know that witness, that will inform the needs they have and what strategies might help them outside the police interview and outside the courtroom, where they are at with their education…you're looking at how they're interacting with whoever has come with them, what means they are communicating by, how their body language appears, how anxious they are feeling.' [E&W-15]

> 'I have kind of devised my own assessment over the years which is very functional based. So I start quite big and look at the environment that the person is communicating in now, how are they coping with distractions, what have they done to manage that environment, what is the impact of that and if I do it well then my assessment will feel like a chat but I know that I am asking certain types of questions, there's a lot of fact finding at the beginning and I will use that information later in the assessment to test language and how they communicate and what kinds of questions or vocabulary, grammar might give them a problem.' [E&W-2]

> 'It is useful because you can always read up on the nature of the person's condition beforehand. Yesterday I was in a police station with an individual who was bipolar who had drug-induced schizophrenia and who suffered from depression. Now, you could say 'Where do you begin?' but really you begin by simply saying 'look, will this person understand a question that is asked of them? Will they be able to process that and respond in a clear, logical and coherent manner? The only way to know that is to ask them a question. Then you can add complexity to it until they reach a level where they can't cope.' [NI-2]

These three intermediaries hail from different professional backgrounds (social work, occupational therapy, and speech and language therapy) and demonstrate how the approach to diagnosing

[799] Victims' Commissioner (n 43) 26.
[800] Criminal Justice Joint Inspection (2014) 'Achieving Best Evidence in Child Sexual Cases – A Joint Inspection' paras 1.4, 6.7; Ministry of Justice (2014) 'Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence' [49].
[801] Ibid.

individual communication difficulties was anything but uniform. This plurality of diagnostic techniques is not unusual per se, with Abbott recognising the 'staggering complexity' often involved with the task.[802] Echoing this, Grimen identifies the theoretical foundations of professional knowledge as heterogenous rather than homogenous which rarely map onto one single academic discipline.[803] That such a broad range of professional knowledge bases can be accommodated under the unifying role of 'intermediary' is, therefore, perhaps unsurprising. Indeed, the need for a heterogenous skillset among intermediaries is obvious based on how the NCA matching service operates. Cases are matched to Registered Intermediaries based on four categories of 'vulnerability': i) children; ii) mental illness; iii) learning disability; iv) physical disability.[804] The broad range of skillsets possessed by intermediaries is represented in **Figure 2** below which outlines the individual specialisms. Despite the spectrum of specialisms, gaps in the intermediary knowledge base still exist. In 2018/2019, a total of 133 requests lodged with the NCA were 'unmatched' due to the unavailability of a suitably skilled intermediary. E&W-11 explained how, despite her willingness to accept a broad range of cases, her theoretical knowledge of an applied behaviour analysis programme known as 'The Picture Exchange Communication System' or 'Pic Exchange' was insufficient:

> 'I was quite comfortable working with mental health, with kids who were ASD, with autism. I had a range so I said from the beginning: 'look I'm happy to take any age' [but] there would be things that I've had to pass back. There were two assessments that came through where there were children who used pics, like the 'pic exchange', and then I had to hand those cases back. That became evident before I actually did the assessment… I had to pass the case back for somebody else to do.'

These comments reflect the multidisciplinary theoretical content that constitutes the intermediary role. In other words, the particular requirements of a given referral from the NCA dictate what theoretical resources are required for the intermediary to be able to initially make a diagnosis.[805]

[802] Abbott (n 109) 41.
[803] Harald Grimen, 'Profesjon og kunnskap' Molander, A. & Terum, L. I. (eds.) *Profesjonsstudier* (Oslo Universitetsforlaget 2008) 71.
[804] MoJ (n 56).
[805] Ibid.

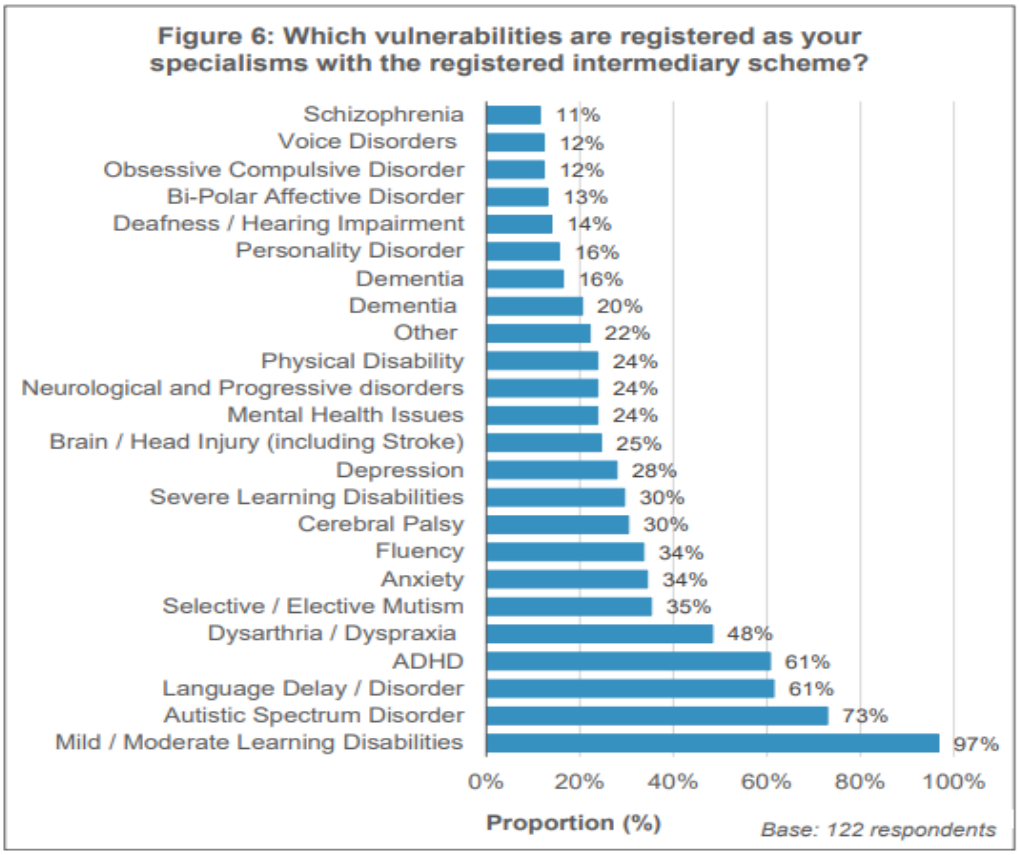

Figure 2 – Specialisms of Registered Intermediaries (referred to as Figure 6 in original source) Source: Victims' Commissioner, 'A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses (January 2018) 35.

However, there are inherent risks in the diagnostic process. The way in which individual problems are classified may damage the professional expertise the intermediary seeks to project. This expertise is particularly vulnerable when diagnosis is performed weakly and/or not clearly conceptualised. This, in turn, creates fertile conditions for 'inter-professional poaching'[806] which occurs when intermediary work is defined by another professional using its own terms.[807] Concerns relating to a lack of diagnosis uniformity were raised by intermediaries, police and judges. In particular, a number of intermediaries from a traditional Speech and Language Therapy (SLT) background identified issues about how non-SLT intermediaries were diagnosing and classifying the problems of vulnerable individuals:

> 'A speech therapist writes a report not only as a diagnostic tool but also 'what should be done to deal with this'… I know a social worker who has no background in assessing communication. They would often ring some of us and they were talking about a Down syndrome boy with a learning

[806] Abbott (n 109) 44.
[807] Abbott (n 109) 190.

disability. They told me what was wrong with him and they have an innate sense of how to assess someone, but they just don't know the terminology. They had that guy down to a tee, but couldn't organise it.' [NI-7]

One intermediary with a background in occupational health was acutely aware that her own techniques did not match up with a typical SLT assessment:

'[Speech and Language Therapists] are very language focused like '12 words in a sentence' whereas I don't really bother with any of that…I usually read a little story and then ask them questions about it, so I get the chance to test all the language things. I test to see if I suggest something will they go along with it, I get some people to describe a family member to see if they can generate information…I've got an assessment of interaction skills which I use quite often which is an OT assessment about how people interact, focus, articulate and it's like a score out of 4.' [E&W-10]

Notwithstanding these comments, most intermediaries expressed real interest in knowing how their colleagues conducted assessments. But the solitary nature of the role and lack of peer review, particularly for non-registered intermediaries, means that individualised practices appear common. The lack of uniformity in diagnosis technique was highlighted by the police who are the only other criminal justice actors to see different approaches first-hand. Two police officers made it clear that they doubted the appropriateness of intermediaries in a lot of cases and questioned their diagnostic methods. When asked about an intermediary assessment one said:

'I could have done a better job myself. Anybody can simplify a question, can't they?' [PO-1]

Another officer commented:

'Anybody with a bit of nous can simplify a question. I can ask the same question of you at one level and the same question of a kid at a different level…You just have to figure out what level they are at to allow you to ask it…all that is important but none of it is the intermediary, that's about the interviewer doing their job properly which is why I have a problem with how intermediaries work.' [PO-2]

While these comments relate to the act of 'treatment' (see below) in terms of *how* to ask questions, they also provide an external perspective on the diagnosis component of intermediary work. There is an implication that diagnosing the extent of a communication disorder ought not be the sole domain of the intermediary. Recounting her experience of another assessment, PO-2 explained how an intermediary pointed to parts of her own body to gauge whether a child understood the names of body parts. PO-2's explanation of the incident and demeanour implied scepticism of the intermediary's

diagnostic techniques. Indicating her unhappiness with the conduct of another intermediary during assessment of a three year old child, she said:

> 'I have raised some concerns. I used one recently that I wasn't happy with because some of the things that she did were not correct.' [PO-2]

That the officer then decided to conduct the interview without an intermediary suggests that the jurisdictional control which intermediaries exert over this aspect of their work is unstable and susceptible to encroachment. Put more bluntly, the police offer sought to appropriate jurisdiction from the intermediary when the objective of obtaining an 'accurate and reliable account' from the victim was not seen to be furthered by their involvement.[808] This example is redolent of professional dominance never being permanently secured and, as Timmermans explains: 'competing groups can invalidate any claim for jurisdiction'.[809] These attempts appear to be built on a process of 'boundary blurring' where one professional (police) encroaches on the domain of another.[810] What appears to facilitate the initial blurring of boundaries is the fact that there is an element of cooperation intrinsically involved between police and intermediaries during assessment. This 'simultaneous cooperation and conflict' produces the conditions where the exclusive jurisdiction may be questioned and then boundaries blurred.[811] Police see how intermediaries assess vulnerable people and identify enough commonalities of practice to deny the intermediary's jurisdiction. This blurring does not, *ipso facto*, mean that the police are able to operate with the same expertise as the intermediary.[812] Indeed, the same police who were quick to criticise the diagnostic abilities of some intermediaries accepted that others were 'exceptional' and a genuine asset to the police during interview. In this context at least, boundary blurring may be contained to specific incidents rather than amounting to a full-scale invasion of the intermediary's diagnostic domain.

While defence solicitors must flag potential communicative issues in suspects and defendants, there was no obvious attempt by these legal practitioners to interfere with the intermediary assessment. The reasons for this may be numerous, but one that was cited by a number of intermediaries relates to the subsequent chapter (Chapter 7) on neutrality i.e. many defence solicitors view the engagement of an intermediary as a distinct benefit 'because their client appears more vulnerable.' [NI-6]. There seems to be less desire to undermine the jurisdictional claim of intermediaries over assessment when the role

[808] College of Policing, 'Investigate Interviewing' Principle 1 < https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/> accessed 5 November 2020.
[809] Timmermans (n 773) 551.
[810] Liu (n 755) 48.
[811] Ibid.
[812] Rosemary Rushmer and Gillian Pallis, 'Inter-Professional Working: The Wisdom of Integrated Working and The Disaster of Blurred Boundaries' (2003) 23(1) Public Money and Management 59.

is viewed as an ally or an asset. Colley and Guéry found similar experiences among public service interpreters in their interactions with 'service users', such as police and prosecutors.[813] These 'service users' were often indifferent to notions of impartiality and desired allegiance from interpreters whom they viewed as 'tools' to assist their own work.[814] My data suggests that being viewed instrumentally by defence solicitors in this way makes intermediaries feel that their expertise and theoretical knowledge is recognised. As has been indicated, reactions from police at the assessment stage were often starkly different. Police were more likely to view the intermediary as an encroachment on their ability to plan and structure the subsequent interview as they wished. Defence lawyers, conversely, are primarily concerned with what is best for their client during interview. Often, it seems, this will involve asking for the presence of an intermediary by their client's side during interview.

Ordinarily, a non-registered intermediary will assess a suspect/defendant alone with the instructed lawyers present, and so the risk of external interference is minimised. This contrasts from other criminal justice settings, particularly the courtroom, where a process termed 'workplace assimilation' occurs. This involves a form of knowledge transfer where other subordinate professionals, non-professionals and members of related professionals 'learn on the job a craft version of [a] profession's knowledge systems'.[815] This concept is important for both Registered Intermediaries and non-registered intermediaries and a key question emerges: are other criminal justice actors able to acquire aspects of intermediary work so as to undermine the role's exclusive jurisdiction? The above examples suggest, at least at the assessment stage, that intermediaries are more likely to be vulnerable to jurisdiction incursion from police than from solicitors. This conclusion reflects a broader theme running throughout the thesis - that the roles of Registered Intermediaries and non-registered intermediaries are often experienced very differently by their practitioners. But it may also be significant for the future development of both roles. If non-registered intermediaries can retain more jurisdictional control over work tasks than Registered Intermediaries, what might this mean for the sustainability of both roles in the criminal justice system? The section below entitled 'jurisdictional settlement' probes this question further.

One final point about diagnosis deserves attention, and it is of potentially existential importance for intermediary claims to exclusive jurisdiction. It relates to the systems put in place by the MoJ to ensure that Registered Intermediaries are sufficiently trained prior to being matched in a case. A senior

[813] Colley and Guéry (n 769).
[814] Ibid.
[815] Abbott (n 109) 67.

intermediary, who is also a registered trainer, was critical of the MoJ recruitment process for new recruits, claiming that many lacked the basic assessment skills:

> '…as a training team we wondered why we had people on our training course who didn't seem to have some of the basics and we looked at the interviewing, why were some people being put forward for interview? So, we don't do the sifting, the MoJ do it and they don't know what they are doing and so we then went even further back and looked at the wording of the interview and that's when we spotted they have taken out the necessity of having a degree and being a professional.' [E&W-7]

E&W-7 accepted that non-SLT Registered Intermediaries would be 'up in arms' about her comments. But her views indicate a fear which many in the intermediary community share: that the credibility and legitimacy of the intermediary role would suffer should it not be recognised as a profession with consistent standards. As noted in the introduction to the chapter, many intermediaries echoed this desire to attain professional recognition. The call for training to be standardised in the way E&W-7 suggests mirrors Abbott's argument that 'the more strongly organised a profession is, the more effective its claims to jurisdiction'.[816] Inconsistency, or indeed incompetence, in diagnostic methods not only threatens the role's relative standing but it also damages the ability to isolate assessment/diagnosis as the intermediary's 'exclusive area of jurisdiction and expertise [and] a legitimate area of knowledge'.[817] Needless to say, the fact that non-registered intermediaries lack a recognised training scheme means that assessment technique standards are much less likely to be consistent and this was evidenced by the responses in interview. In fact, it was a surprise when one intermediary with considerable experience working with both witnesses and defendants described the latter work as 'the Wild West':

> 'The 'Wild West' analogy is quite a good one. I love it, absolutely love it. Given the choice if I had to pick defendants or witnesses I would pick defendants because it suits my personality better. I don't like being told what to do and you are much more your own boss.' [E&W-13]

E&W-13 was one of four intermediaries who explained that they preferred defendant work over witness work. Yet practitioner satisfaction does not necessarily equal strong jurisdictional claims over work. Based on Abbott's argument that claims to jurisdiction are more effective when a profession is well organised, it follows that non-registered intermediaries are less able to compete for legitimacy.

[816] Abbott (n 109) 82.
[817] Fournier (n 757) 69.

While E&W-7 identified deficiencies in Registered Intermediary assessment capabilities, training has at least been updated to ensure basic assessment competencies are met. For non-registered intermediaries, there is no equivalent organisation to centrally organise such training. While Intermediaries for Justice (IFJ) maintains a register of intermediaries who are available to undertake defendant work, there is no membership requirement and indeed many intermediaries decided not to join. Through an inability to control its members and collectively respond to any threats to its jurisdiction, non-registered intermediaries seem to lack the 'cultural machinery for jurisdiction'.[818] An example of the distinction in organisation between the two groups is the 'Registered Intermediary Procedural Guidance' which is published and updated by the MoJ. While affording discretion to registered practitioners in terms of assessment format, this document nonetheless acts as a reference point for the diagnostic elements of the intermediary role. The lack of similar guidance for non-registered intermediaries exacerbates the lack of confidence many feel performing the role. As Plotnikoff and Woolfson note, the lack of regulation of non-registered intermediaries and their inability to access standardised training damages the role's standing within the criminal justice system and may lead to resistance from other criminal justice actors.[819]

As this section has revealed, intermediaries execute their diagnostic function primarily through assessment of the vulnerable individual's communication needs. The assessment 'assembles' these needs into a picture better they are placed in the proper diagnostic category.[820] The next section in this sequence is 'inference'.

6.6.2 Inference

The second element of Abbott's tripartite professional work model is 'inference'. Abbott considers inference to be the principal component of professional work which 'takes the information from diagnosis and indicates a range of treatments with their predicted outcomes'.[821] In other words, inference links diagnosis and treatment through application of expert, theoretical knowledge.[822] In the case of the intermediary, the overlaps between inference and treatment are obvious. During the assessment, the intermediary is required to utilise their professional knowledge to diagnose any communication problems and decide whether the involvement of an intermediary is appropriate.[823]

[818] Abbott (n 109) 82-83.
[819] Plotnikoff and Woolfson (n 37) 277.
[820] Abbott (n 109) 41.
[821] Ibid. 40.
[822] Beverley Burris, *Technocracy at Work* (State University of New York Press 1993) 119
[823] MoJ (n 56).

While the presentation of the recommendations to the police or the court will follow, the professional inferences take place at the assessment stage.

The action of inference raises a number of issues related to the intermediary's professional jurisdiction. Unlike a doctor who is presented with a patient at a surgery or a solicitor who may meet a client at a consultation, the intermediary relies exclusively on other actors for the initial details of a vulnerable individual. In the case of a witness, the matching process overseen by the NCA will pair the Registered Intermediary with the person based on their experience and expertise. Contact will then be made with the relevant police officer in the case who will often provide further details and clarify that the Registered Intermediary has the necessary skill-set. For suspects or defendants, intermediaries are almost exclusively contacted by the instructing solicitor. Yet, even if a defendant has received a prior diagnosis, the solicitor may not be aware of this and the opportunity to engage an intermediary at first instance may be missed. The recommendation to engage an intermediary for a defendant may often arise out of the defence commissioning a psychological report.[824] In reality, the failure of police, lawyers and others to identify vulnerability early on means that the intermediary may often never become involved in a case where they are sorely needed.[825] For both witnesses and defendants, the intermediary is required to make a judgement call, not about the appropriate 'treatment', but whether they are sufficiently skilled individually for the task based on the initial diagnosis of another. This creates a problem for the intermediary as E&W-20 explained:

> 'Recently I had a case allocated to me on the basis of mental health and I made some initial enquiries of the officer and I formed the opinion that the difficulties that were going to be the barrier to communication were not the mental health issues which I thought were more suited to SLT and I recommended that the case be re-matched. I spoke to the police officer and I think this is what every intermediary should do. I spoke to the officer about my thoughts and said about the referral coming through on paper but based on my conversation with you which has added to what I knew, I am changing my mind whether I am the right person to take this case and for these reasons and I think it would be better matched to someone from a different discipline and a different skill set. So, I handed it back to the matching service.' (E&W-20)

[824] Plotnikoff and Woolfson (n 37) 257.
[825] Gisli H Gudjonsson, Isabel Clare, Susan Rutter and John Pearse, 'Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities' (Royal Commission on Criminal Procedure Research Study No 12) (HMSO 1993); Roxanna Dehaghani, 'Vulnerability in Police Custody: Definition, Identification and Implementation in the Context of the Appropriate Adult Safeguard' (PhD thesis, University of Leicester 2017).

In fact, this example gives an insight into the diagnosis, inference and treatment components of the intermediary role. A police officer had presented a vague case of mental health problems to the intermediary who sought further information in a bid to diagnose with more certainty. Concurrently, a self-diagnosis was taking place where the intermediary had to decide if she was competent to assess the individual. The intricacies of this latter process are understandably complex and rely on the subjective value judgements of individuals. Focal to this self-assessment is what E&W-20 termed 'being absolutely boundaried' as to one's competencies. As Riesch notes, construction of boundaries essentially amounts to professions seeking to 'communicate their subject [and] establish their own credibility to talk authoritatively about their subject'.[826] By only accepting referrals which match her skill-set, E&W-20 strengthens rather than weakens her authority and credibility over her work. Further, this form of boundary work encourages intermediaries to be reflective about their own knowledge claims and resist spreading their jurisdictional net so wide so as to make it a target for criticism and possibly attack.

While E&W-20 commendably returned the referral, it seems that intermediaries find themselves in a veritable 'Catch 22' situation. On the one hand, those who accept complex referrals (for which they may potentially be underqualified) and make recommendations accordingly may conduct 'too little inference'.[827] This involves a seamless movement from diagnosis to treatment. The problem with this approach is that it becomes an obvious target for poaching by other professions. If there is a routine, ineluctable link between diagnosis and treatment then why do we need intermediaries at all? The task could be conducted by existing members of the criminal justice system and the activity would arguably not warrant specific professional status.[828] On the other hand, too much 'formal inference' involving intermediaries applying their professional knowledge to the presented diagnosis in more obscure cases, is dangerous. This is because of the risk that the overall activity is perceived as a 'mass of personal judgements, well informed, but ultimately idiosyncratic'.[829] Abbott explains that many of the 'occult' professions, such as astrology, historically faced this very issue by adopting the position that every problem must be handled in its own special way.[830] Further, a profession that frames itself in purely abstract terms faces difficulty in demonstrating what Abbott terms 'cultural legitimacy'.[831]

[826] Riesch (n 708) 454.
[827] Abbott (n 109) 51
[828] Burris (n 822).
[829] Abbott (n 109) 52.
[830] Andrew Abbott, 'The Emergence of American Psychiatry' (PhD thesis, University of Chicago) 388-393.
[831] Abbott (n 109) 54.

The mutually conflicting scenario described above was well understood by every professional group interviewed. There was a palpable sense of unease among many intermediaries who saw opportunities for other actors, particularly members of the court workgroup, to undermine the role's credibility and legitimacy. One particular quote encapsulates this:

> 'I feel that all those dichotomies going on and there is 'divide and conquer' and that is how judges and barristers are going to get you in the end.' [NI-7]

This language illustrates the unease with which many intermediaries regard their role and its susceptibility to attack. It also aligns with Abbott's conception of jurisdiction as competition with malleable jurisdictional boundaries waiting to be capitalised upon by other predatory professions. The professional activities of individual actors in any system of work cannot be unilaterally defined and determined but are rather subject to the dynamics of interdependent relationships.[832] Yet, the above quotes from E&W-20 and NI-7 suggest a cognisance of this threat and a willingness to react. In particular, E&W-20 places the responsibility on intermediaries to engage in introspection, not just to ensure more appropriate matching, but to protect the role's professional jurisdiction within the 'ecology' of the criminal justice system.[833] E&W-20's clarion call can be viewed as a response to the threat of workplace assimilation which Abbott notes 'reaches its maximum in publicly funded worksites specializing in pariah clients - mental hospitals, jails, criminal courts'.[834] This assimilation may involve the police, lawyers and judges appropriating intermediary tasks based on perceptions of incompetence. Backen identifies another catalyst for this assimilation: intermediary reports which do not recommend intermediary involvement at all are never seen by judges or lawyers in a case.[835] As a result, there exists a skewed view of how the intermediary performs its core professional tasks and, crucially, how they recommend their involvement. Without seeing reports in which intermediaries justify their non-involvement, how can judges understand the theoretical knowledge and expertise underpinning diagnosis, inference and treatment? Many intermediaries interviewed echoed this point and felt that lawyers and judges were oblivious to their 'backstage' role during assessment. Citing previous research conducted by Communicourt, E&W-17 claimed that 24 percent of all intermediary assessments conclude with a recommendation of no intermediary involvement. E&W-17 also lamented the judicial perception of the intermediary as primarily self-serving and 'on the make':

[832] Timmermans (n 773) 552.
[833] Abbott (n 109) 33.
[834] Ibid 66.
[835] Backen (n 371) 63.

> 'They don't want to know if we recommend [intermediary involvement] because we're 'self-serving' aren't we? We're appointing ourselves! We're 'desperately looking for work'. I could be in three other courts today. There's no shortage of work! But they think we are looking for work for ourselves!'

The above analysis suggests that intermediaries are conscious of ongoing jurisdictional conflicts and are often prepared to confront them. But beyond individual practitioners voicing their views, can jurisdictional conflicts be resolved systemically? Abbott notes that in inter-professional jurisdictional contests 'the profession with more extensive organisation usually wins.[836] It is axiomatic that a strong, coordinated response to threats on jurisdiction requires an organised professional body or, at the very least, a figurehead. As we have seen in previous chapters, no group of intermediaries currently has such a body or lead individual.

The act of inference is, according to Abbott, a 'purely professional act'.[837] As we have seen in this section, for intermediaries, the act of inference is the link between the diagnosis of communication issues and relevant treatment and is closely tied to how jurisdictional claims are made and defended. The next act in the sequence is treatment.

6.6.3 Treatment

The third component of professional practice is 'treatment'. Abbott's conception of treatment is self-evident and refers to methods to remedy problems or complications made apparent from the diagnosis. Like diagnosis, it is organised around a 'classification and brokering process' which gives a result rather than taking information.[838] Unlike some professions, the intermediary advises the most appropriate treatment rather than actually administering directly. As such, the intermediary report constitutes the 'treatment' as outlined by Abbott. The treatments suggested are embodied in the reports compiled for police prior to interview (if involved at that stage) and then later for the court, if required.[839] This latter, and more substantial report, should include the witness's background, the 'diagnosis' from the assessment and ABE interview, the witness's communication abilities and specific needs together with practical suggestions about how the witness can best be questioned at court.[840]

[836] Abbott (n 109) 83.
[837] Ibid 40.
[838] Ibid 44.
[839] MoJ (n 56).
[840] MoJ (n 56) 16.

These essentially amount to instructions, or 'practical precepts' which are premised on academic work and theoretical principles.[841]

Outlining recommendations in the form of 'treatment' is a potentially hazardous area for the intermediary with a risk of 'outside interloping' into its professional jurisdiction.[842] In other words, the efficacy of treatment, as judged by external actors, such as police, lawyers and judges, is critical to how the intermediary role is perceived and how it gains legitimacy. The quality of recommendations, whether given directly to the police orally or in written form to the court, was a contentious topic in my interviews. Whether from taking responsibility for another intermediary's case or being asked to provide advice on another's Court Report, some intermediaries were visibly concerned about the quality of recommendations. For example, when reviewing another Registered Intermediary's preliminary report, NI-7 was shocked to find '32 points for the police' to follow in a suspect interview. This was, in her view, overly complicated and ran the risk of damaging the image and reputation of intermediaries in general. These fears appear to be well-founded, with police officers critical of intermediary recommendations that appeared to amount to 'common sense'. In the words of officer PO-2:

> 'If we train police officers to ask simple questions, stay on one topic and build rapport then they don't need a speech and language therapist!...you need police officers with heightened training to recognise that and do something about it.' (PO-2)

A similar concern, voiced by some judges in Northern Ireland, lamented the generic nature of the court reports:

> 'Sometimes, some of the reports I have had I have thought: 'I could have worked that out myself' and that might sound arrogant and I don't' mean that. But those are strategies that I think we already have.' [MCJ-2]

> 'They were kind of generic I have to say which detracts from them to some extent because you feel that it's a 'tick-box exercise'. I would like to see something a bit more individual and I think it gives it more weight.' [CCJ-1]

Another judge responded almost identically:

> 'The reports that I have been getting, quite often I find myself apologising as I say to the defence: 'That all seems to me to be common sense' and then I always have to apologise because I know

[841] David Sciulli, *Professions in Civil Society and the State: Invariant Foundations and Consequences* (Brill 2009) 350.
[842] Abbott (n 109) 45.

there is expertise and all the rest of it, but most of us can see when a child is getting stressed and needs a break.' [MCJ-1]

CCJ-2 conveyed a less critical judicial tone about intermediaries' recommendations but remarked that they are 'usually fairly pedestrian [and] rarely differ'. Yet, the tone of these responses signals a potentially serious credibility issue concerning the confidence that other key criminal justice actors have in the recommendations of intermediaries. There were, of course, many intermediaries who had not experienced any adverse comments or attitudes from police, lawyers or judges regarding their recommendations. Further, some intermediaries were surprised when the above judicial perspective was presented, with a number becoming noticeably defensive. One wonders whether a much more serious discord exists between intermediaries, the police and judges about the appropriateness of recommendations. A practice that appears to aggravate the situation is the failure to allow intermediaries to explain their recommendations to the court in a GRH. The requirement to hold a Ground Rules Hearing (GRH) is contained within the relevant Criminal Practice Directions (CPD), Criminal Procedure Rules (CPR) and in the Judicial College guidance.[843] Plotnikoff and Woolfson found that only 30 percent of Registered Intermediaries were almost always asked to discuss their recommendations at a GRH, whereas 95 percent of judges said they almost always invited intermediaries to discuss key recommendations. This discrepancy is not easily explained but is nonetheless evidence of a disharmony between judges and intermediaries. Most intermediaries had at least one experience of no GRH taking place in a case, but when it did the minimisation of their role was evident:

'You don't as a RI ever get asked for any knowledge, half of the time you don't get to open your mouth in a GRH. The longest GRH I had as an RI was 20 minutes. The shortest was about 30 seconds and I didn't even get in the box. It varies very much from judge to judge.' [E&W-13]

'An effective GRH only needs to be 15mins or something. But I do think I need to be given an opportunity to speak- that would make it much better. But when the judge says 'Yes we have read your report and will follow your advice' and that's it, that leaves you no room for questioning anything because the assumption is you are going to move on to the next thing to discuss.' [E&W-8]

[843] CPR (n 23) rules 3.9(6) and (7); CPD (n 22) 3E.2; Judicial College 'Crown Court Compendium: Part I' (June 2022) [10-27].

While most intermediaries spoke of an improving judicial attitude to GRHs, E&W-2 recounted a shocking judicial response to her attempt to explain her recommendations:

> 'the law has changed and we have to have you here now, but I am not impressed. I have seen your report, you're trying to tie counsel's hands behind their back and if you intervene I will hold you in contempt of court.' (E&W-2)

This quote encapsulates what seems to be at the heart of much intermediary - court workgroup conflict over treatment. Recommendations in the court report can be viewed by lawyers and judges as no different to what has been practiced for years, with the intermediary role merely committing age-old techniques to paper report. This differs from the experience of other therapeutic agents, such as probation officers, who have become embedded into the institutional arrangements of judicial institutions such as problem-solving courts.[844] For example, research into American drug courts found that probation officers often wielded a 'substantially superior level of power when compared to other court team members' which in turn substantially influenced case outcomes.[845]

My data suggest that the court workgroup is often reticent to acknowledge treatment recommended by the intermediary. This seems, at least partially, to be based on a lack of understanding of the theoretical basis of recommendations and a belief that the court workgroup can facilitate communication without intermediary assistance. These conclusions support the above suggestion that a discord exists between intermediaries and the court workgroup in terms of how the 'treatment' function of the intermediary role is conceptualised and indeed approached in practice.

6.7 Jurisdictional settlement

Intermediaries not only feel like outsiders, but are also conscious of incursions into their jurisdiction and often struggle with how they can sustain control. What heightens their fears is that, in being part of a 'culture change' towards improved treatment of vulnerable witnesses and defendants, they may be making a rod for their own back. This notion was first suggested to me by an intermediary in Northern Ireland who argued that the profession should be 'working ourselves out of a job' (NI-2). She explained how in five or ten years' time lawyers and judges should have learned sufficiently from the

[844] Young (n 718) 219; Vladimir Konecni and Ebbe Ebbesen, *The criminal justice system: A social-psychological analysis* (W.H. Freeman 1982).
[845] Danielle Rudes and Shannon Portillo, 'Roles and Powers within Federal Problem Solving Workgroups' (2012) 34(4) Law and Policy at 420; Ursula Castellano, 'Beyond the Courtroom Workgroup: Caseworkers as the New Satellite of Social Control' (2009) 31(4) Law & Policy 429.

practice of intermediaries that the role should be minimised. Many intermediaries whom I subsequently interviewed were appalled by this suggestion and argued that it betrayed a lack of understanding of the role. However, there is an alternative analysis of this view. While ostensibly advocating a narrower, more nuanced role for the intermediary, NI-2's comments reflect an attempt to protect the role's jurisdiction in the long-term. This implicitly involves a form of boundary work in which, rather than seeking 'expansion or authority' into a domain claimed by another professional, the intermediary goal is 'protection of autonomy'.[846] Unlike E&W-17 and E&W-7, who advocated for increased intermediary involvement at all stages, NI-2's comments are suggestive of what Abbott terms a 'jurisdictional settlement' between intermediaries and other actors in the criminal justice system.[847] While Abbott details five distinct types of jurisdictional settlement, NI-2 appears to suggest an 'advisory jurisdiction' for intermediaries in the long-term. This involves intermediaries accepting a 'weaker form of control' which involves other actors eventually claiming aspects of the intermediary's current jurisdiction.[848] As explored in Chapter 1, the amendments to the CPD in 2016 and the subsequent case of *R v Rashid* signalled a restriction to the availability of defendant intermediaries. These developments could be viewed as evidence of an advisory jurisdiction in practice as judges are expected to 'adapt the trial process to address a defendant's communication needs'.[849] Further, the court emphasised the 'training and experience' of the defence advocates who should be expected to carry out the 'basic tasks' of asking questions is clear and simple way.[850]

Abbott notes that advisory jurisdiction involves a profession seeking a legitimate right to 'interpret, buffer or partially modify actions another takes within its own full jurisdiction'.[851] In practice, this could arguably involve intermediaries providing more general recommendations about how to facilitate communication without the sort of 'hands on' involvement the role often currently involves. For example, a written report about the vulnerable individual, which the court could use as it wishes, may amount to an advisory jurisdiction. The intermediary may not even be physically present at any stage save for the communication assessment at the outset. Paradoxically, NI-2 views this diminution of the intermediary's jurisdiction as inevitable but ultimately necessary for survival of the role. However, the judges interviewed were largely cautious about the idea that the intermediary's jurisdiction could be incrementally allocated to other professions in the form of an 'advisory settlement'. While some judges acknowledged that the intermediary had forced the judiciary to be 'more alert and aware of the issues

[846] Gieryn (n 110) 792.
[847] Abbott (n 109) 575.
[848] Ibid.
[849] *Rashid* (n 15) [73].
[850] Ibid [80].
[851] Ibid.

that defendants and witnesses may have' (MCJ-2), this did not mean that the role should be phased out:

> 'The intermediary is bespoke to that particular client's needs so whilst I, as the lay person, think I am terribly clever and think I know a lot about autism and don't need the expert because I have a handle on this, when you get the particular individual it's how that condition manifests itself with that particular person in the particular circumstances and the stress you are going to put them under. For those reasons you will still need the RI expertise.' [MCJ-2]

> 'It could well be that we get to a point where, if everyone is on the same page, then there is less need for a Registered Intermediary because the questioning is appropriate and the judges are more informed about what is appropriate…If we are doing it properly, their role ought to diminish and they should be self-limiting to a large degree because, as the process accommodates what they are doing better and as it becomes more familiar, you should see their role reducing. But I would be worried that we get to a point where we get to a degree of complacency where we say: 'oh that's not needed at all now, we know everything about this.' [CCJ-1]

Professional competition over jurisdiction can produce various outcomes since not every profession aiming for full jurisdiction will obtain it. If advisory jurisdiction is indeed the outcome of the intermediary's jurisdictional disputes, a salient question is whether this amounts to the 'leading edge of invasion [or] the trailing edge of defeat' for intermediary work.[852] At such an early stage in the role's development this is a difficult question to answer conclusively. However, crucial to the outcome will be the intermediary's ability to communicate its exclusive authority over its workplace tasks and the acceptability of the role's professional boundaries to other criminal justice actors. This reality is reflected in the comments of judges included in this chapter. The generally sanguine judicial perception of intermediaries and their work appears a good augury for the role's future in the criminal justice system. As will be discussed further in Chapter 9, the introduction of new HMCTS Court Appointed Intermediary Scheme (HAIS), which provides intermediaries for vulnerable court users who are not eligible under the Witness Intermediary Scheme (WIS), suggests that intermediary presence in the justice system looks set to expand rather than diminish.

But there is surely a question of legitimacy surrounding the role's future and, more specifically, whether the intermediary can demonstrate and convince other actors of its 'cultural legitimacy'. Drawing

[852] Ibid 76.

parallels with Abbott's work on social workers, my interview data suggest that intermediaries are consistently struggling to convince police, lawyers and judges of the role's legitimacy. Just as Abbott discovered with social workers, there is a risk that the central public legitimacy of the intermediary derives not from its expertise and theoretical knowledge, but from 'altruism'.[853] In other words, the role is often framed by the caring backgrounds from which most intermediaries are sourced rather than the specialist function practitioners seek to emphasis.[854] Some of the more recent intermediary recruits felt that the older generation of intermediaries did little to dispel this image. E&W-18 talked about tension between these two factions and how projecting the role as a 'volunteer' rather than as a professional was concerning:

> 'They don't like the fact that there's quite a few of us who have gone full time with it and like proper do the job and have made these relationships and we don't do it as a hobby… we're not just retired doing it [because it's] the right thing to do…There's a bit of conflict there. I think, whether it's a profession or whether it is just being 'us kind people, and we are just trying to be kind, and are we trying to help…'' (E&W-18)

Aside from such internal divisions which do little to foster a united intermediary front, the struggle for legitimacy manifests in other ways. One intermediary (E&W-20) explained in interview that the attitude of the judge and lawyers towards her changed once she obtained her doctorate and formally introduced herself as 'Dr X' at a GRH. She felt that respect for the role increased and that the recommendations contained in the court report were taken more seriously. This exchange illustrates the sort of 'them and us' divide between the 'marginal or passive role of court users [and] the active, central role of the legal professionals in the courtroom'.[855] In this example, the granting of a voice to the intermediary based on a perception of elevated status fits the various theorisations of the criminal court as hierarchical and organised and run by the elite courtroom workgroup.[856] This was, however, largely symbolic since the inner zones, or 'circles' using Rock's terminology, of the court are impermeable to an actor such as the intermediary who is not viewed as sharing the same collective goals and expectations of the legal professionals.[857] The above example is an outlier and the struggles

[853] Abbott (n 109) 561.
[854] Although the main sociological accounts of the professions have not been examined in this chapter, Eliot Friedson's critical account of the professions focused on when occupational group's could claim autonomy legitimately. He argued that dominance and authority, rather than altruism, were markers of professional status. See: Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied* (University of Chicago Press 1970).
[855] Jacobson et al (n 356) 96.
[856] Mulcahy and Rowden (n 474) 247.
[857] Rock (n 299); Paul Rock, 'Rules, Boundaries and the Courts: Some Problems in the Neo-Durkheimian Sociology of Deviance' (1998) 49(4) The British Journal of Sociology 586.

for legitimacy faced daily by intermediaries better reflect the reality of the role. Notwithstanding positive signals from some judges and lawyers and the fact that many recent recruits appear to have settled on the role as a full-time profession, the role's parameters and claims to jurisdiction have been shown to be far from settled. Questions remain about how willing the key actors of the criminal justice system are to accommodate the 'professional work' of the intermediary and how disputes over jurisdictions and boundaries will be settled.

6.8 Conclusion

This chapter has identified how the intermediary tussles for control over its work tasks with other criminal justice actors. Through diagnosis, inference and treatment the intermediary performs professional work which is relational at its core. Interaction with other criminal justice actors serves to shape the role's content in a number of ways. It enables the intermediary to demonstrate its theoretical knowledge and expertise in order to persuade audiences of its jurisdictional claims. Equally, other professionals scope out the role and often question its legitimacy. My data reveal the resistance of the court workgroup to threats challenging its cultural norms and how the intermediary role often treads a thin line between gaining acceptance and seeing its jurisdiction vulnerable to encroachment. Fundamental to understanding the nature of these inter-jurisdictional conflicts are boundaries. Boundaries act to mediate inter-professional interaction and delineate the intermediary's tasks, which is fundamental to understanding how the role is located within the criminal justice system and how its work is performed. Although the scope of the intermediary role was initially untested and often unclear, individual practices have seen the construction of boundaries which are continually negotiated between actors. We have also seen how encroachment on the intermediary's tasks often appears to be preceded by the action of 'boundary blurring'. This was illustrated through intermediary cooperation with the police at the assessment stage in which joint sharing of jurisdiction eventually led to police dispensing with the intermediary altogether.

While this chapter has given a snapshot of the intermediary's professional work, the question of where these interjurisdictional disputes will lead remains. In other words, what will the resulting 'outcome' or 'settlement' of these jurisdictional conflicts be? While few intermediaries addressed this point directly in interview, there was a noticeable sense of fear among the intermediary community about the future of the role. Intermediaries were acutely aware of their outsider status and that many in the legal community would welcome a reduction in their influence throughout the criminal justice system. Importantly, it is before this audience that the intermediary claims jurisdiction and seeks legitimacy and

so any eventual settlement will depend on the acceptance of the claims which are staked.[858] If the objective is for the intermediary role to retain its jurisdiction over its workplace tasks, then much will depend on how inter-professional disputes over jurisdictions are settled and how associated boundaries are negotiated.

[858] Abbott (n 109) 191

Chapter 7: The paradox of neutrality

7.1 Introduction

So far, we have seen that the scope of the intermediary role is contested with its parameters in need of clarification. While the relevant procedural guidance from the MoJ and DoJ puts some flesh on the 'bare bones' of s.29 YJCEA, case law reveals how a standardised depiction of the role is elusive.[859] Notwithstanding the need for clarity, the intermediary is consistently represented as a normatively impartial, neutral and objective role.[860] As an 'Officer of the Court', the role shares a responsibility for the administration of justice and the proper functioning of the judicial system.[861] This chapter examines the neutrality of the intermediary role and problematises the value of neutrality as a core tenet of intermediary practice. During my interviews, it became evident that the relationship between intermediaries and the neutrality underpinning their work is complex, poorly understood and somewhat 'taboo'. O'Mahony et al have written about the developing occupational identities of intermediaries and the challenge of reconciling the role's neutrality with different professional backgrounds.[862] This theme, however, has not been developed in the subsequent literature and numerous questions remain. What exactly does it mean for an intermediary to be neutral? How do intermediaries navigate situations that call their neutrality into question? Can the imperative of working neutrally hinder the role's objective of 'facilitating communication'? These are salient questions that should cause one to think critically about the contours of the intermediary role.

This chapter centres on the key finding that intermediaries are embroiled in an ongoing struggle about how the principle of neutrality is conceptualised and negotiated. Generally, there is a strong commitment to these normative principles among all intermediaries, whether registered or non-registered. However, when their practical application is examined, it is evident that the role can transcend that of an objective conduit as framed by the relevant procedural guidance and echoed in the case law. I have termed the tension between these two sides of intermediary practice 'The Neutrality Paradox'. Conceptualising the role as narrow in scope and hermetically sealed from the emotionally charged cases in which intermediaries are involved appears illusory and disconnected from

[859] Birch (n 41) 249.
[860] MoJ, 'Registered Intermediary Procedural Guidance' (August 2019) 20; DoJ, 'The Registered Intermediaries Procedural Guidance Manual' (Northern Ireland) (July 2019); Plotnikoff and Woolfson (n 37) 11.
[861] Joyce Plotnikoff and Richard Woolfson, 'Registered Intermediaries in Action: Messages for the CJS from the Witness Intermediary Scheme SmartSite' (NSPCC and MoJ, December 2011).
[862] O'Mahony et al (n 98) 155.

the reality of actual practice.[863] More specifically, intermediaries I spoke to are committed to the objective of facilitation of communication which often sees them override the official rubrics of the profession to ensure that the individual needs of vulnerable people are met. This involves prioritising their own judgement over the official stance of complete objectivity and involves reconceptualising the boundaries of their own neutrality. In this chapter, this is explored using the Bourdieusian concept of 'illusio'. Illusio relates to a collective belief among members of a 'field' in the value of taking part in collective struggles.[864] Drawing on metaphors of game and game playing, the concept captures how members feel invested in the game being played and how they are motivated by its stakes.[865] When applied to the intermediary role, we may use illusio as an explanatory concept to examine deviations from the expected performance of neutrality. How and why intermediaries demonstrate indifference or lack of commitment to these values is instructive to understanding the role's scope in practice. Reflecting on the strength (or weakness) of the illusio generated by intermediaries helps locate the intermediary within the social world of the criminal justice system. If the core tenet of neutrality is not considered an intrinsic value by intermediary practitioners themselves, this may have significant implications for the role and its practice more generally. Examining the intermediary role through the prism of neutrality also reinforces a key theme emerging from my data: the roles of Registered Intermediaries and non-registered intermediaries are qualitatively different. It is axiomatic that intermediary involvement differs when working with a defendant compared to working with a witness, but this chapter shines a light on how these differing demands impact, and are impacted by, the principle of neutrality.

Examination of the neutrality paradox is important for intermediaries when reflecting on and coping with the tensions and challenges involved in their work. It is also relevant for criminal justice actors such as lawyers and judges who interact with intermediaries and seek to better understand the scope and content of the role. Finally, the issue of intermediary neutrality is relevant for policy makers in terms of how the role is organised, governed and detailed in the relevant legal rules and procedural guidance. For example, in 2022 the HMCTS awarded contracts for the provision of 'Court Appointed Intermediary Services (HAIS)' for vulnerable individuals who fall outside the remit of the MoJ's existing intermediary scheme.[866] As intermediaries are introduced into new justice settings, understanding of the role's nature and scope becomes increasingly important.

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[863] Colley and Guéry (n 769) 113.
[864] Bourdieu (n 112) 187.
[865] Ibid.
[866] HMCTS, 'New contracts awarded to support vulnerable court and tribunal users.' (26 January 2022) <https://www.gov.uk/government/news/new-contracts-awarded-to-support-vulnerable-court-and-tribunal-users> accessed 24 March 2022; For further information on the new scheme, see section 9.4 below; Also see:

7.2 Exploring the normative basis of neutrality

Neutrality is recognised as one of several critical dimensions of procedural justice and is closely linked to the concept of legitimacy.[867] As discussed in Chapter 3, in order for criminal justice institutions to operate effectively they must hold legitimate authority in the eyes of those they serve.[868] The view that the criminal justice system must constantly demonstrate its legitimacy to the public reflects the imperative that decisions are seen to be taken in a 'genuinely unbiased and neutral way'.[869] Intermediaries in England and Wales and Northern Ireland are required to adopt and maintain a neutral position in all aspects of their work.[870] Although similar schemes established in Australia and New Zealand operate slightly differently in some areas of intermediary practice, they retain neutrality as a core tenet of the role.[871] However, varying definitions of the terms 'neutrality' and 'impartiality' exist. While the terms are viewed as distinctive by some academic commentators, others use them interchangeably. For example, in the field of mediation, impartiality often connotes a freedom from favouritism and even-handedness, with neutrality more concerned with decision makers not taking a position regarding the dispute or the parties.[872] Indeed, the updated Registered Intermediary Procedural Guidance of 2020 published by the MoJ exclusively uses the term 'impartial' whereas previous versions relied on both terms at different points.[873] In any case, a significant deal of overlap exists between the usage of the terms in the criminal justice literature.[874] Considering the variance of definitions, the term neutrality for the purposes of this chapter refers to the objective, non-biased

John Taggart 'Vulnerable Defendants and the HMCTS Court-Appointed Intermediary Services' (2022) 6 Criminal Law Review 427.

[867] Tom Tyler, *Why People Obey the Law*. (Yale University Press 1990); Miranda Boone and Mieke Kox, 'Neutrality as an Element of Perceived Justice in Prison: Consistency versus Individualization' (2014) 10(4) Utrecht Law Review 118; M.S. Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center.* (Center for Court Innovation 2006).

[868] Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2013) 102(1) Journal of Criminal Law and Criminology 119.

[869] Lord Neuberger, 'Fairness in the courts: the best we can do' (Address to the Criminal Justice Alliance, 10th April 2015).

[870] MoJ, 'Registered Intermediary Procedural Guidance' (August 2019) 20; DoJ, 'The Registered Intermediaries Procedural Guidance Manual' (Northern Ireland) (July 2019).

[871] See for example: Talking Trouble New Zealand, 'Court Communication Assistant Information Sheet' (14 October 2019 < https://talkingtroublenz.org/wp-content/uploads/2019/10/TTANZ-Court-Communication-Assistant-current-process-October-2019.pdf> accessed 2 September 2020; Witness Intermediaries in New South Wales, Australia also take an oath and promise to be 'impartial and independent': New South Wales Government, 'Witness Intermediary: Procedural Guidance Manual (April 2019) 7 < https://www.victimsservices.justice.nsw.gov.au/Documents/wi_manual-april-2019.pdf> accessed 7 September 2020.

[872] Debbie De Girolamo, The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice (2019) 39(4) Oxford Journal of Legal Studies 834, 841.

[873] MoJ (n 56).

[874] Bibas (n 234) 106.

status of the intermediary as an officer of the court.[875] This means that intermediaries act independently of the defence or prosecution.[876]

Within the criminal justice literature, discussion of neutrality and impartiality has often been dominated by a focus on adjudication.[877] Both neutrality and impartiality are central to conceptions of judicial legitimacy and judicial authority.[878] Even within the jurisprudential debate between legal positivism and natural law, judicial impartiality is a shared concern of any theory of legal regulation.[879] Perhaps surprisingly, the impartiality of the prosecution within the English legal system has received relatively little academic critique.[880] The majority of academic research has taken place within the context of the American judicial system, much of which focuses on prosecutorial discretion as well as the vexed issue of politicisation.[881] The English courts have, however, recognised the position of the prosecution within the adversarial system as that of a Crown representative overarchingly concerned with the administration of justice.[882] Similarly, as a 'Minister of Justice', the prosecutor does not bear the responsibility of securing a conviction at all costs, rather they aim to secure a result to which 'on his view, the evidence fairly leads; his methods and his motivation should be dispassionate'.[883] Sanders has questioned this normative depiction of the prosecution as neutral and argued that, in practice, it represents police interests as enthusiastically as defence practitioners do their clients.[884] The practices of the court workgroup, particularly in the magistrates court where speed and efficiency are the

[875] The MoJ's 'Registered Intermediary Procedural Guidance Manual' from 2015 uses the terms 'impartial and neutral' whereas the updated 2020 simply uses 'impartial'. Correspondence between the author and the MoJ in May 2020 confirmed that this change was made merely for the sake of brevity.
[876] DoJ, 'Registered Intermediary Schemes' <https://www.justice-ni.gov.uk/publications/registered-intermediary-schemes> accessed 26th February 2021.
[877] There is a separate, albeit related, discussion of judicial independence amidst concerns that the judiciary, as an institution, is not detached from other arms of the state as traditional views of separation of powers dictate. See: Mike McConville and Luke Marsh, *The Myth of Judicial Independence* (Oxford 2020).
[878] Roach Anleu and Mack (n 354) 8.
[879] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (Routledge 2003).
[880] Ellison notes how the role of the prosecution counsel has rarely been examined through the lens of impartiality: Louise Ellison, 'A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems' (PhD thesis, University of Leeds 1997).
[881] For example, see: Richard Uviller, 'The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit' (2000) 68 Fordham Law Review 1695; Bennett Gershman, 'The Prosecutor's Duty to Truth' (2001) 14 Journal of Legal Ethics 309; Wayne LaFave, 'The Prosecutor's Discretion in the United States' (1970) 18 American Journal of Comparative Law 532; Ellen Podgor, 'The Tainted Federal Prosecutor in an Overcriminalized Justice System' (2010) 67 Washington and Lee Law Review 1569.
[882] *Banks* [1916] 2 KB 621 (Avory J); *R v Sugarman (*1936) 25 Cr App R 109; *R v Whitehorn* [1983] HCA 42; (1983) 152 CLR 657.
[883] Andrew Ashworth, 'Prosecution and Procedure in Criminal Justice' [1979] Criminal Law Review 482
[884] Andrew Sanders, 'A Community Justice. Modernising the Magistracy in England and Wales' (Institute of Public Policy Research, 2000) 33.

essence of summary justice, produce legitimate questions about how achievable ideals of neutrality really are.[885]

Outside of the court workgroup, the position of the court interpreter is a useful analogue when examining the neutrality of the intermediary. Despite the differing interests of the parties within the adversarial system, court interpreters are required to adhere to the principle of neutrality at all times.[886] The traditional, positivist Anglo-American conception of the interpreter is that of a 'linguistic conduit' limiting itself to faithful, verbatim translation of what is said in court.[887] This model has received sustained criticism, much of which has focused on the disconnect between theory and practice. For example, Angellini questions the conceptualisation of interpreters as passive translation machines and points to their status as 'social beings who are subject to the interplay of social factors, institutional constraints and societal beliefs.'[888] This is linked to the argument that interpreters, as experts in facilitating intercultural communication, must be afforded some leeway in ensuring that this objective is achieved. These critiques recognise that the role is not merely tasked with providing communication, but *effective* communication, which never takes place in a social vacuum.[889] Rudvin explains how the notion of a wholly neutral interpreter is difficult to sustain:

> 'If the interpreter is an active protagonist in the interpreting encounter, constantly making decisions – subjective decisions and fruit of individual interpretation – s/he can hardly be a transparent entity through which some assumedly fixed meaning passes, crosses linguistic systems and comes out the other side 'untouched'.'[890]

Despite the lack of academic attention given to the normative basis of the intermediary's neutrality, drawing parallels with the court interpreter is a useful starting point. The value attached to neutrality in both roles appears broadly the same: any allegation of partiality or undue proximity to either the prosecution or defence is capable of undermining judicial proceedings. Both interpreters and intermediaries participate in interpreted events between individuals and the criminal justice system e.g., during police interview, consultations with lawyers or during court testimony. There is concordance between the 'dynamic' view of language in the interpreting literature and my interview

[885] Eisenstein and Jacob (n 447); McConville, Sanders and Leng (n 763) 6.
[886] Roseann Gonzalez, Victoria Vasquez and Holly Mikkelson, *Fundamentals of Court Interpretation. Theory, Policy, and Practice* (Carolina Academic Press 1991).
[887] Alicia Edwards, *The Practice of Court Interpreting* (John Benjamins 1995) Gonzalez, Vasquez and Mikkelson (n 870).
[888] Claudia Angellini, *Revisiting the Interpreter's Role* (John Benjamin Publishing Co. 2004) 47.
[889] Christina Bratt Paulston, Scott Kiesling and Elizabeth Rangel, *The Handbook of Intercultural Communication* (Wiley 2012) 435.
[890] Mette Rudvin, 'How neutral is neutral? Issues in interaction and participation in community interpreting' in Giuliana Garzone and Maurizio Viezzi (eds), *Perspectives on Interpreting* (CLUEB 2002) 4.

data which reveals intermediaries seeking to facilitate communication but often struggling with how to effect this within the constraints of their neutrality.[891] Dynamic interaction views language as a communication system in which each participant presents themselves to the exchange, and the outcome is regarded as a result of combined interaction.[892] My interview data, explored below, reveals that the formal recommendations which intermediaries make, as well as the more informal, often unrecognised steps they take to facilitate communication, stem directly and inevitably from their own interpretation of communicative situations. These interpretations can - at least in theory - never be finite or fixed but will necessarily be the result of a hermeneutic process.[893] From a sociological perspective, a 'thick' understanding of the intermediary's conditions of practice and social interactions is central to an analysis of its neutrality.[894] In short, it is contended that the role's neutrality is intrinsically relational and functions 'interactively and dynamically' based on the social norms and rules of particular criminal justice settings.[895] This is a critical point of departure for the analysis in this chapter, as neutrality is recognised as contextual and multifaceted. More broadly, this supports the argument that neutrality should be viewed as a 'process' rather than an inherent quality - a point further developed in the section below entitled 'Reconceptualising Neutrality'.

The next section explores Bourdieu's conception of the social world. It introduces the ideas of 'habitus', 'field' and, most importantly for the purposes of the present chapter, 'illusio'.

7.3 Bourdieu's Social World

This chapter focuses on Bourdieu's concept of 'illusio', specifically in relation to the principle of neutrality. However, an examination of illusio must necessarily recognise two other central organising concepts of Bourdieu's work, namely 'field' and 'habitus'. Collectively, these concepts reflect the dialectic dimensions of objectivity and subjectivity in the social world and help facilitate analysis of their relational construction.[896] While the perception and classification of the social world is central to Bourdieu's reflexive sociology, he was also concerned with the existence of specific 'fields' within it. Bourdieu developed a framework to explain how power and knowledge interact in particular areas of society that are relatively autonomous 'fields'.[897] He argued that each of these fields is a specific

[891] Cecilia Wadensjö, *Interpreting as Interaction (*Routledge 2013).
[892] Ibid.
[893] Rudvin (n 890) 3.
[894] Wadensjö (n 891) 17.
[895] John Touchie, 'On the possibility of impartiality in decision-making' (2001) 1 Macquarie Law Journal 21, 30.
[896] Bourdieu (n 112) 172-179.
[897] Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Stanford University Press 1998); Pierre Bourdieu, *The Field of Cultural Production* (Columbia University Press 1993).

microcosm with its own logic, characterised by specific rules of action. Within a field, behaviours and social relations become routine and concretised over time and actors become subjugated to the predominant social order.[898] To think in terms of field is to think 'relationally' Bourdieu explained, and the limits of the field are 'always at stake'.[899] Fields and the social spaces which constitute them do not amount to an 'objective' structure, but instead form a structure which is subjectively constructed by individual and collective practices. It is interesting to note that Bourdieu rejected much of the standard theories of the 'professions' and instead recommended the concept of field as an alternative analytical tool.[900] This would allow, he contended, for 'the full reality it intends to capture' to be accounted for.[901]

Drawing on Bourdieu, we view social organisation as a system of relationships composed of invisible structures. The metaphor of the 'game' is used to illustrate the concept of the field and the role of habitus within the game.[902] Habitus is presented as a 'structured system of dispositions' formed in relation to individually perceived conditions of existence.[903] In other words, the habitus refers to an individual's set of quotidian thoughts and practices that are learned socially and taken for granted. Rather than being viewed as a collection of attributes or inherent characteristics, the habitus is a mediative frame of reference that has the imprint of objective social structures and generates the observed views and practices of agents.[904] It implies that subjects or agents are socially produced in states occurring prior to the system of social relations. The habitus is, therefore, a framework through which the world is perceived and which determines one's actions within it. As a cognitive map, it guides and evaluates an individual's choices and options and habitual ways of performing routine tasks.[905]

As an increasingly common feature of criminal trials and the criminal justice system more broadly, the intermediary and its work constitute a field. Viewing fields as networks of agents occupying symbolic social spaces with each possessing unique attributes and power dynamics enables us to locate the intermediary within the social world of the criminal justice system.[906] The physical manifestations of the field, including the courtroom, consultation room, police stations and interview suites, are all social spaces where conflict and struggle play out between the intermediary and other criminal justice actors.

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[898] Pierre Bourdieu and Loïc Wacquant, *An invitation to reflexive sociology* (Blackwell Publishers 1992) 101.
[899] Loïc Wacquant, 'Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu' (1989) 7(1) Sociological Theory 26.
[900] Bourdieu and Wacquant (n 898) 242.
[901] Wacquant (n 899) 38.
[902] Phil Hodkinson, Andrew Sparkes and Heather Hodkinson, *Triumphs and Tears: Young People, Markets and the Transition from School to Work* (David Fulton 1996).
[903] Bourdieu, *Outline of a theory of practice* (Cambridge University Press 1972) 72.
[904] Ibid.
[905] Karen Robson and Chris Sanders, *Quantifying Theory: Pierre Bourdieu* (Springer 2009).
[906] Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press 1990); Pierre Bourdieu, *Language & Symbolic Power* (Polity Press 1991).

For example, more peripheral criminal justice actors, such as interpreters, also inhabit criminal justice settings but adhere to their own internal logic and principles of organisation.[907] Each of these 'subfields' is imbued with its own 'doxa' – an established order which engenders an unconscious, unquestionable acceptance of the status quo.[908] To be able to participate in a field, an individual must be conscious of the 'rules' in play and have 'the minimum amount of knowledge, skill or 'talent' to be accepted as a legitimate player'.[909] The 'rules of the game' which relate to the intermediary are developed below in a discussion of illusio, but it is clear that the intermediary role emerged because a knowledge/skills gap existed among traditional criminal justice actors.[910] Having identified the intermediary's 'field', it follows that the role is strongly influenced by its habitus. This habitus is objectively structured by the role's relative position in the field but also by the subjective experiences of individual practitioners which are orientated by their perception and classification of their social world.[911] We are concerned here with how adapted the intermediary's habitus is to the field and its 'predisposed way of thinking, acting and moving in and through the social environment'.[912] How the intermediary presents itself to other criminal justice actors, most of whom have more established roles and are familiarised with criminal proceedings, is constitutive of its habitus. All criminal justice actors apprehend the social world of the criminal justice system through their own habitus and the intermediary is no different.

Finally, the concepts of 'field' and 'habitus' are inextricably linked to 'illusio'. How the field functions and is conditioned is reliant on the collective belief of its members, demonstrated through participation in internal struggles.[913] By demonstrating a 'visceral commitment' to their membership of the field, members take an interest in its stakes and are taken in by it. This is what Bordieu refers to as 'illusio' which is created through repeated action and routines and represents an unreflexive commitment to reproducing and enforcing the rules of the game.[914] In this chapter, I use illusio as a conceptual tool to explore what I have termed the 'neutrality paradox' of the intermediary role. As briefly discussed above, examining neutrality can be conceptually problematic, particularly when the principle is viewed as

[907] Moira Inghilleri, 'Habitus, field and discourse: Interpreting as a socially situated activity' (2003) 15(2) Target 243.
[908] Bourdieu (n 112); Damon Golsorkhi, Bernard Leca, Michael Lounsbury and Carlos Ramirez, 'Analysing, accounting for and unmasking domination: on our role as scholars of practice, practitioners of social science and public intellectuals', (2009) 16(6) Organization 779.
[909] Pierre Bourdieu, *The Field of Cultural Production* (Columbia University Press 1993) 8.
[910] See Chapter 6.
[911] Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press 1990).
[912] Paul Sweetman, 'Twenty-first century dis-ease? Habitual reflexivity or the reflexive habitus' (2003) 51(4) Sociological Review 528, 532.
[913] Wacquant (n 899) 40.
[914] Ioana Lupu and Laura Empson, 'Illusio and overwork: playing the game in the accounting field' (2015) 28(8) Accounting, Auditing and Accountability 1310.

integral to the intermediary role.[915] The neutrality paradox centres on the internal struggles and apparent contradictions which play out in how intermediaries practice their neutrality and ultimately justify their actions. It reflects the strong attachment intermediaries have to the ideals of neutrality on the one hand and their willingness to view these principles as malleable and open to reconceptualisation on the other. This dynamic allows one to critically examine neutrality as a core tenet of the intermediary role and to question its conceptual underpinnings. Firstly, we examine how neutrality as a 'locus of tension'[916] within the intermediary role is partly revealed through demonstration of its 'congruent illusio'.

7.4 Congruent Illusio

Bourdieu contended that membership of a particular field involves a belief in its claims and compliance with the 'necessities of the field'.[917] Here, we focus on the core principle of neutrality and the extent to which intermediaries view the principle as a necessary, non-derogable component of their work. We examine whether, and to what extent, intermediaries adhere to their official stance of neutrality 'and do not question its underlying principles'.[918] This examination is concerned with how invested intermediaries are in maintaining and reinforcing their neutral status and whether they are engaged in reproducing the 'doxa' i.e., the presuppositions of the game through their illusio.

In almost every interview with intermediaries, the issue of neutrality arose, not through a question posed, but rather from interviewees describing their work: 'I am there as a neutral party' (E&W-3), 'Our role is neutral' (NI-3), 'You have to be very mindful that we are neutral' (E&W-16), 'You have to be a neutral person or you can't do the job properly' (NI-1). Unsurprisingly, a focal part of initial intermediary induction and training in both England and Wales and Northern Ireland emphasises the neutrality of the role and thus the value appears ingrained in new recruits from an early stage. In this way, the illusio surrounding the neutrality of the intermediary is viewed as what Bourdieu called a 'precondition for successful entry into the field'.[919] In other words, the consistent mentioning of neutrality reflects the collective belief that this is a necessary part of the role. NI-7 and NI-3, both intermediaries in Northern Ireland, explained this:

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[915] Vidal Claramonte recognises similar issues when the neutrality legal interpreters is examined: Maria Carmen África Vidal Claramonte, 'Re-presenting the "Real"' (2005) 11(2) The Translator 259.
[916] Ibid, 263.
[917] Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press 1990) 6; Bourdieu and Wacquant (n 898) 115.
[918] Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford University Press 1998).
[919] Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Stanford University Press 1998) 170.

> 'I remember from the training that we need to be there with a poker face and we need to keep a professional hat on and sometimes it is difficult.' [NI-7]

> '…in our training we were just told about the whole neutrality, the importance of that… we were given guidance as to where you are supposed to stand for Ground Rules Hearings and things, we are supposed to be at the back sort of and you try to sit maybe in between but more often than not I am called up into the witness box.' [NI-3]

These comments are redolent of the illusio implicitly assumed by all who undergo intermediary training and subject themselves to the rules of the game.[920] Yet, when examining illusio, we are primarily concerned with the subjective reality of the field and how its rules have been internalised by members. This involves examining whether intermediaries get caught up and taken in by the game to the extent where they take their neutrality for granted. It is at this point we can begin to clearly see one side of the 'neutrality paradox' develop. My interviews reveal that intermediaries express a high degree of compliance with the official line requiring strict adherence to the oath of neutrality. More strikingly, the individual reflections that emerged from the interviews never seemed superficial or perfunctory. On the contrary, interviewees often took the time to carefully explain and justify the rationale behind their neutral stance:

> 'You are there for the courts, you are there to help the barristers ask questions in a way that somebody understand and you are there to ensure that person can give information and answer the questions in a way that is understood, so you are there for that two way process…and you are more like a vehicle, an instrument to support that…that's why we work for the court. We are not there to support that person to give their story or their version of events, you are there to make sure the court process flows.' [NI-1]

It is important to be reflexive and introspective about such responses. As a researcher examining issues in the criminal justice system, I am a player in the broader field. Regardless of how interviewees perceived me individually, it is possible that they viewed me as someone who was actively looking for instances of their neutrality being compromised or, as Goffman termed it, a slip of the 'mask' which individuals wear during a performance.[921] When faced with questions about their neutrality, interviewees reaffirmed their belief in its virtues as if reading from an official script. The cost of their integrity being called into question appeared too high and no interviewee spoke of the neutrality label

[920] This is similar to the judicial commitment to impartiality which Anleu and Mack explain is deeply ingrained in both legal training and judicial work: Roach Anleu and Mack (n 354) 61.
[921] Erving Goffman, *The Presentation of Self in Everyday Life* (University of Edinburgh Social Science Research Centre 1956) 73.

being a burden or a hindrance.[922] This reflects the investment which intermediaries make in their neutrality, as opposed to being indifferent to it. While the analysis later in this chapter questions how committed intermediaries are to performing neutrality in practice, it is apparent that an impression of attachment to the principle is viewed as crucial for the role's credibility among other actors.[923]

Intermediaries were more vocal describing situations when their neutrality was questioned. Although not a common occurrence, some occasionally receive such accusations, explicitly or implicitly, from other criminal justice actors. When this occurs, intermediaries distance themselves from the 'ataraxy' that characterises other uninvested players in their respected fields.[924] In other words, intermediaries often appear annoyed that their stake in the game is questioned and that their attitude to neutrality may be viewed as one of 'indifference'.[925] E&W-1 expressed this position strongly:

> 'There was one barrister who, let's say, accused me of 'over-egging' things in my report because I had sympathy for the defendant which is really offensive. I was really, really angry because it is offensive because I am there as a neutral party and because it is calling into question the integrity of my opinion and my response was that I categorically disagreed.' (E&W-1)

More common than explicit questioning of the role's neutrality was the perception that the police or defence legal representatives may seek to bring the intermediary on board or into a particular 'team' (E&W-14). This seems to happen most frequently at court when defendant intermediaries often spend long periods with the defendant and their legal representatives. In Northern Ireland, where intermediary appointments are generally for evidence only, it is not surprising that this appears to happen less. Further, the DoJ explicitly prohibits intermediaries from attending consultations between the defendant and his/her lawyers.[926] Social encounters between intermediaries and other actors present an opportunity to reaffirm the attachment to neutrality and demonstrate a strong illusio. In this sense, intermediaries can identify and conserve the principle of neutrality as capital which is uniquely generated in their field.[927] E&W-20 explained how maintaining the illusio translates into practice:

> '…If you're seen to be in and out of these meetings, consultation rooms and you're seen to be going in and out of there. I have had counsel say negative things about police to me and it's those sort of

[922] Erving Goffman, *Interaction Ritual: essays on face-to-face behaviour* (Pantheon 1967) 261.
[923] Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (Stanford University Press 1996). 227-228. This also links in with the conclusions reached in Chapter 7 as intermediaries strive for exclusive jurisdiction and legitimacy through the approval of other criminal justice professionals.
[924] Bourdieu and Wacquant (n 898) 116.
[925] Ibid.
[926] DoJ (n 59) 26.
[927] Bourdieu (n 112) 153.

things that can breach those boundaries and you've got to be very, very clear in the intermediary role about that. I am not here for that discussion, I am here to facilitate communication. It's a difficult area being a human being, being absolutely non-partisan in your role and being explicit about what you can and cannot do.' (E&W-20)

Many intermediaries commented on the need to proactively 'perform' neutrality and also be seen to do so. In Bourdieusian terms, this fosters a visceral commitment to the game and rationalises the participant's investment in it.[928] It is the illusio that helps explain why intermediaries submit unequivocally to the underlying principles of their neutrality and proceed to externalise it.[929] In some cases, this operates as a defence mechanism to protect the role from any accusations or perceptions of partiality. E&W-17 explained how engaging with the so called 'other side' of the case is crucial:

'I make a big point of arriving in court on the first day and finding the prosecution barrister to say hello. Because if you don't do that, and they see you all the time walking around with the defendant and his team, then you look like you're part of the team. So, for instance, I always make sure that I sit halfway when I am sitting on the back of the benches, I sit halfway between the two. I don't' sit behind the barrister.' (E&W-17)

This deliberate positioning of oneself in a neutral space was a common theme in interview. It appeared most pronounced in Northern Ireland where intermediaries were firmly of the view that the role operates independently of any side in the criminal process. A strong attachment to the ideal of neutrality was apparent from all Northern Irish Registered Intermediary interviewees. NI-2's comments exemplify this position:

'I am not beholden to anyone. I am an independent provider of a service and I work to my standard… I am not working for a lawyer, I am not working for the police. I consider myself to be an officer of the court and, as such, an officer of the criminal justice system.' (NI-2)

Another Northern Irish intermediary, NI-4, discussed how the suspect interview at the police station serves as a good place to 'practice our neutrality'. She continued:

'I think it's very important to make it clear that either verbally or non-verbally I am neutral here. I'm not on anybody's side… In terms of neutrality, I think that our non-verbal language can speak as loud as things that we do say.' (NI-4)

[928] ibid 102.
[929] Ibid.

In England and Wales, one phenomenon which encapsulates the notion of a congruent illusio relates to the preparedness of intermediaries to work on both sides of the 'two tier' system during the same trial. In other words, as an independent communication expert, an intermediary could be appointed to facilitate communication for a number of individuals rather than being appointed to one witness or defendant. There is currently no provision for such an appointment in the legislation, Criminal Procedure Rules (CPR) or Criminal Practice Directions (CPD) and is instead a case management issue for the sitting judge. This practice, of which three interviewees had direct experience, may be described as 'crossing the court'. This term was coined by E&W-7 who had been asked by the judge to assist a vulnerable defendant after the commercial organisation providing an intermediary withdrew.[930] E&W-7 admitted feeling initially unsure about the idea but rationalised that 'the job was no different, sitting next to the witness, listening to the questioning, reading questions, intervening, simplifying the language'. E&W-7 went on to explain in more detail why her decision to 'cross' the court was justifiable and, ultimately, utilitarian:

> 'I think I can switch from one to the other. Some intermediaries think that is unethical. If the court has agreed and I have been asked to do that, I can't see why anyone is going to object. I am just there assisting the court and if a whole case is going to collapse because of an invoice they don't want to pay!' (E&W-7)

The topic of crossing the court prompted other intermediaries to reflect and evaluate their attitudes towards the role's neutrality. This often revealed a sense of ambivalence. While there was a recognition that assisting communication should transcend notions of 'sides', interviewees generally concluded that it would not be good practice and was best avoided. It was argued in Chapter 3 that intermediaries can help legitimise the criminal justice process, but the practice of crossing the court could possibly have the opposite effect. Despite intermediaries in Northern Ireland routinely working with both defendants and witnesses, one magistrate considered that an intermediary crossing the court could prove problematic 'in a sensitively charged case…[and would be] best avoided if possible' (MCJ-2). It was suggested that vulnerable witnesses may struggle to cope with seeing the person with whom they have developed a rapport now sitting with the accused (or witness). As E&W-15 explained, the risk of the witness (or defendant) feeling let down by such a practice may be more than merely cosmetic and could adversely affect the ability to communicate:

> 'It would depend on that witness and if they would have that knowledge before giving evidence or at all because I think it could jeopardise them and the support I give to them if they saw me on the

[930] This seems to be a relatively common occurrence due to the policy of one commercial provider to provide intermediaries for full trial appointments only. For judicial comment on this policy: see *R v Biddle* (n 74).

'other side' because frequently whilst we say 'we are not on anyone's side', the witness will see us as 'theirs' and it's a fine line.' (E&W-15)

It is useful to reflect on how these individual understandings and perceptions of neutrality map onto the concept of illusio. Bourdieu contends that illusio is 'removed from discussion' and that adherence to the doxa 'forbids questioning of the principles of belief'.[931] Heidegren and Lundberg echo this by noting that the unthinking commitment to the logic of the field means that 'no-one questions whether the battles in question are meaningful…Illusio is thus never questioned'.[932] On one hand, these statements do seem to resonate with much of what I observed about intermediary culture. Despite the often-isolated nature of the role and high levels of autonomy, there are many issues within the intermediary community which generate debate and internal discussion. Some of these are extremely contentious, for example, the divide between the speech and language therapy cohort of intermediaries and the 'nouveau' intermediaries who predominately hail from a social work, nursing and teaching background. However, the complete lack of discussion between intermediaries around the issue of neutrality and its potentially blurry edges was surprising. I initially concluded that the role's neutrality must be a 'taboo' subject which is personally navigated but not externalised. While O'Mahony et al identified the potential for conflict between individual intermediary practices and the value of neutrality, I saw little evidence of this in interview.[933]

Yet it was clear in interview that intermediaries were acutely aware of the underpinning rationale of their neutrality and its centrality to the role's work. Bourdieu wrote that adherence to the necessities of the field is unconscious and inscribed into the bodies of participants.[934] The acceptance of illusio is not depicted as a deliberate choice, since the agent who was raised in the field will not question its norms and principles, but will instead perceive them as natural and obvious.[935] How can we reconcile this with the account emerging from the interview data? Bourdieu's account of illusio is premised on the inculcation of norms, principles and beliefs through action and routine. But importantly, these go unquestioned because they are perceived as immemorial and imbedded. They are done 'and have always been done that way'.[936] The newness of the intermediary 'profession' must be taken into account as the role's habitus and logic of practice have not been examined and are, consequently, poorly understood. The role may be described as being in a liminal state, inhabiting a social space which

[931] Bourdieu (n 112) 102.
[932] Carl-Göran Heidegren and Henrik Lundberg, 'Towards a Sociology of Philosophy' (2010) 53(1) Acta Sociologica 3.
[933] O'Mahony et al (n 98) 155.
[934] Bourdieu (n 112) 171.
[935] Kirsten Donskov Felter, 'Breaking with Illusio' (2012) 66(1) Studia Theologia 86, 102.
[936] Bourdieu (n 112) 102.

lacks clear pre-prescribed ways of doing and being.[937] Therefore, what exactly constitutes the internal logic of the intermediary field is still embryonic, particularly compared with established professions with established hierarchical structures. For example, Bourdieu explicates numerous types of 'conservation strategies' used by those in dominant positions in a field to preserve hierarchisation and enhance their positions.[938] The dearth of academic research into the intermediary role, its organisation and governance means that examining internal struggles for capital, power and positions is extremely difficult. We may say that the doxa - the presuppositions that constitute the intermediary field - do not yet appear settled.[939] Newcomers to any field must learn and play by the unarticulated rules and conventions, but if these are still in flux then it is not surprising that the content and significance of a key principle like neutrality is also unresolved.

7.5 Weak illusio

As the above discussion explains, intermediaries demonstrate a commitment to the principle of neutrality and have a stake in reproducing this as a rule of the game. In this regard, my data suggest a congruence between the official standards and protocols of the role and the belief intermediaries have in them. The reverse side of the 'neutrality paradox' reveals a conflict with this congruent account, as intermediaries appear to resist the constraints imposed on them by their neutrality. Defining resistance within a discussion of illusio can be a difficult task. While some authors have focused on the inseparability of resistance and power, there has been little elaboration on how resistance actually operates.[940] Other research has conceptualised resistance as refusal or a challenge to prevailing ideas which enable people to comprehend the dominant order.[941] However, I found the patterns of resistance among intermediaries difficult to reconcile with accounts of resistance in other empirical settings. For example, the idea that individuals 'must try individually or collectively, to subvert' the rules of the game in order to mount a resistance did not resonate with my data.[942] The conceptualisation of resistance as associated with 'strategic manoeuvres' and premeditated strategies to undermine occupational practices may be more applicable to traditional workplace settings with bureaucratic institutions and complex professional hierarchies.[943] Instead, any resistance among intermediaries appears to be

[937] Victor Turner, *The Forest of Symbols* (Cornell University Press 1976).
[938] Pierre Bourdieu, *Sociology in Question* (SAGE Publishing 1993).; Ahu Tatli, Mustafa Ozbilgin and Mine Karatas-Ozkan, *Pierre Bourdieu, Organization and Management* (Routledge 2015) 211.
[939] Pierre Bourdieu, *The Logic of Practice* (Polity Press 1992) 66.
[940] Deborah Reed-Danahay, *Locating Bourdeiu* (Indiana University Press 2004) 64.
[941] Penny Dick, 'Resistance, Gender and Bourdieu's notion of field' (2008) 21(3) Management Communication 327.
[942] Ibid 337.
[943] Sierk Ybema and Martha Horvers, 'Resistance Through Compliance: The Strategic and Subversive Potential of Frontstage and Backstage Resistance' (2017) 38(9) *Organization Studies*, 1233; Senia Kalfa, Adrian Wilkinson,

individually driven without any obvious ideological motive. The type of collective resistance which is often embodied through organisations such as, for example, trade unions was noticeably absent among intermediaries.[944] As a consequence, intermediaries do not seem to experience the 'establishment of a dispositional habitus around behaviours and knowledge' which arises from strong collective organisation.[945] Yet, despite not being engaged in any coordinated resistance strategy, resistance among intermediaries is evident in a much more subtle way. Although not vocally disavowing their neutrality, intermediaries experience an ongoing struggle between the practical demands of their often emotionally demanding work, their professional backgrounds and their need to remain detached and objective.

While illusio provides that players have a belief in the *necessity* of the game, my interview data gives an insight into how intermediaries view the relationship between the role's overarching function of facilitating communication and the norms and principles that constitute their illusio. In terms of neutrality, a discord is evident between the neutrality narrative that intermediaries subscribe to and reproduce, and the strategies, tactics and methods employed in the facilitation of communication. This may be termed a 'weak illusio', defined by the simultaneity of belief in the role's neutrality and a willingness to often compromise its integrity. A sustained process of 'toggling' ensues between a desire to protect the legitimacy of the role and the need to ensure that communication is effectively facilitated.[946] My interviews are replete with examples of this tension which occurs throughout the stages of intermediary involvement in a case. In the following comments, E&W-2 gives an example of a witness contradicting themselves during ABE interview and the interviewing officer not picking up on the discrepancy. E&W-2 later raised the issue with the officer but sought to justify her actions:

> E&W-2 - "…so they may contradict themselves or say something that doesn't quite make sense and I'll be wanting to ask something just so they understand what they are telling me. I will say to the officer afterwards. So, if someone is describing something that happened at night and then they might say 'he had sunglasses on' I will think 'why has he got sunglasses on at night?'
>
> Interviewer - But you might say to the officer afterwards?
>
> E&W-2 - Afterwards yeh, but not on camera and not with the witness there. But that's me asking it kind of as [name] and not as the intermediary."

and Paul Gollan, The Academic Game: Compliance and Resistance in Universities' (2019) 32(2) Work, Employment and Society 274.

[944] Ahu Tatli et al (n 936) 127.

[945] Ibid.

[946] Craig Calhoun and Richard Sennett, *Practicing Culture* (Routledge 2007) 165.

In a similar vein, E&W-13 suggested that the intermediary necessarily concerns itself with the emerging evidential picture at police interview. She staunchly defended the position that intermediaries ought to be more 'assertive' with police officers in terms of how interview questions are formulated:

> '…in the interview the intermediary is not just the intermediary but is also potentially looking it at like a juror would. Because it's the first time you have heard their account and if my brain is going 'well, what about this?' and if I am doing that then a jury member is likely to do that. So, in the breaks I go with the officer…and I would say 'Don't know about you, but there's just one thing that's rattling in my mind' because I don't know the rest of the evidence but I am thinking 'If I am thinking it, a jury member might be thinking it.' (E&W-13)

In these two examples, the strategies and tactics adopted by the intermediaries constitute the role's habitus. These methods reflect not just the way in which intermediaries navigate the settings of the criminal justice system, but specifically how they develop a 'feel' for the rules of the game.[947] These seemingly innocuous comments and informal chats with the interviewing officer inform what Sweetman terms the 'predisposed way of thinking, acting and moving in and through the social environment'.[948] The relationship between the habitus and illusio here is revealing. As Bourdieu notes, illusio is most potent when the habitus is capable of embodying the field.[949] Players must 'bring to the game…a habitus that is practically compatible…and above all, malleable and capable of being converted'.[950] The comments of E&W-2 and E&W-13 reflect the ability of intermediaries to view their habitus as transformative and amenable to restructuring.[951] The apparent tension with the role's neutrality is absolutely central to this: it is through reconceptualising their own neutrality that intermediaries reconcile the principle with their primary function of facilitating communication. By viewing their oath of neutrality as complimentary to, rather than a restriction on, their core functions, intermediaries remain engaged and committed to the game.

The type of social interactions which provide the setting for the above quotes are important to understanding the intermediary illusio and its fragility. Criminal justice sites, such as the interview suite, consultation room and courtroom, are where investment in the illusio begins and is reinforced.[952] As new entrants, intermediaries bring their own dispositions to the field which are gradually transmuted

[947] Bourdieu (n 918) 77.
[948] Sweetman (n 912).
[949] Bourdieu (n 918).
[950] Ibid 100.
[951] Bourdieu, (n 112) 100; Diane Reay, Gill Crozier and John Clayton, 'Strangers in Paradise: Working-class Students in Elite Universities' (2009) 43(6) Sociology 1103, 1105.
[952] Bourdieu (n 112) 166.

imperceptibly without obvious crisis or conflict.[953] For example, the criminal court initially bewildered many intermediaries who slowly became accustomed to its rituals and customs. The tendencies and practices of intermediaries when working with other criminal justice professionals become embedded in the habitus and such practices then attain a coherence and regularity. Yet the social relations which develop in the field often challenge the neutrality of the intermediary role. The working relationships which intermediaries foster often threaten to 'shatter' the illusio and the commitment and investment in the game.[954] This is essentially the other side of the 'congruent illusio' explained above whereby intermediaries vehemently defend their neutrality and want to be seen to be neutral. The 'neutrality paradox' sees intermediaries sometimes drawn to sides, most notably to the police during ABE interviews and with the defence at court. As early as the police station, achieving best evidence can be viewed as a collective goal which demands a coordinated approach:

> 'I think [police] feel like you're working with them, and in a way you are because they want to get the best evidence from the witness and that's what you're both trying to do…there is a feeling that you have got to be on the same page or otherwise you couldn't really do it, you've got to be a bit of a team.' (E&W-9)

E&W-6 similarly uses the analogy of working as a 'team' to describe a joint effort with police during ABE interview:

> 'Last year I worked with two police officers over a very significant period of time, nine months. I would say we had a very professional but very supportive relationship…we all had a role to play and obviously I remained objective to help the witness give evidence but it was like the boundaries became blurred almost because I would go afterwards, not in front of the witness, and go: 'you know what she said there? This doesn't mean it…' which I suppose in a way was stepping out of my role, kind of going: 'I don't get this, she said that then and then she said that?' but I think we formed a good team.' (E&W-6)

This latter quote encapsulates the nature of the neutrality paradox. Although initially emphasising the objective approach to her work, E&W-6 then recognised how discussion of the evidence with the police officer compromised the integrity of her role. The contrast between the enclosed, more intimate setting of the interview suite and the open, public setting of the criminal court also appears to influence the conceptualisation and performance of neutrality. When 'backstage' the intermediary seems more

[953] Bourdieu (n 112) 165.
[954] Helen Colley, 'Not learning in the workplace: austerity and the shattering of illusio in public service' (2012) 24(5) Journal of Workplace Learning 317.

willing to risk their neutrality than in the 'front', public stage of the criminal courtroom.[955] The concentration and effort required to be seen as neutral by the judge, lawyers and general audience contrasts sharply with the off-camera moments when an intermediary may, for example, raise evidential issues with the interviewing officer. We may view these incidents as deviations from the 'official stance' of neutrality as 'the impression fostered by the presentation is knowingly contradicted as a matter of course'.[956] The emotional energy expended by intermediaries in such cases is evidenced by the fact that several remarked in interview that they no longer accept defendant cases due to the nature of allegations involved.

The notion of intermediaries being 'pulled' into the 'defence camp' was frequently mentioned in interview, although many considered this was based more on perception than reality. Two Northern Ireland judges noted the risk of intermediaries being assimilated into the defence legal team and the collegiality associated with it, although both stressed that they had seen no evidence of this. In England and Wales, these fears appear to have foundation. Intermediaries explained that their close involvement with defence representatives when assisting a suspect/defendant led to a sense of being closely involved. This contrasts with the experience of assisting a witness which tends to be brief and limited purely to the period of their examination. Plotnikoff and Woolfson highlighted this reality and how the 'behind the scenes' work of defendant intermediaries often goes unnoticed by judges.[957] This backstage role often involves close proximity to the defence legal representatives and can lead to a lack of appreciation of the intermediary's neutrality. This places a unique strain on the neutrality of the defendant intermediary role of which practitioners must be aware in order to avoid 'cross[ing] the boundary into a support role'.[958] O'Mahony et al found intermediaries felt excluded by the setting of legal consultations, and even by informal conversations between opposing counsel, and were reluctantly drawn into discussing case details which they recognised threatened their neutral stance.[959]

The gravitation of intermediaries towards defence representatives, or the 'defence camp', as explained by the above quotes, requires closer examination. As explored in Chapter 6, intermediaries generally identify as outsiders to the world of the criminal justice system. In terms of special configuration at least, this is not surprising. As Mulcahy and Rowden outline, modern court design in the UK is engineered to separate different groups of users and intermediaries are effectively excluded from many of the 'deep' spaces inhabited by the court workgroup.[960] Intermediaries in interview spoke of the

[955] Goffman (n 921) 114.
[956] Ibid 112.
[957] Plotnikoff and Woolfson (n 37) 271.
[958] Ibid 276.
[959] O'Mahony et al (n 98) 160.
[960] Mulcahy and Rowden (n 474) 87.

discomfort of 'hanging around' (E&W-11; E&W-7) the precincts of the courthouse, often without anywhere to sit, read or even eat. The lack of intermediary space within the court precinct is, however, more pronounced when working as a defendant intermediary. Most interviewees spoke about liaising with Victim Support (or Witness Service in Northern Ireland) when working with witnesses and becoming accustomed to the surroundings of the Witness Support Suite. When working in a defendant intermediary capacity, the same practitioners reported feeling excluded and had no similar physically separate space to occupy (unless in the cells with a defendant in custody). Instead, they mostly inhabit 'shallow' zones such as public and circulation areas.[961] E&W-3's experience reflects this difference:

> 'it's bloody awkward when there is nowhere to put your bag…When assisting a defendant it's even more awkward because you don't even have the Witness Service to help. I have my coat and bag with me and they get shoved under the bench. Where do I go? With the defendant cases I just hang out in the corridor.' (E&W-3)

E&W-10 discussed the problem of 'small talk' with witnesses but said that she is often able to 'leave that to the Witness Service'. In a defendant intermediary capacity, this is not an option and the prolonged periods spent with the defendant and their legal representatives can perhaps understandably lead to a spirit of camaraderie. Just as the differences in intermediary provision can affect perceptions of and approaches to neutrality among intermediaries, so too can the built environment in which intermediaries operate. As Rowden notes, special configuration can dictate how individuals are expected to behave and, of particular relevance to the intermediary, perceive their own role and its parameters.[962]

It is instructive at this stage to return to the concept of resistance in the context of the empirical data presented. It is perhaps misleading to examine the reconceptualisation of neutrality in terms of resistance at all.[963] Rather than 'resisting' occupational norms and directives, the process of reconceptualising neutrality reveals a hierarchy of values which guides intermediaries in their practice. This mirrors the findings of Colley and Guery who concluded that public service interpreters invest more in the stakes of what drove the role's creation in the first place than the profession's official rubrics.[964] Where broad objects of value are not deemed to be best served by the profession's official code, the personal judgement of interpreters supplants it. This was also evident in my data as intermediaries

[961] Thomas Markus*, Buildings and Power: Freedom and Control in the Origin of Modern Building Types* (Routledge 1993) 167.
[962] Emma Rowden, 'Remote participation and the distributed court: an approach to court architecture in the age of video-mediated communication' (PhD thesis, University of Melbourne 2011).
[963] For a discussion of multiple forms of resistance including 'subtle', 'ineffective' and 'counterproductive' resistance see: Ybema and Horvers (n 943).
[964] Colley and Guéry (n 769) 13.

appear to prioritise the facilitation of communication above all else, almost oblivious of the collateral risks to their neutrality. For example, one intermediary (NI-2) in Northern Ireland insisted on attending a legal consultation without prior approval from the DoJ because of the imperative that the defendant could 'understand the advice being given and that the barrister was getting clear instructions'. Colley and Guéry contend that public service interpreters demonstrate a 'weak illusio' by distancing themselves from official protocols through their practice. While intermediaries risk breaching their neutral position, this may not necessarily equate to a lack of investment in the role and its underpinning rationale.[965] Since the concept of illusio is imbricated with habitus, we must recognise the notion of habitus not only as malleable but also as 'transformative'.[966] This allows us to view the reconceptualisation of neutrality not as an aberration or an outlier, but as being incorporated into the intermediary habitus.[967]

Bourdieu and Wacquant describe habitus as an 'open system of dispositions that is constantly subjected to experiences'.[968] Thus, the intermediary habitus is responsive to the conditions of work and what goes on around them. This explains intermediaries framing communication facilitation as the role's core concern and centring their practices around it. It must also be relevant that those carrying out the intermediary role, usually professionals in their own right, display attitudes, dispositions and expectations from different occupational fields. These are acquired in their respective social environments, where preferences and customs are equally deemed natural and obvious. Yet when these varying habitus encounter an unfamiliar field, such as the criminal justice system, resulting disjunctures can 'generate change and transformation'.[969] Intermediaries appear to effect this change and shape their habitus as a result. It follows that this has implications for the intermediary illusio. Intermediaries may not, in practical terms, display an unwavering commitment to the logic or value of neutrality, but they appear invested in their membership of the game more broadly, in particular in ensuring that their primary function of communication facilitation is discharged. Like habitus, illusio is constitutive of individual experiences and can be thought of in the plural i.e., consisting of differing investments which can be distinguished from one another without abdicating illusio completely.[970]

[965] Ibid.
[966] Reay et al (n 951) 1105.
[967] Ibid.
[968] Bourdieu and Wacquant (n 898) 133.
[969] Diane Reay, 'It's All Becoming a Habitus': Beyond the Habitual Use of Habitus in Educational Research.' (2004) 25(4) British Journal of Sociology of Education 431, 436.
[970] Ibid; Raphael Dalleo, *Bourdieu and Postcolonial Studies* (Liverpool University Press 2017) 206.

7.6 Witness work vs Defendant work

The two-tier provision of intermediaries in England and Wales has been explained and its effects on intermediary practice acknowledged. Yet apart from O'Mahony who has researched the identities of defendant intermediaries, relevant guidance and associated literature tends to view intermediary work as homogeneous.[971] For example, the Criminal Practice Directions outline the 'roles and functions' of intermediaries as a unified group without attention paid to the nuances associated with working with individual categories of witness.[972] The inability of some judges to differentiate Registered Intermediaries from non-registered intermediaries has also been highlighted with some concern.[973] My interview data suggests that intermediaries do recognise the differing demands of working with witnesses on one hand and defendants on the other. Such a finding should cause one to reflect on the state of the 'two-tier' system of intermediaries in England and Wales and consider its viability and desirability. For the purposes of the current chapter, we can focus on the principle of neutrality and how different approaches to intermediary work may impact its conceptualisation. If intermediaries consider that the two-tier system gives rise to different working demands, how does this impact their approach to the principle of neutrality?

Several intermediaries in England and Wales explicitly recognised the aforementioned divide created by the two-tier system. Beyond mere labels, these intermediaries outlined the practical differences between 'witness work' and 'defendant work' and indeed a considerable number stated their preference for defendant work over witness work. Two reasons cited were the increased autonomy of non-registered work and a desire to balance out the perceived injustices that defendants face throughout the criminal justice system.[974] For example, the plight of vulnerable defendants located in the dock, unable to follow proceedings, was highlighted. E&W-6 described the experience of one defendant confined to a 'glass thing, with two security guards either side of us - it didn't' feel conducive to communication'. When speaking about vulnerable defendants, the emotionally charged nature of intermediary work, and the toll it can take, was apparent. E&W-17 explained how sentencing can often be the most difficult stage for intermediaries to remain detached:

> 'What I really care about is their sentence. I really worry about vulnerable people who have done something wrong and then people don't take into account their vulnerability. That is what bothers

[971] Brendan O'Mahony, 'How do intermediaries experience their role in facilitating communication for vulnerable defendants?' (2013) DCrimJ thesis, University of Portsmouth.
[972] CPD (n 22) 3F.
[973] Plotnikoff and Woolfson (n 28) 124.
[974] For further discussion on equality of treatment between defendants and other witnesses, see: Diane Birch, 'Evidence: Evidence via Television Link and Video Recording of Interview with Child' [2001] Criminal Law Review 473, 477; Hoyano (n 307) 968; Jacobson and Talbot (n 114) 50.

me…I want them to be treated fairly. When I find out there's no presentencing report, when I find out that people take them straight to the cells, and they have no time to say goodbye to their wife of 60 years who's dying of cancer, that's when I get upset.' (E&W-17)

The potential blurring of the boundaries between the role of neutral communication conduit and sympathetic supporter here is evident. This links with O'Mahony's finding that some defendant intermediaries may form an emotional attachment to defendants and feel a sense of loss when a trial concludes, particularly when a defendant is convicted and imprisoned.[975] In their court report, intermediaries are obliged to explain the recommended duration of their involvement in a case. However, E&W-17's quote points to the risk of intermediaries recommending their involvement for purposes that are not directly tied to the facilitation of communication. As mentioned above, several intermediaries in England and Wales noted that vulnerable defendants have no dedicated support provision and no designated space within the court building except for the cells. The lack of court familiarisation visits for vulnerable defendants was also noted as plainly unfair especially considering these routinely took place for witnesses.[976] Despite this, many intermediaries took the initiative to organise a viewing of the court for defendants despite no judicial direction or policy requiring them to do so. These reflections reveal how intermediaries negotiate their own neutrality and are prepared to act beyond their agreed scope based on perceived inequalities.

In Northern Ireland, the unitary system of intermediaries has meant that such a sharp distinction has not emerged. Intermediaries in Northern Ireland recognised the right of defendants to effective participation and how defendants have a different stake in the criminal process compared to witnesses. Indeed, procedural differences between witness work and defendant work in terms of interview format and the length of time physically spent in the courtroom were noted. However, there was no obvious divergence in how the core aspects of the role were approached whether it was a vulnerable witness or a suspect/defendant being assisted. Interestingly, intermediaries in both jurisdictions felt that they were treated differently when working with defendants. E&W-3, who has extensive experience of both witness and defendant work, described this difference in treatment:

'Yeh, [the roles] are quite different. Well, I would say the role is similar but the way that it is perceived is so different, the way that you have to present the role has to be different if that makes sense?... there's a lot more resistance for intermediates for defendants than for witnesses...a lot more, so I think you have to be a lot more persuasive as a non-registered intermediary…' (E&W-3)

[975] O'Mahony et al (n 98) 162

[976] CPD (n 22) 3G.2 provides that it 'may be appropriate' for a vulnerable defendant to visit the courtroom prior to trial, sentencing or appeal, but in the experience of interviewees this rarely happens.

Despite interviewees in both systems acknowledging this disparity in treatment, the notion of having to consciously perform the role differently when working with defendants was only apparent in England and Wales. When I mentioned the concepts of 'witness work' and 'defendant work' to intermediaries in Northern Ireland they were viewed with a mixture of alarm and incredulity. Intermediaries in Northern Ireland spoke more about differences between individual courts and judges than about differences in their own approach to witnesses and defendants. Significantly, the judges interviewed in Northern Ireland echoed this conception of a unitary intermediary role:

> '…everybody is clear they are professional experts who are providing an independent role within the trial... I haven't noticed any difference and I have seen some intermediaries who have worked in both roles. I haven't discerned any difference.' [MCJ-2]

NI-3 explained how the unitary system is firmly embedded in the role's culture:

> 'We were told right from the beginning, I think it was the Lord Chief Justice who said this service will be available for witnesses and has to be for defendants too. From the get-go, I haven't known anything else.' (NI-3)

As a hallmark of the intermediary role, neutrality defines and shapes our understanding of its work and its content. The finding that intermediaries in England and Wales conceptualise and operationalise the principle differently is significant as we begin to understand the complexities of the role and the factors which affect its performance. Equally, the finding that intermediary provision in Northern Ireland has not generated this issue is important and invites comparison between the two jurisdictions.[977] The next section seeks to problematise the value of neutrality and suggests a fundamental rethink of its understanding and application within intermediary praxis.

7.7 Reconceptualising neutrality

Chapter 2, which tracks the emergence of the intermediary role, reveals how the position of an interlocutor/intermediary has not historically been characterised by its objectivity or detachment from the vulnerable individual. The findings explored in the present chapter suggest that the normative underpinnings of the intermediary are ripe for examination. This is premised on the paradox intermediaries display between the commitment to the ideals of neutrality on one hand and the struggle to remain within its normative parameters on the other. As has been explored, the approach

[977] For a comparison of intermediary provision between England and Wales and Northern Ireland see: John Taggart, '"I am not beholden to anyone… I consider myself to be an officer of the court": A comparison of the intermediary role in England and Wales and Northern Ireland' (2021) 25(2) International Journal of Evidence and Proof 141.

which intermediaries adopt towards their neutrality varies considerably and individual practices often reveal internal inconsistencies and contradictions. The fact that intermediaries demonstrate what I have termed 'congruent' and 'weak' illusio seamlessly, and often interchangeably, is significant. Questioning the normative basis of neutrality allows for recognition that complete consistency among practitioners is both unrealistic and undesirable.[978] Instead, the principle of neutrality should be viewed as necessarily reflexive in a way that allows for diverse attitudes and experiences of those executing the intermediary role. This would allow for the specific demands of the intermediary role to be considered, separate from standard accounts of neutrality which tend to focus on the complex processes of adjudication and dispute resolution.[979]

Reconceptualising the neutrality of the intermediary requires a more dynamic and relational view which sees the principle not as an endpoint, but as a process. This rejects the notion of neutrality as an inherent quality in favour of viewing it as a principle realised through striving towards a normative ideal.[980] It also echoes Kramer's theorisation of neutrality as an 'endeavour' by which individuals reach decisions prescribed by legal norms within a liberal-democratic system of law.[981] Such a model fits the realities of intermediary work and the nature of the role as unattached, autonomous yet simultaneously involved in the emotionally loaded details of a case and of the individuals involved. For example, the fallacy of intermediaries operating an evidential 'vacuum' described above highlights this point. Drawing on the court interpreter comparison, our conception of neutrality should allow the social skills of practitioners to be brought to the foreground during all communicative events.[982] Viewing these communicative events as co-constructed between the intermediary and the vulnerable individual (as indeed any other participating parties) allows for the complexity of communication barriers to be recognised.[983] Linked to Chapter 6, affording discretion to intermediaries in this way strengthens their professional jurisdictional claims through the trust and deference invested in them by fellow professionals.

The empirical data explored in this chapter reveals how intermediaries balance conflicting demands to uphold a neutral presentation. This often requires what Bergman-Blix and Wettergren describe as 'skillful inter-professional emotional attuning'.[984] The same authors use the concept of 'objectivity

[978] Brian Tamanha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010).
[979] William Lucy, 'The Possibility of Impartiality' (2005) 25(1) Oxford Journal of Legal Studies 3.
[980] Touchie (n 895); Roach, Anleu and Mack (n 354) 9.
[981] Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2009) 64.
[982] Wadensjö (n 891).
[983] Ibid.
[984] Stina Bergman Blix and Åsa Wettergren, 'The Emotional Interaction of Judicial Objectivity' (2019) 9(5) *Oñati Socio-Legal Series* 726.

work' to explain the nature and content of neutrality among different courtroom actors.[985] For example, they argue that adjudication requires judges to emphasise their 'impartial demeanour' whereas prosecutors experience a 'contingent and shifting' objectivity due to their case involvement and interaction with witnesses.[986] Acknowledging that criminal justice actors experience and perform neutrality differently allows us to focus on the interactional and emotional aspects of intermediary work that can often be viewed with suspicion. As Lucy notes, impartiality is not a ubiquitous term that is easily transferable between different contexts.[987] This does not mean that intermediaries are excused from neutrality as a duty, rather the value should be seen through the lens of a role which has a unique status within the criminal process and is populated by individuals with varied occupational backgrounds.

It is perhaps unsurprising that the quotes from intermediaries which point to a 'weak illusio' relate to conduct which would be deemed non-controversial in fields such as speech and language therapy, social work or teaching. For example, while both speech and language therapists and intermediaries are encouraged to build rapport with a vulnerable individual, the former may achieve this through empathetic concern and emotional support.[988] Intermediaries may make recommendations based on emotional issues affecting communication, however, any emotional support must be left to the court defendant support (in Northern Ireland) or a friend or family member.[989] Similarly, Carlen and Powell have pointed to a preference among social workers and probation officers to avoid inter-professional conflict through the use of 'courtroom lore' which involves close working relationships with lawyers and informal rule usage.[990] This resonates with the interactions described above between some intermediaries and police officers which arguably undermine the intermediary role's neutrality. Just as the craft of judging has deeply ingrained values which judges are rarely asked to reflect on and critically examine, intermediaries are recruited from backgrounds with their own sets of norms, values and unquestioned practices.[991] Indeed, O'Mahony et al identified potential conflict in roles resulting from some intermediaries 'wearing more than one professional hat'.[992] As noted above, Bergman-Blix and Wetergren argue for greater understanding of the heterogeneity among court professionals in terms of their objectivity and role performance. It seems odd not to examine the intermediary's relationship

[985] Ibid 723.
[986] Stina Bergman Blix and Åsa Wettergren, *Professional Emotions in Court: A Sociological Perspective* (2018) 161.
[987] Lucy (979) 30.
[988] Wendy Papir-Bernstein, *The Practitioner's Path in Speech and Language Pathology* (2018) 122.
[989] MoJ (n 56) 13.
[990] Pat Carlen and Margaret Powell, 'Professionals in the Magistrates' courts: the courtroom lore of probation officers and social workers' in Howard Parker (ed), *Social Work and the Courts* (Hodder and Stoughton 1979).
[991] Roach, Anleu and Mack (n 354) 61.
[992] O'Mahony et al (n 98) 160.

with neutrality in a similar vein and we should perhaps question whether the illusion of neutrality is necessary to the role's acceptance.

7.8 Conclusion

This chapter reveals the 'neutrality paradox' experienced by intermediaries in their work. While there exists a strong commitment to the normative principle of neutrality among all intermediaries, the role often transcends that of an objective communication conduit as framed by the relevant procedural guidance and case law. The normative expectation of the role as a detached, objective communication facilitator indicates a lack of understanding of intermediary work and its content. Bourdieu's concept of illusio operates as a useful explanatory tool for investigating how intermediaries conceptualise their own neutrality and how they negotiate its content. Reflecting on the strength (or weakness) of the illusio generated by intermediaries helps locate the intermediary within the social world of the criminal justice system. How and why intermediaries demonstrate indifference or lack of commitment to these values is instructive to understanding the role's scope in practice.

How should these findings influence the provision and organisation of intermediaries? A starting point must be a recognition of what O'Mahony et al term the 'intricacies of the non-partisan relationship' between intermediaries and the vulnerable individuals they assist.[993] This should be a feature of intermediary training so that practitioners are aware of how their commitment to neutrality may be challenged at different stages. Yet, a hurdle to any discussion of intermediary neutrality is the relatively poor understanding of the role among lawyers and judges who rarely see the 'behind-the-scenes' work involved. The urgent need for collaboration between judges, advocates and intermediaries has already been highlighted by Plotnikoff and Woolfson.[994] The unique challenges associated with intermediary neutrality must firstly be recognised before the viability of neutrality as an ethical standard can be seriously debated.

Finally, examining the intermediary role through the prism of neutrality reinforces a key theme emerging from my data: the roles of Registered Intermediaries and non-registered intermediaries in England and Wales are qualitatively different. In Northern Ireland, where a unitary system of intermediaries exists, such a distinction has not emerged, and neutrality appears a less complicated and contested aspect of the role. This finding should be instructive to the MoJ as it rolls out the HMCTS Court Appointed Intermediary Scheme (HAIS) in 2022. Based on current proposals, this will cover intermediary provision for vulnerable defendants to replace the current unregulated, ad-hoc system of

[993] O'Mahony et al (n 98) 164.
[994] Plotnikoff and Woolfson (n 37) 23.

non-registered intermediaries. At first glance, this proposal exacerbates the 'two tier' intermediary provision which has led to the emergence of what this thesis terms 'witness work' and 'defendant work'.[995] The MoJ needs to seriously consider how the perception of intermediary neutrality will be affected by formalisation of this distinction in intermediary work. Based on the experience in Northern Ireland, a unitary system of Registered Intermediaries who work with both witnesses and defendants appears best placed to avoid such a distinction emerging.

[995] Henderson (n 8) 11.

Chapter 8: Witness work, defendant work and participatory roles

8.1 Introduction

Damaska defines the adversarial criminal trial as 'proceedings structured as a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest'.[996] Conceptualised in this way, the trial as the centrepiece of criminal proceedings is depicted as a state mechanism to resolve grievances against suspects, defendants and offenders.[997] While the adversarial nature of criminal proceedings is often framed around the state's obligations in relation to establishing the guilt of the accused, it is now generally accepted that the administration of justice demands recognition of the rights and interests of other people affected by the criminal action.[998] This is one reason behind the movement towards modified adversarialism, discussed in Chapter 3. Despite this development, the primacy given to orality and cross-examination within the criminal trial leads some to question whether other parties, such as complainants and witnesses, can ever be fully integrated into the criminal justice process.[999] For example, Doak argues that these groups are 'conscripted' into a purely operational role in which their views, interests and rights are subservient to the collective interest of calling defendants to account for their actions.[1000] These issues go to the heart of how we conceptualise the aims and underpinning values of trial proceedings as discussed in Chapter 3.

This chapter focuses on the participation and, specifically, the relationship between intermediaries and the participatory roles of witnesses and defendants. It examines how the intermediary role is inextricably tied to the different ways in which vulnerable individuals participate within the criminal justice process. It returns to the concepts of 'witness work' and 'defendant work', which are further developed in this through a focused analysis of participatory rights. The data presented here suggest that the communication difficulties experienced by defendants, the inhibiting nature of the criminal court environment (in particular the dock) and the deficiencies in defendant intermediary provision

[996] Mirjan Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 University of Pennsylvania Law Review 506, 563.
[997] Doak (n 191) 1.
[998] Ibid; CPR (n 23) rule 1.1; Also see: *Doorson v Netherlands* (1996) 22 EHRR 330 where the ECtHR noted that: 'Contracting States should organise their criminal proceedings in such a way that [the interests of victim and witnesses] are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.' [43].
[999] Nicola Lacey and Hannah Pickard, 'A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27(2) The Journal of Political Philosophy 229.
[1000] Doak (n 191) 35. For an alternative account, see: Owusu-Bempah (n 254).

result in a form of participation which distinguishes defendants from witnesses. While the defendant's individual right to 'effective participation' is recognised through caselaw and relevant guidance, the experiences of intermediaries provide a unique insight into how the role adapts to differing participation roles and is, in turn, shaped by them. The findings from my interviews challenge a balancing approach to participation which seeks to equalise the rights of witnesses and defendants and the chapter attempts to analyse the meaning and experience of participation and how this can relate to the nature and scope of the intermediary role.[1001]

8.2 Participatory 'roles' and rights

Chapter 3 introduced participation as a core aim or value of the criminal trial and indeed the wider criminal justice process. When studying participatory roles, one difficulty is that the term participation may feasibly apply to a broad range of criminal justice participants. Edwards links participation to the broader concept of citizenship and the notion of 'being in control, having a say, being listened to, or being treated with dignity and respect'.[1002] This definition could apply to all victims, witnesses, defendants and even jury members. While participation is viewed as instrumental in achieving many criminal justice objectives, there is a need for clarity about how these objectives individually relate to different criminal justice participants.[1003] For example, Kirby et al discussed the 'multifaceted' nature of participation and conceptualises the term in relation to court users rather than focusing on one group, such as witnesses or defendants.[1004] Cooper at al highlight the usefulness of a 'generic, crossjurisdictional approach to participation'.[1005] Elsewhere in the same text, the authors point to the 'long established principle…that people should be able to participate effectively in the court and tribunal proceedings that directly concern them.'[1006]

It is widely accepted that non-defendant witnesses, as autonomous participants, should be treated with respect and dignity throughout the criminal justice process. As explored in Chapter 2, concern for witness welfare and facilitation of best evidence led to the introduction of the special measures regime

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[1001] John Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice' (2003) 30(2) Journal of Law and Society 309, 317; Andrew Ashworth, *The Criminal Process: An Evaluative Study* (2nd edn, Oxford University Press 1998) 30.

[1002] Ian Edwards, 'An ambiguous participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

[1003] Neil Walker and Mark Telford, 'Designing Criminal Justice: The System in Comparative Perspective, Report 14, Review of the Criminal Justice System in Northern Ireland' (London, HMSO) 10.

[1004] Amy Kirby, Jessica Jacobson and Gillian Hunter, 'Effective participation or passive acceptance: How can defendants participate more effectively in the court process?' (Howard League What is Justice? Working Papers 9/2014) 11.

[1005] Jacobson and Cooper (n 406) 4.

[1006] Ibid 1.

through the YJCEA. The interests of non-defendant witnesses is now codified through the overriding objective of the CPR which require courts to respect 'the interests of witnesses, victims and jurors and keeping them informed of the progress of the case'.[1007] Further, as per the CPR, the court is required to take 'every reasonable step' to facilitate the participation of *all* individuals within proceedings, including witnesses.[1008] However, reforms in England and Wales have not yet granted witnesses a set of procedural rights along the same lines as the defendant.[1009] For example, neither witnesses nor complainants enjoy a right to be present during the trial, question witnesses, present evidence or to have legal representation.[1010] Efforts to enhance or reform the role of non-defendant witnesses as participants have, so far, largely failed. Despite increased recognition of their status within the criminal process, Doak concludes that any formal non-defendant participatory right is 'fundamentally impossible to realise in a meaningful way'.[1011]

As noted above, the participatory rights of defendants are much more firmly established than non-defendants. Fundamentally, the accused enjoys the right to be present at his own trial as well as the right of confrontation.[1012] It is also a long-standing principle in criminal law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part.[1013] The right to effective participation is an 'implied' right which derives not only from the guarantees contained within Article 6 of the ECHR, but is implicit in the notion of an adversarial system of adjudication.[1014] The ECtHR first recognised the right to effective participation in the case of *Stanford v UK*.[1015] In *SC v UK,* the court explained that defendant enjoys not only the 'right to be present, but also to hear and follow the proceedings.'[1016] The court went further and stated that:

> 'effective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general

[1007] CPR (n 23) rule 1.1.
[1008] Ibid rule 3.8(3); CPD (n 22) 3D.2.
[1009] Owusu Bempah (n 254) 28; Hoegen and Ingeborg Brienen (n 401).
[1010] Doak (n 191) 138.
[1011] Ibid 158.
[1012] The right of confrontation under Art.6 of the Convention affords the defendant the right to 'examine or have examined witnesses against him'. Also see: Elmar Widder, The Right to Challenge Witnesses – an Application of Strasbourg's Flexible 'Sole and Decisive' Rule to other Human Rights (2014) 3(4) Cambridge Journal of International and Comparative Law 1084.
[1013] Jacobsen and Talbot (n 114) 8.
[1014] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (31st August 2020) 30.
[1015] *Stanford v UK* (n 436) [26].
[1016] *SC v UK* (n 422) [29].

thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.'[1017]

While subsequent case law has grappled with the concept of effective participation, the scope of the right remains relatively unclear. Although the court's explanation in *SC v UK* remains the most instructive statement on the right to effective participation, questions about its content and reach remain. Firstly, it is unclear whether the right includes the ability to provide coherent and intelligible testimony. The special measures which are available to defendants (use of live-link and intermediary assistance) were both introduced to facilitate the effective participation of defendants.[1018] It follows that since these measures seek to enable defendants to testify, and improve the quality of their evidence, the right to effective participation incorporates the ability to provide good quality evidence.[1019]

This chapter challenges a broad and generic approach to the concept of participation. Discussion of 'participatory parity' is not particularly helpful in answering the chosen research questions.[1020] One of the core findings of this thesis - that the intermediary role is plagued by confusion as to its parameters - becomes much more difficult to examine if participatory entitlements of criminal justice actors are homogenised. A more useful approach recognises that the criminal justice system is the 'scene of conflicting aims and interests' in which witnesses and defendants have different roles with correspondingly differing interests. [1021] This should facilitate a more nuanced analysis rather than a preoccupation with the notion of balance. Thus, it does not necessarily follow that participation rights must be granted to complainants simply because they are granted to defendants. A rigorous critique of individual participatory roles is an effective antidote to a 'zero-sum game' which assumes that promoting the rights of defendants must necessarily lead to losses for complainants.[1022]

Despite commonalities between witnesses and defendants, a distinction must be drawn. One can recognise the instrumental role intermediaries play in assisting the production of complete, coherent and accurate testimony of both defendant and non-defendant witnesses and also acknowledge the

[1017] Ibid.
[1018] Samantha Fairclough, 'The role of the principle of equality in the provision of special measures to vulnerable court users' (PhD Thesis, University of Birmingham 2017).
[1019] Abenaa Owusu Bempah, The interpretation and application of the right to effective participation (2018) 22(4) International Journal of Evidence and Proof 321, 327.
[1020] Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City-states and Democratic Courtrooms* (Yale University Press 2011) 17.
[1021] Andrew Ashworth, *The Criminal Process: An Evaluative Study (*2nd edn, Oxford University Press 1998) 30.
[1022] Jackson (n 1001) 313.

defendant's unique participatory role within the criminal process. [1023] To be clear, while intermediary involvement may contribute to efficient fact-finding, the participatory role of defendants is much broader and the defendant intermediary role invariably mirrors this.[1024] This enhanced participatory role reflects the accused's interest in criminal proceedings and the consequences of any outcome. The fundamental guarantees and protections which the defendant enjoys within the criminal process are based mainly on the public censure of conviction and state punishment which are at stake.[1025] To argue otherwise risks reliance on what Jackson terms a 'dubious symmetry' between the interests of witnesses on one hand, and the interests of the accused on the other.[1026] Rather than pursuing a 'justice for all' policy, a rights-centred approach better addresses the rights which complainants, witnesses and defendants are afforded within criminal proceedings. This chapter takes this position as a point of departure and argues that intermediary practice reflects the differing participatory roles enjoyed by witnesses and defendants. It elaborates the concepts of 'witness work' and 'defendant work' described in Chapter 7 and reveals how intermediaries conceptualise the differences between the two.

8.1 'Effective participation' means 'early participation'

Although difficult to imagine today, prior to the Police and Criminal Evidence Act 1984 (PACE) criminal defence lawyers had very little contact with their clients before their appearance at court. Since then, increased sociolegal research into the treatment of suspects at the police station has revealed the importance of advisors as a restraint on coercive police behaviour.[1027] While most attention has been given to the plight of vulnerable witnesses, it is now accepted that *any* individual who is unable to access relevant advice or support is placed at a disadvantage.[1028] Although not an advisor, the presence of the intermediary to continually assess the defendant's ability to participate and intervene if necessary, acts as a safeguard for his welfare and treatment.[1029] Recent research has shown how suspects with mental health disorders are over-represented in custody and that many suffer heightened levels of

[1023] S.16(3) YJCEA.
[1024] Owusu-Bempah (n 254) 6.
[1025] Abenaa Owusu-Bempah, 'Penalising Defendant Non-Cooperation in the Criminal Process and the Implications for English Criminal Procedure' (PhD Thesis 2012) 27; Andrew Ashworth and Lucia Zedner, 'Justice Prevention: Preventive Rationales and the Limits of the Criminal Law' in Antony Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 293.
[1026] Jackson (n 1001) 317.
[1027] Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused: The Organization and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 101; John Walkley, *Police Interrogation* (Police Review Publishing Co. 1987); Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (Routledge 2011).
[1028] Ibid 100.
[1029] HM Government 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children' (July 2018) 11.

suggestibility, compliance, and acquiescence.[1030] It is, therefore, difficult to explain or justify the fact that intermediaries are almost never matched with vulnerable suspects at the police station in England and Wales (see Introduction).[1031]

The importance of intermediary involvement at the police station for vulnerable suspects was a prevailing theme across my interviews and a preference for earlier involvement can be linked to how intermediaries conceptualise defendant participatory rights. Consistent with Owusu-Bempah's position that the term 'effective participation' needs clarification, the reasons advanced by intermediaries were multifaceted and reveal different understandings of the right's content.[1032] It was noteworthy how no intermediary resorted to the narrative of 'equal justice' i.e. that suspects should be automatically entitled to the same level of intermediary access as vulnerable complainants.[1033] Instead, most interviewees spoke separately about the position of the accused and the myriad participation challenges they face in criminal proceedings. As the study sample consisted of intermediaries who had experience working with both witnesses and defendants, this finding is significant. The following analysis reveals that intermediaries conceptualise 'witness work' and 'defendant work' based not only on the differences in governance and organisation of the roles, but also because of differing participatory entitlements.

8.3 Assessment and interview

As noted above, the legislative basis for defendant intermediaries in England and Wales limits assistance to the period of testimony. In England and Wales, while judges have allowed for broader involvement at trial, defendant intermediaries become involved in proceedings much later than Registered Intermediaries for witnesses.[1034] This practice, which is directed and overseen by the judge, seems to have led to a degree of passive acceptance among intermediaries. Most intermediaries whom I interviewed in England and Wales had no experience of assessing a suspect prior to police interview and viewed the defendant role as being primarily court based. Indeed, the two police officers interviewed had never encountered an intermediary assisting a suspect and viewed the role as intrinsically witness focused: "intermediaries go with witnesses, appropriate adults with defendants"

[1030] Gisli Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' (2018) 15 Legal and Criminological Psychology 161; Björn Hofvander Henrik Anckarsäter, Märta Wallinius, and Eva Billstedt, 'Mental health among young adults in prison: The importance of childhood-onset conduct disorder' (2017) 3 BJPsych Open 78.
[1031] Farrugia and Gabbert (n 65).
[1032] Owusu-Bempah (n 1019).
[1033] Jackson (n 1001).
[1034] Email from Communicourt to author (22 April 2021).

(PO-2). Despite this, when intermediaries were directly questioned in interview, there was unanimous agreement that the role *should* be involved as early as possible. It seemed counterintuitive to them that a vulnerable suspect, who later warranted intermediary assistance at court, would have had to endure a police interview without an intermediary:

> 'It just makes no sense whatsoever, because all the damage is done already because the interview has already taken place, so loads of stuff has gone on already and its inherently unfair. Like my guy who I went to court with recently as a defendant, he said 'I just wait my turn and then I answer when they ask and I don't really pay attention. I would like to understand' but it was just beyond him.' (E&W-10)

The picture depicted by E&W-10, of a vulnerable defendant who 'participated' in a police interview, yet was seemingly oblivious to the case against him, is a regrettable consequence of the current defendant intermediary provision. It resonates with what Baldwin and McConville term the 'profound sense of non-involvement' many defendants experience, despite being legally represented.[1035] When we compare such examples with the early involvement of Registered Intermediaries for witnesses, questions around the participatory roles of both groups come into focus. In interview, intermediaries explained the importance of assessing the vulnerable witness with the police officer in attendance, planning the Achieving Best Evidence (ABE) interview with the officer based on their observations in assessment and working through the questions to ensure their suitability. The evidential importance of the ABE requires 'effective planning' and intermediaries were generally very positive about their suggestions and recommendations being listened to by police.[1036] My interview data echoes the observations of Plotnikoff and Woolfson that effective coordination of ABE interviews can involve phone calls, emails and sharing of question formats between police and intermediaries.[1037] The Registered Intermediary Procedural Guidance now sets out in detail how interaction between Registered Intermediaries and police should be conducted.[1038]

In Northern Ireland, the DoJ justifies the provision of intermediary assistance at the police station on the need to 'enable suspects to participate effectively when being interviewed by the police'.[1039] As discussed in Chapter 7, one consequence of providing Registered Intermediaries for both suspects at police interview and witnesses at Achieving Best Evidence (ABE) interview is that the concepts of 'witness work' and 'defendant work' have not emerged. Police feedback on intermediaries has been

[1035] John Baldwin and Michael McConville, *Jury Trials* (Oxford University Press 1979) 83.
[1036] Criminal Justice Joint Inspectorate, 'A joint inspection of the treatment of offenders with learning disabilities within the criminal justice system' (January 2014) [5.9].
[1037] Plotnikoff and Woolfson (n 37) 77.
[1038] MoJ (n 56) 12-13.
[1039] DoJ (n 46) 3.

extremely positive and there are collaborative efforts to improve identification of vulnerability.[1040] Despite these developments, challenges have emerged. A recurring theme among intermediary interviewees was the comparative lack of time for planning and reviewing questions prior to a suspect interview compared to an ABE interview. NI-4 explained that this issue, as well as the confrontational style of the suspect interview, exacerbate the risks of miscommunication and the need for intermediary intervention:

> 'There won't have been the same time for planning. To be honest, when I do intervene it's sometimes met with irritation. The police, going into that suspect interview, have a very specific tunnel of questions that they want to ask. They're not used to deviating off or changing language, so I can understand that it's different for them and for someone like me to come in and question their questioning and it is asking a lot of them.' (NI-4)

This example suggests that even when witnesses and defendants enjoy equal intermediary access at the investigative stage, the task of facilitating communication can vary significantly. Similarly, it highlights how distinctions between 'witness work' and 'defendant work' may emerge within a unitary system of intermediaries. As NI-4 explained, many of the communication issues associated with suspect interviews arise not only because of external time pressures, but also because of their intrinsically confrontational style. It seems likely that if intermediaries in England and Wales were involved with suspects at the investigative stage (as they are in Northern Ireland) the distinction between 'witnesses work' and 'defendant work' would be reinforced.

The defendant's presence at the police interview also engages the Article 6 right to effective participation.[1041] Arguably, without an intermediary, many vulnerable suspects cannot reach the threshold for participation as set out in *SC v UK*. The involvement of intermediaries in assessing vulnerable witnesses pre-interview is premised on aiding participation through the facilitation of communication, yet the same reasoning has not led to similar provision for defendants.[1042] Intermediaries highlighted this unsatisfactory situation and their reflections shed light on how they conceptualise defendant participation. The thrust of their responses may be summarised as follows: while witness involvement amounts to a mere snapshot of proceedings, defendants must be assessed more globally based on their need to understand and follow the whole of a case. E&W-3's view on this distinction outlines the point:

[1040] DoJ (n 566) 6.

[1041] Owusu-Bempah further argues that the case law in respect of legal advice to remain silent creates expectation of defendant participation see: Owusu-Bempah (n 254) 110.

[1042] As explained above, intermediaries for witnesses and defendants are both engaged to help further the broad criminal justice objective of 'achieving best evidence'. Also, see: Owusu-Bempah (n 254).

> 'With a defendant you have to assess, it is a different skill-set standing and answering questions to sitting in a dock for maybe days and weeks, processing all that information, listening to a lot of complex language, having to pick out all the important points, assimilate it and somehow understand which parts are relevant to your case…with a witness you only need to assess their ability to understand the questions and give the answer…whereas with a defendant you also have to be able to assess their ability to sit in a dock, so the assessments are longer with a defendant generally.' (E&W-3)

Differences in assessment approach were broadly acknowledged by most intermediaries in interview. As discussed above, intermediaries generally accepted that 'defendant work' is distinct and operates under different rules than 'witness work'. Yet, it was by explaining the participatory role of defendants that the distinction became most apparent:

> 'When it is a defendant being assessed, I am thinking more about their ability to understand things that aren't directly involving them. That is the difference really and their understanding has to be so much bigger. It is so challenging understanding what is going on in court from minute to minute. It's really hard to get your head around, and the volume of information is huge so I am thinking about that more really.' (E&W-10)

These comments reflect a recognition among intermediaries that the participatory role of the accused is not only broader than that of witnesses, but also more complex and individual. At the assessment stage, the intermediary can prospectively evaluate how well the accused will navigate the communication challenges of the criminal justice system. It is, however, absurd to suggest that such challenges first emerge at court. Indeed, suspects in police interview may be at higher risk of not fully understanding the significance of questions put to them or the implications of their answers.[1043] E&W-10's comment that intermediaries become involved after the 'damage' of the suspect interview is concerning but also revealing. In this context, this 'damage' may often equate to the denial of participatory rights as the vulnerable accused struggles to understand the evidence against him and what is at stake. As Dehaghani notes, PACE Code C, which outlines the requirements for the detention, treatment and questioning of suspects, implicitly recognises that suspects are afforded additional safeguards at police investigation.[1044] It follows that the 'damage' done to suspects is theoretically preventable, or least limitable, through the appointment of a suitable intermediary.[1045]

[1043] Gudjonsson et al (n 825); Roxanna Dehaghani, 'Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody' (2021) 30(2) Social & Legal Studies 251.
[1044] Dehaghani (n 1043).
[1045] The appointment of an AA may be appropriate in certain situations, but the role is markedly different from that of an intermediary: see Dehaghani (n 825).

While defendant intermediaries work predominantly in and around the trial, interviewees recognised that someone struggling to comprehend questions from a barrister in court will inevitably struggle to comprehend questions in a police interview. This supports Hodgson's contention that defence participation is actually *most* important at the pre-trial investigation stage.[1046] Fairness requires that the accused is properly informed about critical choices and can have his voice heard — two imperatives which are clearly engaged at this early stage of investigation.[1047] In a similar vein, McConville et al identify the police interview as the key forum where the complex, interactive process of case construction takes place.[1048] If we view access to legal advice, disclosure of evidence and authenticated interview recording as conductive to 'informed defence participation',[1049] why then would a vulnerable suspect's access to an intermediary not also be considered as such? In addition, there is a risk of adverse inferences being drawn where a defendant relies on facts not mentioned in police interview.[1050] This increases pressure on suspects to answer police questions, despite possible communication problems.[1051] For all these reasons, there is a strong argument for prioritisation of intermediary presence at police interview to protect the accused's participation — something which is not happening in practice.

Despite the lack of intermediary presence at the investigatory stage for suspects, it is instructive to reflect on this preliminary stage when considering how defendant participation may be conceptualised. The Divisional Court in *OP* recognised the unique challenges vulnerable defendants face under cross-examination at court, which it noted amounts to the 'point of maximum strain'.[1052] It held that when the accused submits himself to such questioning, the 'developed skills' of an intermediary would often be required. Since defendant intermediaries are appointed to ensure the defendant's right to effective participation, this invariably includes the role's involvement with the accused during court examination. As the previous paragraph outlined, the accused's participation during suspect interview ought to be relevant to the broad assessment of participation. It is ill-conceived to argue that the accused's

[1046] Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial 2: Judgment and Calling to Account* (Hart Publishing, 2006) 223, 241.
[1047] McKeever (n 406) 233.
[1048] McConville, Sanders and Leng (n 761).
[1049] Owusu Bempah (n 254) 100.
[1050] See: Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogodrodova and Taru Spronken*, Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia 2014) 275.
[1051] In the case of *R v Biddle* (n 74), it was argued that the trial judge should not have directed the jury that an adverse inference could be drawn, pursuant to section 35 of the CJPOA, from the appellant's failure to give evidence. The appellant' representatives argued that the is decision to do so was Wednesbury unreasonable as a result of the withdrawal of the intermediary. While the appellant addressed all the allegations fully at the police interview, the nature of his communication difficulties raises serious question marks over his ability to comprehend and process the evidence.
[1052] [36].

participation, which is explicitly recognised during trial examination, should not extend to confrontation at police interview.[1053] This point was reinforced by the ECtHR in *Panovits v Cyprus* which held that effective participation is engaged from the beginning of a criminal investigation and, in particular, 'during any questioning by the police'.[1054]

Roberts and Zuckerman stress the importance of 'open exchange of arguments and information at every significant stage of the litigation' which includes the nature of the prosecution case 'well in advance of trial'.[1055] However, this presupposes comprehension of such information by the accused, which the empirical data reveal is patently not the case.[1056] While the presence of legal representatives is beneficial to the accused at police interview, it can also act to marginalise and exclude participation.[1057] Indeed, intermediaries in interview cited countless examples of being appointed to a vulnerable defendant at court who had little to no appreciation of the case against them despite having the benefit of a lawyer during suspect interview. E&W-3 summarised the plight of defendants with an analogy: "it's like [the defendant] being asked questions about chapter 12 of a book without having read the first 11 chapters." Such a description is realistically not applicable to vulnerable witnesses who have a 'snapshot' involvement in proceedings compared to defendants. Recognising that the accused's participatory role and participatory rights apply at the investigatory stage means that intermediary assistance should be available both at the investigative stage and in the courtroom.

8.4 'Pragmatic and flexible' intermediary appointments

Apart from unequal intermediary provision between witnesses and defendants, no other issue has caused more contention among the intermediary community than the terms of intermediary involvement with a vulnerable defendant.[1058] What have become known as 'evidence only' appointments have been criticised by commercial intermediary providers, such as Communicourt, who have adopted a blanket policy of refusing such requests. Communicourt argues that it is unfair to expect an intermediary coming late to proceedings to build adequate rapport with a defendant and to be 'in

[1053] Geoffrey Stephenson and Stephen Moston. 'Police interrogation' (1994) 1 Psychology, Crime and Law 151.
[1054] [2008] 27 BHRC 464 [67].
[1055] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press 2010) 57.
[1056] Directive 2012/13/EU on the right to information in criminal proceedings stipulates that information about applicable procedural rights should be given in an "easily comprehensible manner" (paragraph 22).
[1057] Hodgson (n 1044) 243; Zenon Bankowski and Geoff Mungham, *Images of Law* (Routledge 1976) 86.
[1058] This assertion is based upon my experience of interviewing intermediaries, attending different conferences where the intermediary role has been discussed and many informal conversations with other academics and lawyers working in this area.

tune' with the specifics and context of the case.[1059] Their position is also based on the potential negative impact on the defendant, for example, that he 'may not fully understand the prosecution case or be able to instruct his/her legal team without the use of an intermediary.'[1060] This echoes Hoyano's argument that if a defendant cannot understand questions in the course of his own testimony without an intermediary, it is highly probable that he will not understand the rest of the trial without one.[1061] As defendant intermediary appointments are entirely ad-hoc, the terms of appointment are decided by the judge. Section 104 of the Coroners and Justice Act 2009 (CJA) provides for defendant intermediary involvement for the period of testimony only, and the early case law which considered the role's scope reinforced this. The Divisional Court in *OP* drew a distinction between the two types of assistance which a vulnerable defendant may require.[1062] The first, which the court considered could be performed by an adult, such as a friend or relative, involves assisting the vulnerable individual throughout the whole trial by providing 'general support, reassurance and calm interpretation of unfolding events'.[1063] The second, which requires the presence of an intermediary, involves assisting a defendant during his testimony and providing 'skilled support and interpretation'.[1064]

In interview, intermediaries were eager to correct a misassumption that they routinely recommend their involvement at every stage of proceedings. As noted in Chapter 6, 24 percent of all defendant assessments conclude that an intermediary is not required and there was palpable frustration among interviewees that many police, lawyers and judges view the intermediary role as 'self-serving'.[1065] The substance of intermediary recommendations is instructive to understanding how defendant participation is conceptualised by intermediaries. Although a handful of intermediaries wanted to see much wider involvement for the role as a starting point, a much more representative view was that a 'pragmatic and flexible' (E&W-16) approach would better reflect the individual participatory needs of defendants. While intermediaries were broadly dissatisfied with the 'rarity' provisions of the Criminal Practice Directions (CPD),[1066] this disgruntlement stemmed from the fact that it deprived them of flexibility in terms of their recommendations. E&W-16 explained the importance of intermediaries

[1059] Communicourt, 'Decision Making in Respect of Intermediary Appointments for Defendants' <https://www.communicourt.co.uk/wp-content/uploads/2013/05/1-and-2.-Decision-making-in-respect-of-intermediary-appointments-for-defendants.pdf> accessed 5 March 2021.
[1060] Email from Communicourt to author (21 April 2021).
[1061] Laura Hoyano, 'Coroners and Justice Act 2009: special measures directions take two: entrenching unequal access to justice?' (2010) 5 Criminal Law Review 345, 360.
[1062] *OP* (n 64).
[1063] Ibid [34].
[1064] Ibid [36].
[1065] Backen (n 371) 67. Precise figures on the proportion of cases in which an intermediary is recommended for evidence only are hard to obtain. Intermediaries from Communicourt, however, recommend their involvement for evidence only in less that 1% of cases (E-mail from author to Communicourt, 21 April 2021).
[1066] CPD (n 22) 3F.14. For further discussion, see Chapter 1.

being afforded latitude when crafting their recommendations but equally being responsive to the individual needs of the vulnerable defendant:

> 'I think it's worth being pragmatic and it's worth being flexible rather than dogmatic. In lots of ways the role is carried and can be won through flexibility and by being responsive to the needs of the court. I don't know how anyone could advocate a position where every defendant needs an intermediary for the whole trial.' (E&W-16)

This characterisation of the role in defensive terms, as one that can be 'won' through tactical action, mirrors the arguments made in Chapter 6 - intermediaries are aware of the constant pressure to reinforce their professional expertise and jurisdiction. This was also evident in Northern Ireland with NI-7 stressing that intermediaries: 'should be able to decide when an intermediary isn't needed, because that's where our demise will come.' While these quotes illustrate the protectiveness of intermediaries over their expertise and ability to authoritatively make recommendations to the court, they also speak to an appreciation of defendant participation and its content. Intermediaries rejected the 'full trial' versus 'evidence only' dichotomy and explained how they often recommend their involvement at discrete stages of proceedings, such as pre-trial conferences, during the prosecution's case or even at sentencing. This data is fascinating not only because defendant intermediaries are under-researched, but also because it reveals how intermediaries respond to the different participatory role of defendants compared to witnesses. While for witnesses the focus of intermediary involvement is oral testimony, interviewees recognised the unique communication challenges the criminal justice system generates for defendants and how the intermediary role must creatively adapt to confront them. As the examples in the following paragraphs illustrate, the unique participatory needs of defendants contour the scope and character of the intermediary role and support the conceptualisation of 'witness work' and 'defendant work'.

8.5 Pre-trial involvement: consultations and guilty pleas

The configuration of criminal justice spaces can impact the nature of social relations and the ability of citizens to participate.[1067] The spaces in which the intermediary meets, interacts and communicates with other actors are instructive to understanding how the role operates and the potential limitations on its functions. The importance of a designated space with aural and visual privacy where a defendant can instruct his legal advisors is recognised in the Court and Tribunal Design Guide.[1068] It provides that

[1067] Mulcahy and Rowden (n 474) 10.
[1068] HM Courts and Tribunal Services, 'Court and Tribunal Design Guide' (HMCTS 2019) 142.

'other associated parties' may also be in attendance, which would seem broad enough to cover an interpreter or an intermediary if either, or both, are appointed.[1069] While it is common for defendant intermediaries in England and Wales to attend legal consultations, the interview data revealed how crucial this stage of proceedings is viewed in terms of assessing the defendant's communication and, by extension, his participation in proceedings. Unsurprisingly, the value of intermediary attendance at consultations where legal instructions are given is increased when the vulnerable defendant has not previously been assessed. In such circumstances, which appear worryingly common, intermediaries viewed pre-trial consultations as a crucial juncture to the defendant's prospective participation. E&W-1 explained:

> 'sometimes I've gone for conferences and it's the first time the defendant has fully understood the evidence against them and they have pleaded because they basically realise that they are not going to win and there is no point in chancing their luck because it's not going to work, but if you think about money and the time that saves in court for the sake of a conference.' (E&W-1)

E&W-17 also highlighted the importance of intermediary involvement at legal consultations when the defendant is deciding how to plead:

> 'I might help them to plead guilty if that's what they need to do. That's when you need me there. I had a case when I've actually said: 'please appoint me on the first day because the barrister's saying there is so much overwhelming evidence'. Six years ago I went to see a defendant in a pretrial conference with his barrister. The barrister said: 'there's DNA evidence Billy'. Billy said: 'didn't do it'. They said it five times and I said: 'Billy, they found bits of your body in her knickers'. He went: 'yes I did it' and we had no trial. So, I am convinced that we have *such* a role to play meanwhile.' (E&W-17)

Most intermediaries described similar experiences, whereby their involvement was viewed as an efficient way of helping to procure a sensible guilty plea. This aspect of the intermediary role has been recognised by Plotnikoff and Woolfson as instrumental to pre-trial processes being adapted 'so far as necessary' to facilitate the defendant's effective participation.[1070] Backen remarks that many vulnerable defendants with poor reasoning stubbornly deny charges as they believe it is their 'best way to freedom', despite overwhelming evidence to the contrary.[1071] This element of participation is

[1069] Ibid; In a recent virtual trial pilot study conducted by JUSTICE, provision was made for a 'virtual room' for the defendant to consult with counsel: Linda Mulcahy, Emma Rowden and Wend Teeder, 'Testing the case for a virtual courtroom with a physical jury hub Second evaluation of a virtual trial pilot study conducted by JUSTICE' (JUSTICE 2020) 4.
[1070] Plotnikoff and Woolfson (n 37) 261.
[1071] Backen (n 371) 40.

uniquely defendant centred and very clearly distinguishes 'defendant work' from 'witness work.' Beyond this transactional facilitation of communication, the intermediary may play an unrecognised yet important role in legal consultations: mitigating pressure from defence counsel who seek to 'negotiate' with the prosecution, resulting in a guilty plea. E&W-17's example above could accurately be described as the intermediary communicating the barrister's advice in more comprehensible terms. However, the empirical findings of McConville and Baldwin point to a more concerning practice of defence counsel coercing defendants into pleading guilty.[1072] Helm's more recent empirical work identifies 'problematic incentives' to plead guilty which, more worryingly, appear to disproportionately affect vulnerable defendants.[1073] Admittedly, it is difficult to empirically gauge the impact that intermediary presence may have on defence lawyers in terms of their advice regarding plea. There may also be questions over the blurring of lines between a) good communication facilitation that helps the defendant to understand the evidence and b) the intermediary effectively encouraging a guilty plea.

In my interviews, only one intermediary specifically addressed the issue of guilty pleas being procured. E&W-10 noted the case of one defendant who 'miraculously' pleaded guilty after his defence counsel visibly struggled to amend questions in line with the intermediary's recommendations. The intermediary was suggesting that the guilty plea was procured to save the barrister the ordeal of an uncomfortable examination-in-chief. This example resonates with the court workgroup's view of the guilty plea as an efficient method of case disposition, with little regard given to the deleterious effect on the defendant's right to fully challenge the prosecution case.[1074] While my sample did not include legal representatives, it would be insightful to interview defence lawyers and intermediaries, *ex post facto*, about their experiences of consultations in which the defendant decided to plead guilty. The potential of the intermediary to act as restraint on defence representatives raises a litany of questions about defendant participation but also about the scope of the intermediary role, in particular its neutrality and relative status within criminal proceedings.

8.6 The 'unknowns' of defendant work

The decision to plead guilty will often require the intermediary's communication expertise, yet the role is potentially much broader and more varied. Reflecting on the pre-trial position of witnesses compared

[1072] Baldwin and McConville (n 1035) 39; Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused: The organisation of criminal defence lawyers in Britain* (Clarendon 1994); Peter Nardulli, *The Courtroom Elite* (Ballinger Publishing Company 1978); Eisenstein and Jacob (n 447).
[1073] Rebecca Helm, 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial' (2019) 46(3) Journal of Law and Society 423.
[1074] Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process* (Little Brown and Company 1965).

to defendants, E&W-16 recognised the significance of the defendant's pre-trial discussions with counsel and remarked that 'with defendants you are more actively making sure they've understood'. This enhanced defendant intermediary role at the pre-trial stage was recognised by almost every interviewee and reflects the perception that defendants require a broader understanding of the case and its potential ramifications. E&W-14 drew an interesting comparison:

> 'I think the witness has a very limited role at court. They are there to literally turn up…so all they are there to do is to be cross-examined. Whereas, with a defendant there are still so many unknowns…the intermediary needs to be there [at the consultation] so the defendant is able to give instructions and understand what is going on.' (E&W-14)

The 'unknowns' which E&W-14 described warrant closer examination. As well as helping to facilitate guilty pleas, these relate to the defendant's prospective role in proceedings and centre on some salient issues: a) does the defendant understand the charges and prosecution evidence? b) is the defendant able to point out those aspects of prosecution evidence with which he disagrees? c) is the defendant able to instruct his lawyer? This is not an exhaustive list, but it underscores how, even prior to a trial, the defendant's participation is engaged. As discussed in Chapter 3, it is paradoxical that intermediaries assess the defendant's ability to effectively participate yet are prohibited from expressing an opinion on the issue of competence.[1075] Of course, an intermediary appointed at the investigative stage will be able to assess the defendant's communication and prospective participation much earlier, as evidenced by intermediary practice in Northern Ireland.[1076]

Perhaps the most significant 'unknown' at the pre-trial stage, apart from the decision as to plea, relates to whether the defendant will give evidence under examination. While this chapter advocates a broad understanding of defendant participation, it is understandable that much significance is given to oral examination. Lady Justice Rafferty's remarks in *OP* that cross examination represents the 'point of maximum strain' for the defendant reflects this view.[1077] Intermediaries in interview placed importance on *all* vulnerable individuals being given a full opportunity to have their voice heard in court 'to enable them to give their best evidence.' (E&W-8) For example, enabling young sexual abuse complainants to give evidence brought a sense of fulfilment to intermediaries who perform a role that can often be solitary and underappreciated. Yet, my interview data suggest that the oral testimony of the accused, around whom the criminal trial seemingly centres, is approached differently by intermediaries. This is

[1075] In determining whether a defendant is fit to plead, a court should consider whether the use of an intermediary or other special measures would enable a defendant to be accommodated within the trial process: *R v Walls* [2011] EWCA Crim 443 [37].
[1076] DoJ (n 563) 3.
[1077] *OP* (n 64) [36].

not to suggest that intermediaries demonstrated less commitment to ensuring the best evidence of witnesses is produced. Instead, it may stem from the perceived lack of support for defendants compared to witnesses and the belief that facilitating a defendant's 'best evidence' at times requires catalytic action from the intermediary. This perception of inequality was discussed in Chapter 7 and is evidenced by the following comment from E&W-13:

> 'The defendants are at a loss at the start [and] have got as many needs, if not more, and they have got nothing. I came into the defendant work partly because I was seeing defendants not getting help which is ethically and morally wrong to me.' (E&W-13)

Focusing on the decision about whether to testify, my interview data suggest that intermediaries assume a more proactive role in a bid to secure defendant participation. E&W-17 revealed how intermediaries can feel compelled to 'enable' defendants to give evidence in a way that exceeds the orthodox facilitation of communication role. Beyond tackling the perceived systemic inequalities within the criminal justice system, intermediaries can find themselves fighting the defendant's corner against the advice of legal representatives:

> 'Barristers don't want them to give evidence either. Barristers don't want inconsistent defendants getting in the witness box and saying the wrong thing. I was with one about six weeks ago, somebody who had just become a QC, who thought he really knew his stuff. He said twice to this defendant, in a week and a half trial – 'I'm not sure it's a good idea for you to give evidence"… in front of me I said: 'really? Why would that be? Because the jury really need to hear his voice. All they've got to see him sitting in the dock, they've got no idea about who he is', and when you hear somebody's voice it completely changes. He said it to him twice, and I pushed and he gave evidence and he was acquitted. That's not my job, I'm not there to get anybody acquitted- but if he just had his barrister standing up for him I don't think they would have got the flavour of what this man was.' (E&W-17)

E&W-17 was aware that by pushing the defendant to give evidence she overstepped the limits of her neutral, objective role. Her actions seem to be in response to the defendant's role being minimised and the perceived failings of the defence barrister to protect his client's best interests. Just as intermediaries justify the stretching of their impartiality as part of the overriding responsibility to facilitate communication (see Chapter 7), E&W-17's eagerness for the defendant to testify may arguably be viewed through a participatory lens. This position views the accused's 'voice' as their focal instrument with a pressing need for the jury to see 'who he is' and for him to be recognised as a rational and

autonomous human being.[1078] The ethical issues with this position are, however, plain to see. What did the defendant want to do and was his decision to testify truly informed? E&W-17's actions seem veiled with concern for the accused's participation but should cause us to question the extent to which his individual autonomy was respected. It is worth briefly noting again that in Northern Ireland, where the concepts of 'witness work' and 'defendant work' were not recognised by intermediary interviewees, these ethical issues relating to neutrality were not so pronounced.

It is important to remember that the intermediary and defence barrister have different roles and duties which ultimately impact how they conceptualise and engage with the right to effective participation. Intermediaries, owing their primary duty to the court, are concerned with the facilitation of communication which often seems indistinguishable from, or at least instrumental to, their role in facilitating participation. Access to legal representation has been interpreted as integral to effective participation, in particular since a lawyer will often be best placed to articulate the defendant's version of events and also to challenge the evidence against him.[1079] A barrister owes a professional obligation to act in the best interests of his client, which may not necessarily result in advice that the accused should testify.[1080] Indeed, a defendant may understand the 'thrust' of what is said in court and be able to follow proceedings yet decide not to testify based on legal advice.[1081] The above exchange between E&W-17 and defence counsel suggests that settings such as legal conferences may act as sites of conflict between these two positions.

An alternative perspective is that E&W-17's frustration was based on a misassumption that both she and the barrister were primarily concerned with effecting the same right. Lord Thomas in *R v Grant Murray* noted that intermediaries are 'instructed to provide advice and guidance to the judge (and to the advocates), not to dictate to anyone what is to happen [or] interfere with the functions of others'.[1082] While intermediaries are intimately concerned with ensuring the right to effective participation, the burden to ensure the right is upheld ultimately rests with the trial judge.[1083] E&W-17's actions arguably blur the boundaries between the responsibilities of criminal justice actors in protecting the right to effective participation and, in the words of Lord Thomas, suggest that she 'misunderstood her role'.[1084]

[1078] Lai Ho (n 237) 105.
[1079] Owusu-Bempah (n 1017) 332.
[1080] Bar Standards Board (n 525) Part 2: Code of Conduct, CD2.
[1081] Kirby et al (1004) 9.
[1082] *Grant Murray* (n 12) [199].
[1083] Ibid. This point was also echoed by the Court of Appeal in *R v Thomas* (n 18) [38].
[1084] Ibid.

Yet not all vulnerable defendants who require intermediary assistance decide to testify. It is often not appreciated that only 47 percent of defendants who benefit from the assistance of an intermediary choose to give evidence.[1085] At consultation stage, intermediaries must also assess the utility of their assistance throughout the 'first half' of proceedings in helping the defendant to understand the impact of his decision.[1086] These nuances of the defendant intermediary role question the participation narrative that focuses solely on the defendant's testimony. The accused who chooses not to testify should be treated as a free, dignified and autonomous agent within his own trial whose participatory role extends beyond the witness stand.[1087] Theories of the criminal trial which centre on defendant participation through oral testimony, such as those advanced by Duff et al, struggle to accommodate this position since they are undergirded by a normative expectation that the accused will testify.[1088] Duff's conception of the trial as a 'communicative enterprise' is premised on engaging the accused through 'argument and justification'.[1089] A non-testifying defendant who seeks to put the prosecution to proof remains worthy of a participatory role through what Ho terms as a 'dialogue' throughout the trial.[1090] An intermediary assisting a non-testifying defendant may even assume a heightened responsibility since this 'dialogue' will not be reciprocal in the same way. While effective participation is broadly construed, providing testimony is an important element since the accused can demonstrate an awareness of the case against him through his answers to questions. When a defendant does not testify, the scope for defendant engagement is invariably restricted and thus the intermediary may have to compensate for this. As Ho argues, the trial has a 'communicative purpose', but the form of the defendant participation within it varies and intermediaries are responsive to this through the facilitation of communication.[1091]

8.7 Participation and the dock

A focus of the chapter so far has been on differentiating criminal justice participants based on their individual participatory roles. Although these roles are often discussed in abstract terms, they are reified through the criminal justice built environment and the spaces within it.[1092] The ability of criminal justice spaces to encourage or inhibit participation has been the subject of sociolegal enquiry, much of

[1085] Communicourt (n 21).
[1086] Ibid.
[1087] Owusu Bempah (n 254) 44.
[1088] Duff et al (315) 101.
[1089] Duff (n 324) 133.
[1090] Lai Ho (n 237) 105.
[1091] Ibid 104.
[1092] Rowden (n 962).

which has lamented the exclusion of the laity as outsiders.[1093] As the central participant of the criminal trial, it is reasonable to assume that the defendant and his needs would be prioritised within such spaces. The values of legitimacy, autonomy and participation, as discussed in Chapter 3, require the defendant to be afforded the time and space to converse properly with his lawyer throughout and follow proceedings from an appropriately located space within the courtroom. Yet the reality of the modern criminal court is starkly different. Facilities for the accused have progressively diminished over the last fifty years, in ways that 'radically distinguish the material conditions of those presumed innocent from others participating in trials'.[1094] The spatial configuration of the courtroom has the potential to marginalise the accused and to dehumanise and anonymise him in his own trial.[1095] Mulcahy and Rowden conclude that no other criminal justice participant has had his access to facilities diminished more than the defendant in this period.[1096] Among the design changes made to defendant facilities have been the loss of a writing desk, increased distancing from his legal representative, disruption of sightlines to the public gallery and the capacity of courts to provide good quality catering facilities to the cells.[1097]

When intermediaries discussed defendant participation and court design, one key issue emerged: the dock. The spatial configuration of the dock itself, its relative location in the courtroom and the impact of the accused being physically separated from the other trial participants were all viewed as detrimental to communication. Most intermediaries recounted stories of defendants being exhausted, confused and resigned to their fate whilst in this enclosed space. Rosen's description of the dock as a 'humiliating and degrading' experience was echoed by interviewees, many of whom recalled visceral memories of distraught defendants with their heads in their hands, impatient for the ordeal to end.[1098]

It was noticeable that the interviews raised many of the same concerns which formed the basis of the ECtHR case of *Stanford v UK* twenty-three years earlier. Two recurring issues which intermediaries identified as being problematic for defendants were the poor acoustics of the courtroom and restricted visibility from the confined dock. E&W-16 and E&W-14 both explained how the sense of disconnection and isolation from proceedings is exacerbated by the physical barriers that separate the defendant from the rest of the court:

[1093] Carlen (n 366); Sharyn Roach Anleu and Kathy Mack, 'Magistrates' everyday work and emotional labour' (2005) 32(4) Journal of Law and Society 590; Pat Carlen, 'The staging of magistrates' justice' (1976) 16(1) The British Journal of Criminology 48.
[1094] Mulcahy and Rowden (n 474) 31.
[1095] Rock (n 299) 240.
[1096] Mulcahy and Rowden (n 474) 31.
[1097] Ibid.
[1098] Lionel Rosen, 'The dock – Should It Be Abolished?' (1966) 29 Modern Law Review 289, 296.

> ‘In the dock you can hardly hear what is going on. The visibility is not good either. The defendant then goes face in hand and gives up on listening. The barristers are speaking forwards and you have a view of their back and they are mumbling. It makes you feel really separate.’ (E&W-16)

> ‘I do think, unless there is a very good reason for being behind a screen, the Perspex glass automatically separates. If you have someone who is not very good at concentrating, they will think they don’t have to listen.’ (E&W-14)

E&W-7 echoed these viewpoints and further explained how recent developments in terms of dock design have made conditions worse:

> ‘You can’t communicate in the dock. It’s toughened glass and a tiny slit…it’s very hard to hear, you are isolated from the court unnecessarily in a lot of cases…The dock has been made worse recently because recently they have put grills at the top and some have gone solid at the top so it’s hot, it’s sticky, it’s smelly and you can’t hear anything and it’s bloody uncomfortable. The architecture is crap.’ (E&W-7)

The relationship between the intermediary and the right to effective participation is impacted by the special configuration of the dock. As the above quotes demonstrate, intermediaries were acutely aware that participatory entitlements of defendants were poorly served by the dock and its design. Some intermediaries explained how they often seek to counter these difficulties through recommendations in their court report. For example, two intermediaries, E&W-17 and E&W-13, explained how they actively recommend the defendant’s removal from the dock with the permission of the judge. Both described this recommendation as necessary to ensure the ‘effective participation’ of the defendant. When asked, E&W-17 suggested that such action was often required to ameliorate the inherent deficiencies of the defendant’s position and explained that intermediaries have an ‘enhanced’ role to ‘break through’ these barriers:

> ‘I think if we could just get the defendants on the side and not with the barristers having their backs to them, that would make a huge difference…Who in their life experience ever sits in a room to people with their backs? It is just ridiculous. I think once I get them out of the dock… although you see once I’ve got them out the dock, I still have a very active role sitting at the back with them. I did a couple of weeks ago, I asked the judge [if we could] sit outside the dock.’ (E&W-17)

E&W-13 explained how she adopts the same practice:

> ‘One of my recommendations is that they don’t sit in the dock. It’s about the person engaging and participating in their trial, so how can it be fair if they can’t properly participate? You are there to ensure effective participation in trial. I ask for them to be outside…Also, in the dock you have those

> stupid leaning bars. If I need to be creating visual aids for someone about what's happening the court, who's who, what people are saying…I can't do that on my knees, I can't type on my knees. It might be that I sit outside the dock so I have a bench. In fairness, courts have always accepted that.' (E&W-13)

These comments suggest that the dock not only inhibits the defendant's participation in proceedings but also negatively impacts upon the intermediary's ability to do their job. While these two findings may appear to be two sides of the same coin, they in fact provide a valuable insight into the content of the intermediary role. Intermediaries are more than a passive communication conduit, they can also actively manage a defendant's environment to promote participation. This echoes the 'broad' conception of communication, as discussed in Chapter 7, and sees intermediaries attempting to neutralise barriers to defendant participation. While intermediaries working with witnesses are also concerned with environmental factors, in particular room layout during assessment and the spatial configuration of the live-link room, it was clear that the dock presents a unique set of difficulties which intermediaries must consider. For example, during the GRH intermediaries normally agree a method of intervention so they can alert the judge when a witness has not understood a question or if it needs rephrased. When in the dock, however, intermediaries are often unable to get the attention of the defence lawyer or the judge to seek clarification or flag concerns. Miller argues that the dock interferes with the defendant-lawyer relationship by 'effectively prohibiting free and uninterrupted consultation and suggestion throughout the trial.'[1099] There is also little time allowance given for the intermediary to communicate to the accused what is happening throughout a case. Another significant issue created by the enclosed nature of the dock emerges when a vulnerable accused is a co-defendant in a multihanded case. E&W-8 was appointed to assist a defendant with severe communication difficulties in a case with nine other defendants:

> 'I did one multi-defendant case with about 10 people and it was so noisy. I can't believe what happens in the dock, with the noise and the mucking around. It was phenomenal. Everyone was just talking to each other and things were being thrown…but the problem is that the person you are with is getting distracted, and it does have an effect on their ability to concentrate and follow what is going on. So you need to think carefully about layout, I would discuss it with the barrister. But there are fixed reasons why someone has to be in a position then I don't think I have full control. I can't say where someone needs to sit, especially in multihand case, but I would always make sure that if we do have any control over it then we are sitting in the most sensible place…it's so important they can see and hear.' (E&W-8)

[1099] Julie Miller, 'A Rights-Based Argument Against the Dock' [2011] Criminal Law Review 216, 221.

This quote encapsulates just how inhibiting the dock and its design can be for the participation of the defendant but also how cognisant intermediaries are of this reality. The disempowering effect of the dock is also evident as E&W-8 is constrained in terms of practical recommendations. This contrasts significantly with the freedom many intermediaries are afforded when working with witnesses. The following quote from E&W-9 provides an excellent example of this in practice:

> 'with a witness you can pretty much say anything, for example I had someone and it was agreed that they could take their dog into witness service with them while they were waiting…you would never get that for a defendant in a million years. I had a dock officer report that fact that I had given the defendant a stress ball…which was in my report!' (E&W-9)

E&W-9's experience reflects a key theme of the findings: intermediaries feel their role is perceived differently by judges and lawyers when working with defendants compared to witnesses and that the nature of the work is often more challenging. The present section reveals that the dock's ability to prejudice and alienate extends to the intermediary as an associated party of the defendant. This leads to the paradox whereby intermediaries strive to mitigate the participatory challenges of the dock yet find their ability to do so inhibited by their placement within it.[1100] The dock reinforces what Mulcahy and Rowden term the 'strict hierarchy' of court users and the reality that the participatory rights of the defendant have never been prioritised in the design of modern court buildings.[1101] The incremental fortification of the dock and its 'removal' of the defendant from proceedings is incongruous with the enhanced participatory role of the defendant which this chapter advocates.[1102] As Miller has noted, the dock poses a serious risk to the presumption of innocence, right to legal assistance and, crucially, the accused's right to participate effectively in the criminal trial.[1103] The experiences of intermediaries explored in this section emphasise that taking the defendant's right to effective participation seriously must necessarily include addressing current deficiencies associated with the dock.

[1100] Ironically, the prospect of remote trials may enhance defendant participation as they dispense with the need for a secure enclosure that is physically distinctive from those used by other participants. In this respect, 'virtual justice' has a potentially 'democratizing effect' with the defendant being 'more central to deliberations than they would be in a physical court' (JUSTICE, 'Testing the case for a virtual courtroom with a physical jury hub Second evaluation of a virtual trial pilot study conducted by JUSTICE' (June 2020) <https://justice.org.uk/wp-content/uploads/2020/06/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf> accessed 2 November 2020; Meredith Rossner, 'Remote Rituals in a virtual court' (2021) 48(3) Journal of Law and Society 334; Meredith Rossner, David Tait and Martha McCurdy, 'Justice reimagined: challenges and opportunities with implementing virtual courts' (2021) 33(1) Current Issues in Criminal Justice 1.
[1101] Mulcahy and Rowden (n 474) 275.
[1102] Linda Mulcahy, 'Putting the defendant in their place: why do we still use the dock in criminal proceedings?' (2013) 53(6) British Journal of Criminology 1139.
[1103] Miller (n 1099) 216.

8.8 Sentencing

Sentencing lies at the heart of the criminal justice system and it is at this stage that the 'communicative nature' of the process is most apparent.[1104] Sentences communicate official censure or blame, the communication being chiefly to the offender but also to the complainant and to wider society.[1105] In recent years, complainants in some jurisdictions have gained the right to participate in sentencing and diversion processes. For example, the Labour government introduced the 'Victim Personal Statement Scheme' in 2001 to enable complainants to explain the impact of the crime in their own words through a personal statement made to the police. Yet complainants are granted a relatively limited participatory role at sentencing. While the right to challenge a sentence may exist on the basis that it constitutes an inadequate punishment, there is no corresponding right to participate.[1106] Inter alia, this has been based on the view that granting such a procedural right may interfere with the public nature of the prosecution system.[1107]

As a key juncture in the criminal trial, the question of intermediary involvement with defendants at the sentencing stage deserves attention. Any sentencing model, regardless of its underpinning ideals, must communicate the punishment to the offender even if he chooses not to listen or be persuaded by it.[1108] But while a court can deliver sentence, there should be a concomitant understanding of its content and what it practically means for the offender. The notion of 'informed sentencing' requires a court to make reasonable adjustments and to consider the individual abilities and support needs of offenders to avoid unreasonable expectations being imposed.[1109] As the ECtHR held in *SC v UK*, effective participation must involve the accused understanding the significance of any penalties imposed.[1110] Domestically, the Equal Treatment Bench Book emphasises the need for sentences to be 'accessible', noting that intermediary presence at the sentencing hearing may be required to ensure this is achieved.[1111] The Sentencing Council also notes that courts may consider requesting information about a defendant's communication difficulties and how an intermediary may assist during the sentencing process.[1112]

[1104] Owusu Bempah (n 254) 58; Julian Roberts, *Exploring Sentencing Practice in England and Wales* (Palgrave Macmillan 2015) 6.
[1105] Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, Cambridge University Press 2015) 94.
[1106] Doak (n 191) 167-171; *McCourt v United Kingdom* App No 20433/92, 2 December 1992.
[1107] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (3rd edn, Oxford University Press 2005) 50.
[1108] Antony Duff, *Punishment, Communication and Community* (Oxford University Press 2001) 126.
[1109] Prison Reform Trust, 'Prison Reform Trust response to the Ministry of Justice consultation, Punishment and reform: effective community sentences' (June 2012) 8.
[1110] *SC v UK* (n 422) [29].
[1111] Equal Treatment Bench Book (n 36) 113.
[1112] Sentencing Council, 'Sentencing offenders with mental disorders, developmental disorders, or neurological impairments' (effective from 1 October 2020).

In interview, intermediaries felt strongly about the need for communication assistance at the sentencing stage. However, this has not been reflected in the literature or wider academic or policy discussions. While Kirby et al have highlighted the connection between effective participation and the role of the judge at sentencing, the nature of intermediary involvement has received little elaboration.[1113] Since Article 6 ECHR applies to the determination of a criminal charge, the right to effective participation arguably does not cover the sentencing stage, but this is open to debate and is unresolved. Examining the intermediary role at sentencing is instructive in understanding different participatory roles within the criminal process. Unsurprisingly, when intermediaries were asked about their involvement at the sentencing stage they spoke only about the defendant. The view among many was that their involvement throughout the process would be diminished if the ultimate outcome was incomprehensible to the defendant. For those who had previously worked with vulnerable individuals in the criminal justice system, seeing the defendant bypassed at sentencing stage left a lasting impression:

> 'A lot of the vulnerable young people I worked with in my previous role would come out of court without having understood what had just happened to them. One observation I did with the defendant where they were getting a custodial sentence, I understood that when the judge gave it, but I watched [the defendant's] face and they didn't know that until they came out and had a debrief.' (E&W-15)

As was explored in earlier chapters, different conceptions of the intermediary role and its scope have emerged between some judges and intermediaries. This tension, evidenced, for example, in the case of *R v Grant Murray*, appears largely based on different views about the extent of the role's involvement throughout trial.[1114] 'Pragmatic and flexible' appointments should not only involve intermediaries justifying their recommendations to the court but should also promote collaboration between the two to ensure appointments are effective. The sentencing stage offers an opportunity for judges to use intermediaries as an instrument to ensure that the verdict is understood. E&W-13 recounted an example of such a practice from a case involving an extremely vulnerable defendant:

> 'The judge was absolutely amazing and kept asking if [the defendant] was understanding…The judge actually requested me to come and see him in chambers to help him word the sentence. I said [the defendant] is so fixed on the sentence that she won't listen to anything before that…and the likelihood is that if you do the sentence first and then explain then she will listen and I will make sure she listens. And it worked really well.' (E&W-13)

[1113] Kirby et al (n 1004) 11.
[1114] *Grant-Murray* (n 12).

In Northern Ireland, NI-5 lauded one District Judge who has developed a reputation for positively including the intermediary in the Youth Court:

> 'Judge [X] has been excellent. He's just got it into his practice…he will meet with the young person and he brings lay magistrates with him. He takes you into his chambers and there's everybody there and the case is discussed and he gives the intermediary the opportunity to speak. And there's lots of discussion around that…[he] creates this kind of 'let's talk about this, let's do the right thing'.' (NI-5)

The centrality of the judge's role in the above examples must be recognised. The power to appoint defendant intermediaries not only rests with the court, but the judge must also adapt the trial process to address the defendant's particular communication needs.[1115] As the Court of Appeal recognised in *R v Grant Murray*, the 'burden rests on the trial judge to ensure the effective participation of a vulnerable person, not on the intermediary'.[1116] Considering that judges are required to approach all intermediary appointments on an individual basis, consulting intermediaries about the defendant's particular communication needs seems central to ensuring the right is upheld. Yet in interview, intermediaries explained that judges often failed to utilise their communication expertise. E&W-18 explained how a magistrate's bench adopted an inflexible approach and preferred to stick rigidly to their original terms of appointment:

> 'They paid me to be there for the 3 days…then the judge said: 'I haven't granted for the intermediary to be in here.' Well, do you want to pay me to just sit outside? That's ridiculous…I said 'well I'm here still, I'll stay for sentencing and probation and I can help him understand those processes'. And the judge was like: 'Well I haven't asked you to do that!' and It's like I'm here and you're paying me, it's a lack of understanding of how you could be used I suppose.' (E&W-18)

While intermediaries have the tools to facilitate communication, these can be rendered redundant if judges are unwilling to be flexible in the terms of their appointment. In the example above, even if E&W-18 had not originally recommended her presence at the sentencing hearing, the defendant's participation would have only been enhanced by an intermediary explaining the significance of the sentence and impact of probation. Of course, adherence to 'pragmatic and flexible' intermediary appointments does not mean automatic entitlement to communication assistance at every stage. However, the principles of pragmatism and flexibility should involve some deference to intermediary expertise regarding their involvement at discrete stages of proceedings. As the following example from

[1115] *Cox* (n 572); CPD (n 22) 3F.12.
[1116] [199].

E&W-17 demonstrates, intermediaries are capable of disagreeing with legal professionals and recommending their involvement only when the defendant actually requires it:

> 'The defence barrister turned up to say: 'I'd like the intermediary [at the sentencing hearing]' and I stood up, put my hand up and said: 'Your Honour,' - the judge's first response was: 'we do have to think about the public purse you know?'…and I said: 'Can I just say that in this case, this man will not have to play an active role in the sentencing hearing…so he doesn't actually need me here because there are other people who can help him I'm sure'…the judge said: 'thank you very much Ms [X]! I won't be calling on you for the sentencing.'…and then the judge said: 'I think Mr.' [X], the defence barrister, 'is becoming a little too dependent on his intermediary!'' (E&W-17)

It is useful to conclude this section on sentencing by returning to some theoretical approaches. Owusu-Bempah argues that the defendant cannot begin to account for his criminal conduct, or be 'called to account', until the sentencing stage, when it has been proved that they are guilty of the offence.[1117] She continues that it is at this stage of the process where 'the wrongness of the act, as well as its consequences, can be communicated to the defendant and the public.'[1118] This is based less on the argument that the defendant cannot begin to account pre-sentence, but that it is not legitimate to expect him to (or call him to) account for his wrongdoing until the charge has actually been proven. Duff's account of the trial emphasises the need for 'repentance and atonement'[1119] from the defendant and expects an acceptance of responsibility as well as positive evidence of redress.[1120] While these accounts espouse differing normative theories of the criminal process, they both recognise a minimum requirement of defendant participation at sentencing. Both accounts value sentencing as a communicative enterprise and, as a minimum, the ability of the defendant to understand the wrongfulness of his actions and their consequences.[1121] The reflections of intermediaries in interview echo the importance of these imperatives, but also highlight the potential negative outcomes when they are not prioritised.

While all stages of criminal proceedings present communication challenges for vulnerable defendants, sentencing can often be the most bewildering and disempowering. [1122] Yet, despite the right to effective

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[1117] Owusu Bempah (n 254) 58
[1118] Ibid.
[1119] Antony Duff, 'Penance, punishment and the limits of community' (2003) 5(3) Punishment & Society 295, 298.
[1120] Antony Duff, 'Penal communities' (1999) 1(1) Punishment & Society 27.
[1121] Duff's account of punishment, however, focuses on a process of 'two-way communication' which seeks to demonstrates to offenders the extent to which they have done wrong and focuses their attention on their crime and its consequences. See: Marguerite Schinkel, 'Punishment as moral communication: The experiences of long-term prisoners' (2014) 16(5) Punishment and Society 578.
[1122] Jacobson and Talbot (n 114) 17; Jacobson and Cooper (n 406) 123.

participation gaining more academic attention, the participatory role of the defendant at sentencing tends to be ignored. As Peay and Player lament, the little qualitative research conducted into the importance of vulnerability at sentencing focuses on complainants and witnesses rather than defendants.[1123] Theoretical accounts of sentencing generally recognise that vulnerable defendants should be proportionately punished for their wrongdoing, relative to other offenders. There is also a broad consensus that alternative dispositions should be available to sentencers when dealing with a vulnerable accused.[1124] But rather than focusing on how the defendant's vulnerability affects what is done *to* him, the right to effective participation requires a reciprocal understanding of the court's disposal and its significance. Respect for the accused as an autonomous citizen requires nothing less. Traditionally, the responsibility of ensuring that defendants understood their penalty and its significance has fallen to defence legal representatives, yet the ability of lawyers to satisfactorily execute this function has been questioned.[1125] As communication experts, and likely the individual who best understands the unique communication challenges the accused faces, intermediaries are central to ensuring the defendant's participatory role at sentencing is respected. More broadly, the work of intermediaries at sentencing can help generate a more nuanced discussion of effective participation and a better understanding of its multifaceted nature.

8.9 Conclusion

There is a broad consensus that, as an institution of the state, the criminal justice system must allow for at least a minimum degree of lay participation to be balanced with the input of professionals and experts.[1126] Drawing on the experiences of intermediaries, it is recognised that participation is approached as a relative concept, with its content turning on the profile of the vulnerable individual and the nature of their communication difficulties. A recognition of the differing participatory roles of witnesses/complainants and defendants is important to understanding their relative positions within the criminal justice system but also to ensuring that respective participatory entitlements are maximised rather than diminished.[1127]

[1123] Jill Peay and Elaine Player, 'Pleading Guilty: Why Vulnerability Matters (2018) 81(6) The Modern Law Review 929, 952.

[1124] Lea Johnston, 'Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness (2013) 103(1) The Journal of Criminal Law and Criminology 147; Richard Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013).

[1125] Stephen Andrew Noguera, 'Communicative Sentencing: Exploring the Perceptions of Young Offenders in the Community' (D.Phil thesis, University of Oxford) 233.

[1126] Albert Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford University Press 2014).

[1127] Rock (n 299) 181-196.

This chapter also reveals that different participatory roles are central to understanding intermediary practice and how the role's scope is conceptualised by intermediaries. The interview data suggest that intermediaries can adapt to the differing participatory challenges of the vulnerable individual. The concepts of 'witness work' and 'defendant work' are further developed through the physical environment of the criminal justice system, the attitudes and perceptions of other criminal justice actors and the relationships which intermediaries negotiate in their role. This chapter challenges judicial conceptions of the intermediary role and calls for judges to adopt a more flexible and pragmatic approach to defendant appointments. The 'unknowns' of the trial necessitate flexibility and many defendants require communication assistance long before the trial and sometimes even after it concludes. The appellate courts have advocated an overly simplistic 'binarised' approach to defendant intermediary appointments whereby intermediary assistance is granted either for full trials or testimony only.[1128] Intermediaries consistently avoided such rigid formulations of the level of support vulnerable individuals require to communicate. Collaboration between intermediaries, lawyers and judges is essential to ensure individualised assistance for vulnerable witnesses and defendants – something which intermediaries pointed out would likely be more cost-effective and time-efficient.

Finally, this chapter has revealed how the differing systems of intermediary provision in England and Wales and Northern Ireland impact the relationship between the intermediary role and participation. Registered Intermediaries working within the Registered Intermediary Scheme (RIS) in Northern Ireland can impact participation earlier at the police station than their counterparts in England & Wales. Yet the RIS does not permit intermediary assistance beyond the period of evidence giving. As a result, it seems that the ad-hoc system of intermediaries for defendants in England and Wales is more conducive to the type of 'pragmatic and flexible' appointments which this chapter has advocated. In both jurisdictions, however, intermediaries were acutely aware of the central role of the judge in directing the terms of an intermediary appointment and how this, in turn, impacts the intermediary's ability to address participatory challenges faced by vulnerable people.

[1128] *OP* (n 64)*; Rashid* (n 15).

Chapter 9: Conclusion

As recognition of speech and communication problems, learning disabilities and mental health issues increases within the criminal justice system, demand for intermediary assistance increases too. In September 2020, the Ministry of Justice (MoJ) declared that increased intermediary capacity was a 'priority' to ensure that the most vulnerable individuals receive communication support.[1129] The recently established HMCTS Court Appointed Intermediary Services (HAIS) sees an extension of intermediary services beyond the Witness Intermediary Scheme (WIS) (see further below). With the work of intermediaries expanding into other fora, such as family courts, civil courts and employment tribunals, the intermediary role looks set to become increasingly important in terms of ensuring access to justice for vulnerable court users. The fact that the Criminal Practice Directions (CPD), Criminal Procedure Rules (CPR) and the Equal Treatment Bench Book now explicitly include reference to the intermediary role is significant in terms of its increased profile. The organisation and provision of intermediaries in England and Wales and Northern Ireland also remains instructive for other jurisdictions where intermediary schemes based on the WIS have been rolled out.[1130]

The aim of the present research project was to expand knowledge about the role of the intermediary, including how intermediaries interact with and experience the social world of the criminal justice system. At the launch of the WIS in 2004, there were many unanswered questions about the profile of who would execute the role, how it would be integrated into the criminal justice system and what its impact might be on vulnerable court users. While we now have a clearer idea about the profile of intermediaries, more research was needed to answer the latter questions. Cooper and Mattison echo this view by highlighting the 'pressing need for further research into the efficacy and development of the role in practice'.[1131] More specifically for the purposes of this project, the lack of empirical research into the intermediary role has resulted in a poor (and often confused) understanding of the role's scope and content. In response, this thesis has examined the position of the intermediary within the criminal justice system through a sociolegal lens. It has drawn on the experiences of those at the coalface of intermediary work and contributes to a better understanding of the realities of the role and its impact on different court users. By including the experiences of intermediaries working in both England and Wales and Northern Ireland, as well as those working with both witnesses and defendants, it illuminates the 'complexities and the richness' of the intermediary world.[1132] Fundamentally, this thesis strives to give a voice to intermediaries to talk about their work and the challenges they face within it. From these experiences and drawing on methodological insights

[1129] MoJ, 'The Witness Intermediary Scheme Annual Report 2019/2020' (September 2020) 2.
[1130] For example, see: Kelly Howard, Clare McCann and Margaret Dudley, 'What is communication assistance? Describing a new and emerging profession in the New Zealand youth justice system' (2020) 27(2) *Psychiatr Psychol Law 300.*
[1131] Cooper and Mattison (n 42).
[1132] Lisa Given, *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE publishing 2008) 794.

from grounded theory, a theory has emerged which helps us understand what intermediary work involves and what roles intermediaries assume throughout the criminal justice system.

The research questions outlined in the Introduction have steered the overall direction of the thesis. This chapter summarises the answers to these research questions and sets out how the findings may impact intermediary provision going forward. While the research questions are mutually informative and overlap, I will take each in turn.

9.1 What are the parameters of the intermediary role?

Seventeen years on from the rollout of the first intermediary Pilot Study, the role's formal parameters are contained within the Criminal Practice Directions, Criminal Procedure Rules and relevant procedural guidance from the MoJ. A relatively stable picture of the intermediary role emerges from these sources: an objective communication conduit, primarily focused on the facilitation of communication and owing its primary duty to the court. As explained in Chapter 1, and noted throughout the thesis, the judicial depiction of the intermediary role has been somewhat less consistent. This thesis has problematised the normative description of the intermediary role and has generated a rich understanding of how those executing it view their work and its scope and content. The parameters of the intermediary role have been shown to be malleable and adaptable to the circumstances of a case, the extent of communication issues, the profile of the vulnerable individual and interaction with other criminal justice agents.

The issue of the intermediary's professional status and whether the role is perceived as a criminal justice professional was an unexpected finding from the field. When embarking on a research project using a grounded theory methodology, one inevitably has a sense of some issues which might arise in data collection. As Holton and Walsh note, researchers bring their own espoused values and accumulated experience to the research.[1133] However, the issue of professional status consistently arose in early interviews and I decided to pursue this line of enquiry in later interviews. When reflecting on the potential impact of professional identity/status on the parameters of the intermediary role, one moment stands out as particularly instructive. After one interview, when walking with an interviewee to the tube station, she mentioned that only recently did she feel that she was being genuinely listened to at GRHs. She explained that since obtaining her doctorate, and could therefore officially be referred to as 'Dr X', judges and lawyers were much more responsive to her Court Report recommendations. She felt that she could make recommendations with more confidence and suggest strategies and adjustments that she previously may not have done. This vignette caused me to reflect on the intermediary's relative status within the professional world of the court – a line of analysis developed in Chapter 6. It illustrates how and why the professional status of the intermediary and the perception of 'professional work' is relevant to understanding the parameters of the role. It also provides a snapshot of the 'tussle' for control over work tasks in which court professionals engage. This, in turn, has

[1133] Judith Holton and Isabelle Walsh, *Classic Grounded Theory: Applications with Qualitative and Quantitative Data* (Sage Publishing 2017) 107.

the potential to impact the legitimacy of their work. Chapter 6 reveals that although the scope of the intermediary role was initially untested and was often unclear, individual practices have seen the construction of boundaries which are continually negotiated between actors. Intermediaries thus engage in boundary work to protect their own professional jurisdiction and to carve out their own area of expertise. As the intermediary special measure continues to develop and expand, further questions around the professionalisation of the role are likely to emerge and shape its scope and content. Looking ahead, how the introduction of the new HMCTS Court Appointed Intermediary Scheme (HAIS) (see further below) impacts the intermediary's control over its work and its professional jurisdiction will deserve attention. Research into the operation of HAIS will be needed to assess whether a 'jurisdictional settlement' is reached between intermediaries and other criminal justice actors and, consequently, what impact this may have on the nature and scope of the intermediary role.

One of the most obvious ways in which the parameters of the intermediary role are fluid and context-dependent relates to the issue of neutrality. As explained in Chapter 7, O'Mahony et al have previously written about the developing occupational identities of intermediaries and the challenge of reconciling the role's neutrality with different professional backgrounds.[1134] This ranged from issues around emotional attachment to defendants, to potential conflict in roles resulting from some intermediaries 'wearing more than one professional hat'.[1135] My findings develop these concepts further and explicate the tension some intermediaries face between the commitment to the ideals of neutrality on one hand and the struggle to remain within its normative parameters on the other. By developing the concept of the 'paradox of neutrality', I explored how individual intermediaries conceptualise their own role, its demands and its broader place within the criminal justice system. Bourdieu's concept of 'illusio' was used as an instructive explanatory concept to examine deviations from the expected performance of neutrality. Examining the illusio of the intermediary role helps us to delve deeper into why intermediaries act as they do and examine what significance these actions have on the role's status and position. Illusio also allows us to view the parameters of the role as contoured by intermediaries themselves through their iterative practices. Indeed, just as intermediaries negotiate their own professional boundaries and identity through their social interactions, they similarly co-construct their neutrality with other actors. As Chapter 7 concludes, the content of the role's neutrality remains unsettled and is ripe for collaborative discussion between judges, advocates and intermediaries themselves. Any attempt to demarcate the intermediary role's parameters must necessarily address the vexed issue of neutrality. My findings suggest that the unique challenges associated with intermediary neutrality must first be recognised before the viability of neutrality as an ethical standard can be seriously debated.

I have explored in this thesis how the parameters of the intermediary role are coloured and shaped by the conceptualisation of the criminal justice value of participation. Chapter 3 set the scene for later discussion

[1134] O'Mahony et al (n 98) 155.
[1135] ibid 160.

about how the different participatory roles of witnesses and defendants qualitatively impact intermediary work. Chapter 8 explored in detail how these different participatory roles are central to understanding intermediary practice and how the role's scope is conceptualised by intermediaries. As will be discussed further below, this often centres around whether intermediaries are working with vulnerable witnesses or vulnerable defendants. Yet it is difficult to escape the conclusion that effective communication is a pre-requisite to effective participation, notwithstanding that the latter term may mean different things for witnesses compared to defendants. My findings suggest that intermediaries respond to the different participatory roles of vulnerable court users and, in turn, impact the nature of their own role by doing so. This finding is particularly significant as it is not acknowledged in any of the relevant procedural guidance. It remains to be seen whether the newly introduced HAIS scheme will recognise the variation in intermediary work and the impact it can have on performance of the role. More broadly, these findings also support the view that intermediaries are not an occupational monolith nor are they mere conduits who conduct a passive communication role. This echoes the conclusion in Chapter 7 that reconceptualisation of the intermediary role more broadly requires a more dynamic, relational view of the nature of its work and the challenges it faces.

9.2 How has the role of the intermediary been conceptualised by key stakeholders?

One of the key points emphasised in Chapter 4 was the overlapping nature of the functions that can be ascribed to the intermediary and how the role is inherently relational and multifaceted. To this extent, the parameters of the intermediary role appear heavily dependent on the practices of the established court workgroup, in particular the judge. Chapter 6 developed this further by arguing that intermediaries are involved in a process of negotiation, conflict and exchange with other criminal justice actors over jurisdictional claims. I conclude this chapter by arguing that these processes are fundamental to understanding the complexity of the intermediary role and how its parameters are to be understood. The 'complex social world' of the criminal court, as vividly described by Rock, remains highly resonant and influenced how I analysed my interview data.[1136]

How then do key stakeholders conceptualise the intermediary role? From early in the thesis, it was identified that the judicial conception of the intermediary role has been inconsistent and, at times, confused or misunderstood. One stark example of this was highlighted by Plotnikoff and Woolfson who found that many judges were unable to distinguish between Registered Intermediaries for witnesses and defendant intermediaries.[1137] In my own interviews, several intermediaries explained how they had been mistaken as interpreters and had to explain their function to the Court. E&W-7 explained how she had to explain numerous times to a defence solicitor that she was not, in fact, an Appropriate Adult. Understanding how the judiciary interacts with the role is particularly important since intermediaries cannot be expected to

[1136] Rock (n 299) 2.
[1137] Ibid.

operate effectively without the confidence of the judiciary.[1138] My interview data reinforce the importance of the relationship between the bench and intermediaries. Judges decide the terms of intermediary involvement in a criminal case and intermediaries were clear that their role is heavily dependent on direction from the bench. The power dynamics of this relationship must be understood. As discussed in Chapter 3, without judicial oversight, advocates have less incentive to collaborate with intermediaries and adhere to the agreed ground rules. In this regard, intermediaries rely on coercive judicial power to enforce their recommendations and legitimise their position. The power of the judge to enable the intermediary to execute its functions was clearly understood by all interviewees. This was illustrated by E&W-17 who remarked: 'You've got a report to write to go to the court, to convince the court that you should be appointed.' Such comments demonstrate how intermediaries are aware of the power imbalances within the court's implicit hierarchical structures which serve to exclude them. As explored in Chapter 6, the tools of diagnosis, inference and treatment may be viewed as an attempt to gain exclusive jurisdiction over work tasks and permeate the established, legitimised inner groups of the court. However, I concluded in Chapter 6 that intermediaries are consistently struggling to convince police, lawyers and judges of the role's 'cultural legitimacy'. This seems, at least partially, to be based on a lack of understanding of the theoretical basis of intermediary recommendations and a belief that the court workgroup can facilitate communication without intermediary assistance. While many lawyers and judges are increasingly accepting of the intermediary role, it is not obvious that there is broad understanding of the rationale for its introduction or the need for its continued existence. It is important that intermediary work is not just accepted, but also understood by other court actors.

As developed in Chapter 7, how the role's neutrality is approached is significant in terms of how the role is conceptualised more broadly. In the highly partisan world of the criminal court, an objective, neutral role, such as the intermediary, is understandably viewed with interest and, perhaps at times, suspicion. Chapter 7 highlights the lack of serious debate around the nature of intermediary work and the challenges involved in its performance. The 'neutrality paradox' is a concept based largely on the experiences of intermediaries and their struggle adhering to the official rubrics of the role. However, a more nuanced understanding of this concept would require further judicial insight and the experiences of legal professionals. As Bourdieu explains, the concept of habitus is objectively structured by the role's relative position in the field but also by the subjective experiences of individual practitioners which are orientated by their perception and classification of their social world.[1139] This is true for intermediaries as it is for judges, lawyers and other criminal justice actors. This thesis has conducted some of the groundwork for understanding how the intermediary role is conceptualised. Further research with a more diverse sample of participants could shed further light on this research question.

[1138] Plotnikoff and Woolfson (n 28) 17.
[1139] Bourdieu (n 897).

More generally, the notion of the intermediary as an 'outsider' significantly impacts how the role is conceptualised by those executing it. Firstly, almost every intermediary talked about feeling excluded by the archaic world of the criminal justice system and, in particular, its formalities. Rock's description of the criminal court as 'ceremonial, disciplined and staged' resonated with intermediary interviewees who spoke of the demands of the transition into the legal world from their other occupational backgrounds.[1140] The role's relative placement outside the inner circles of the court has been explored above. Yet the role's status as an outsider was less pronounced in the more 'backstage' areas of the criminal justice system, such as the police station. It was clear that intermediaries felt able to develop working relationships with police officers more easily than courtroom actors. In turn, as explained in Chapter 7, increased informality seems to provide fertile conditions for the role's neutrality to be tested. This distinction between intermediary work in or around the court compared to the earlier, investigative stage seems significant in terms of the role's conceptualisation. Firstly, intermediaries who attend the police station to assist with ABE interviews are there on request. In many cases, they develop relationships with police officers who know their skill set, have their contact details and often genuinely seek their communication expertise. The deference shown to some of the more senior intermediaries by police officers was obvious from my interviews. This contrasts sharply with the court environment where none of the court workgroup are in position to witness an intermediary assessment or develop a rapport with the vulnerable individual. Instead, the intermediary presents as an outsider, their expertise and recommendations reduced to a court report which is often discussed in a perfunctory manner at the GRH.

Based on the above, there is clearly scope for further research to investigate the nature of the working relationships between intermediaries and police officers both in ABE and at police interview. Gaining a rich, in-depth understanding of the judicial perception of the intermediary role was difficult in my research due to problems accessing judges in England and Wales. There is unquestionably further scope to research judicial attitudes to intermediary practice which would help answer this research question. This thesis provides judicial insight from Northern Ireland and emphasises the importance of the working relationships between intermediaries and the bench. It highlights how lawyers and judges, as members of the court workgroup, play an important role in shaping how the intermediary functions day-to-day.

9.3 What, if any, differences exist between the roles of 'registered' and 'non-registered' intermediaries?

The third research question prompted a closer examination of the 'two tier' intermediary provision in England and Wales. When courts first began to allow applications for defendant intermediaries, there was initial confusion as to whether an intermediary registered with the Witness Intermediary Scheme (WIS) could be appointed. In the case of *OP*, Cheltenham Magistrates Court originally directed 'An intermediary shall be

[1140] Rock (n 299) 27.

appointed to assist the defendant, subject to availability this should be a registered intermediary'.[1141] The MoJ then refused the defendant access to a Registered Intermediary. As has been explained, courts subsequently developed the practice of allowing 'non-registered' intermediaries who fall outside the scope of the WIS for eligible defendants.

While witnesses and defendants are entitled to different types of intermediaries, I wanted to find out what this distinction means in practice. The sample cohort for this research project was chosen because I wanted to speak to intermediaries with experience of working in both roles. These individuals were best placed to explain what it meant to them to be a 'witness intermediary' in one case and a 'defendant intermediary' in another. As has been explored, the significance of this distinction in how the intermediary role is performed has been largely overlooked. The fact that several judges interviewed by Plotnikoff and Woolfson were unable to differentiate between the two types intermediary is indicative of this problem.[1142] This caused me to reflect on the normative function of the intermediary role and whether the profile of the vulnerable individual being assisted may change the role's scope and content.

The answer to this third research question centres on my conceptualisation of 'witness work' and 'defendant work'. Put simply, intermediaries not only view the demands of working with defendants and witnesses differently, but they also perform a qualitatively different function with each. This echoes Plotnikoff and Woolfson's view that intermediaries for defendants 'require a broader and more in-depth understanding of the legal process and terminology'.[1143] Evidence of this distinction in my own data was apparent from all aspects of intermediary work, from working with police at the investigative stage to interactions with the vulnerable individual at court. Indeed, several intermediaries not only identified differences in how the two roles operate but stated a clear preference for working with defendants. Although likely hyperbolic, E&W-13 described non-registered intermediary work as 'The Wild West' compared to working as a witness intermediary under the WIS.

The emergence of the concepts of 'witness work' and 'defendant work' was perhaps not surprising considering Henderson's early recognition of the 'two tier' intermediary provision.[1144] But I wanted to investigate further and to better understand the myriad factors which contribute towards the distinction. Viewing the different roles through the lens of participation proved instructive in understanding how the communication needs of the vulnerable individual shape intermediary practice. It became clear from my data that defendants do not merely receive a unique form of communication assistance during proceedings - the nature of their participatory role *demands* it. Although intermediaries rarely used the term 'participation' in describing their function, time and time again in interview they explained the unique communication challenges faced by defendants compared to witnesses. The challenges of the confrontational police interview, the use of arcane language in legal consultations, poor acoustics in the dock

[1141] *OP* (n 29) [1].
[1142] Plotnikoff and Woolson (n 86) 17.
[1143] Plotnikoff and Woolfson (n 37) 275
[1144] Henderson (n 8).

and complex sentencing remarks were all cited as uniquely defendant experiences. I found that defendant intermediaries often moulded their communication facilitation role in response to these conditions.

As explained in Chapter 7, the practice of defendant work can conflict with the role's impartiality. Indeed, elaboration of the 'witness work/defendant work' concept acts as a heuristic for understanding the conflicts intermediaries experience between their impartiality and facilitating communication. It has been explored how close relationships can potentially develop with the defence and that sympathy can be generated for the defendant. These findings are perhaps better understood when compared with the shorter, often less developed relationships which intermediaries develop with witnesses. Indeed, recognising the witness work/defendant work distinction is a pre-requisite for any serious discussion about how the intermediary role's neutrality may be reconceptualised. As noted at the end of Chapter 7, conceptualising the role as narrow in scope and 'hermetically sealed' from the emotionally charged cases in which intermediaries are involved appears illusory and disconnected from the reality at the coalface.[1145] It would be futile to question the role's impartiality without appreciating that intermediaries experience differing demands depending on the profile of the vulnerable individual being assisted.

Finally, the thesis used Northern Ireland as a useful comparator based on its unitary system of intermediaries. The fact that intermediaries registered with the DoJ are equally likely to be matched with a witness or a suspect/defendant has meant that no obvious distinction between witness work and defendant work has emerged. Intermediaries in Northern Ireland recognised the right of defendants to effective participation and how defendants have a different stake in the criminal process compared to witnesses. Indeed, procedural differences between witness work and defendant work in terms of interview format and the length of time physically spent in the courtroom were noted. However, there was no obvious divergence in how the essential elements of the role were approached whether it was a vulnerable witness or a suspect/defendant being assisted. Tellingly, many Northern Irish intermediaries in interview were puzzled at the suggestion that such a distinction between witness work and defendant work could even exist. This is strong evidence of the impact a unitary system of intermediaries can have, not just on the organisation of intermediary provision, but on the conceptualisation of the role by those who execute it.

9.4 Defendant intermediaries – a formalised role in sight?

As noted above, a key motivation for conducting this research project was an interest in the differing provision of intermediaries for defendants compared to witnesses. The 'two tier' system raises questions relating to access to justice, fair trial rights and equality of arms.[1146] In July 2020, the MoJ announced that it was 'seeking to engage with the market for the provision of HMCTS Court Appointed Intermediary Services (HAIS)'.[1147] In January 2022, contracts were awarded to a selection of suppliers for the provision of the new

[1145] Colley and Guéry (n 769) 113.
[1146] Henderson (n 8).
[1147] MoJ, 'Court Appointed Intermediary Services: A Pre-Procurement Notice' (20 July 2020).

intermediary services and the HAIS scheme has been operational from April 2022.[1148] The MoJ explained that these services will be provided in the courts and tribunals in England and Wales and are specifically focused on the appointment of intermediaries who can be instructed to provide an assessment of a person's communication needs along with providing recommendations on measures that could be put in place by the court to support vulnerable people, young people and children and other individuals who may need assistance during court proceedings.[1149] The HAIS scheme relates only to intermediary services that currently fall outside the remit of the MoJ Witness Intermediary Scheme (MoJ WIS).

The HAIS scheme does not formally implement s.104 of the Coroners and Justice Act 2009. As such, there will continue to be no statutory basis for defendant intermediaries and the inherent jurisdiction route will continue to be used by judges. The MoJ has outlined that a number of 'commissioning bodies' will be responsible for booking an intermediary directly.[1150] These commissioners will choose an intermediary from one of two frameworks: MASP (Managed & Approved Service Providers) and ASP (Approved Service Providers). The MoJ differentiates between the two frameworks based on 'organisational capacity and capability'.[1151] MASPs are expected to be larger groupings of intermediaries who deliver appropriate training for their own intermediaries, either provided in house or via a third party. The MASP framework is likely to be more complex and contain more obligations than the ASP framework.[1152] The ASP framework applies to smaller groupings of intermediaries or independent intermediaries who are unlikely to have the same capacity as MASPs to accept bookings.[1153] Intermediaries working for an ASP must demonstrate a minimum of two years' experience or have experience of court hearings from another role, or experience of supporting vulnerable people.[1154] There is no equivalent requirement for MASP intermediaries. Further, ASPs will not be expected to offer the same in-house training and recruitment opportunities and will need to be assessed as part of a competency-based assessment process.[1155] Unlike the WIS, no centralised work allocation/booking system will be implemented by HAIS. As such, no "matching service" will be introduced to the equivalent to that currently carried out by the National Crime Agency for Registered Intermediaries.[1156]

The HAIS scheme is a potentially significant development in terms of the intermediary role and the provision of communication assistance for defendants. It represents an effort to bring a degree of formality to defendant intermediary provision and end the informal system of ad-hoc appointments. Yet the proposed system does seemingly perpetuate the 'two tier' system of intermediaries by continuing to exclude eligible defendants from the WIS. As the charity Intermediaries for Justice (IFJ) has argued, there will continue to be

[1148] HMCTS (n 866).
[1149] Ibid.
[1150] MoJ, 'Court Appointed Intermediary Services Market Engagement: Questions and Answers' (2 June 2021) 2.
[1151] Ibid 16.
[1152] MoJ, 'Court Appointed Intermediary Services Market Engagement: Questions and Answers' (17 June 2021) 5.
[1153] Ibid 2.
[1154] Ibid 39
[1155] Ibid.
[1156] Ibid 24.

a 'lack of parity for vulnerable people across all aspects of the Justice system'.[1157] Other concerns include a lack of regulation or quality control and increased fragmentation of services across geographical regions and court services.[1158] In the run up to the scheme's launch, several intermediaries in England and Wales expressed grave concerns to me personally about what the scheme would mean for the future of the intermediary role more broadly. There was a deep-seated frustration that working intermediaries had not been consulted about the new scheme's organisation, regulation and operation.

While the HAIS scheme is relevant to the present study and the research questions, my data cannot speak to the scheme's prospective operation. Intermediaries in my interviews talked about their experiences working within the ad-hoc non-registered intermediary role. However, the introduction of the HAIS arguably affirms the importance of the findings in this thesis. One of the main arguments advanced throughout is that intermediaries conceptualise 'witness work' and 'defendant work' differently. In other words, intermediaries approach aspects of their role differently when working with a vulnerable witness or a vulnerable defendant. It is possible that the organisation and structure of intermediary provision within HAIS will recognise this. It may make sense that prospective intermediaries working within HAIS are given defendant specific training to reflect qualitative differences in the roles. Formal segregation of intermediaries into 'registered' and HAIS/defendant roles, however, may have unintended consequences. Differences in quality control, oversight and organisation may create at least the perception of an inequality of arms. Perhaps the most worrying aspect of the HAIS scheme is the lack of provision of intermediaries for vulnerable suspects at the police station. I argue in Chapter 8 that the lack of such provision for suspects is indefensible given the accused's participatory rights. These findings provide a powerful argument for the MoJ to take the defendant's rights seriously and extend intermediary provision to the investigatory stage.

9.5 Future directions

The findings of this thesis can harness change both in terms of policy developments relating to intermediary practice as well as how the role is theorised. Firstly, by demonstrating the utility of intermediary assistance at all stages of the criminal process, my findings should cause policy makers to think more globally about intermediary provision. The notion of the intermediary as a solely court-based role is misconceived and contributes to a lack of understanding of the role's purpose. The objective must be to involve intermediaries (both for suspects and witnesses) at an earlier stage to assess potential communication issues. The biggest concern in this regard relates to suspects at the police station who have historically been denied such assistance. Unfortunately, this situation looks set to continue with the operation of the new HAIS scheme. The MoJ must reconsider this policy or at the very least clearly justify its decision. It seems likely that the exclusion of intermediary assistance for suspects at the police station is resource related, but this does not

[1157] Letter from Intermediaries for Justice (IFJ) to MoJ Procurement (28th August 2020) available at: <https://www.intermediaries-for-justice.org/sites/default/files/legal_union_sectors_workers_to_moj.pdf> accessed 14 June 2021.
[1158] Ibid.

change the uncomfortable reality that many suspects who will later be appointed an intermediary at court will have already completed a police interview without specialist communication assistance. This position is untenable and must be addressed urgently.

Of course, intermediary appointments at an earlier stage are dependent on vulnerability being identified and responded to. This is a significant issue, with police identification of vulnerability at the police station inconsistent at best. This appears due, at least partially, to various different definitions of vulnerability used across different police forces.[1159] There is an urgent need for standardised police training on how vulnerability can be identified but also how officers should act upon it. Such training must include reference to the intermediary role, its scope and content. As noted above, a triage system, whereby intermediaries provide telephone advice to police when screening, has previously been suggested but has not been adopted by the MoJ or NCA.[1160] More research on such a proposal is needed and intermediaries must be consulted about the viability of such a scheme in practice. More generally, increased collaboration between police, appropriate adults and intermediaries would help understanding of the different roles and responsibilities. Now that the MoJ has formalised defendant intermediary provision through HAIS, intermediaries working with defendants should be easier to organise and coordinate as a collective group. It is incumbent on the MoJ to seek constructive feedback from intermediaries as to how their services can best be utilised, particularly at the pre-court stage.

This thesis has highlighted further work that needs to be done to secure the legitimacy of the intermediary as an independent, communication specialist and better integrate the role into the criminal justice system. How can this be achieved? Judicial training should continue to highlight the utility of intermediary work and underline the responsibility to have due regard to the intermediary court report as per the CPR.[1161] Further, ensuring that the vocational training of lawyers includes reference to the intermediary role is important. Prospective criminal lawyers entering the profession must understand what the intermediary role involves and how it can assist them in terms of their treatment of vulnerable witnesses and defendants. In terms of criminal justice design, the lack of dedicated space for the intermediary at court and the police station (which is indicative of its outsider status) should be addressed. If the intermediary role is to be recognised and accepted as a legitimate criminal justice actor, then more thought must be given to the spaces is inhabits. The work of Mulcahy and Rowden is instructive as they highlight the need for court design to reflect the needs of those who work there.[1162] Going forward, regard should be given to where is available for intermediaries to assess vulnerable individuals, what spaces exist in the court building to meet with lawyers to review questions and the suitability of spatial configuration within the court itself. Further, building on the

[1159] Emily Critchfield, Hannah Kennedy and Andy Myhill, 'Recognising and responding to vulnerability-related risks guideline: Evidence review part two Frontline policing vulnerability risk assessment tools' (College of Policing, November 2021).
[1160] Pettitt et al (n 798); Victims' Commissioner (n 10) 46.
[1161] Criminal Procedure Rules (n 23) [3.9].
[1162] Mulcahy and Rowden (n 474).

important work of Mulcahy, Rowden and Rossner,[1163] academic critique of the dock in the criminal court should reflect on the voices of intermediaries who have experienced the challenges of the dock when working with vulnerable defendants.

Finally, this thesis can also influence theoretical work examining more nuanced aspects of the criminal process and the criminal trial. As explored in Chapter 3, most work in this area has overlooked or sidelined the significance of intermediary work. What we understand the purpose of the criminal process (with the trial at its centre) to be is enriched by a deeper understanding of the intermediary role. Recent developments in criminal justice only augment the need for more theoretical work into the intermediary role. For example, in light of the establishment of remote courts due to the Covid-19 pandemic, important questions emerge about the treatment of vulnerable suspects and defendants and the collection of best evidence. How the intermediary role operates in such an environment and how intermediary work impacts the aims and values of the overall criminal process deserves further attention. While this thesis has not focused on these specific questions, my findings relating to the intermediary role, its scope and content are instructive. Further, the ongoing funding crisis in the criminal justice system has focused minds on how resources are allocated. It would be regrettable if intermediaries were treated as low-hanging fruit in any future budget cuts. This thesis has drawn attention to the possibility of intermediaries accepting a reduced 'advisory jurisdiction' (see chapter 6) which would likely be less costly financially for the MoJ. However, any policy decisions relating to the scope of the intermediary role must recognise the impact the role has had on the nature of the criminal process. Further theoretical work on intermediaries in the criminal justice system is important to better understand how the role relates to its underpinnings aims and values.

9.6 Conclusion

This thesis set out to better understand the work of the intermediary in the criminal justice system. This included an investigation of the scope of the role and the content of its work. The use of an inductive, grounded theory methodology encouraged me to be sensitive to what my research participants were telling me and to stay open to new lines of enquiry that might arise along the way. The result of this investigation is that we can better appreciate not only what intermediary work involves, but also the impact of that work on vulnerable individuals within the criminal justice system, and the impact of the criminal justice system on intermediaries. This research project draws particular attention to the intermediary's development of a professional status, complications associated with the role's neutrality and the role's contribution to ensuring the participation of vulnerable court users. Of course, these three aspects of the intermediary role's function are not exhaustive. However, the examination of the role's scope and function in chapters 7-9 provides a relatively comprehensive insight into its operation and its wider impact on criminal proceedings.

[1163] Linda Mulcahy, Meredith Rossner and Emma Rowden, 'What if the dock was abolished in criminal courts?' (Howard League for Penal Reform 2020).

This research has set the intermediary role in the context of the social world of the criminal justice system. This should have several implications for those who perform the role but also for lawyers and judges in particular. I hope that both prosecution and defence lawyers can view the intermediary as a useful tool for the facilitation of communication, rather than a hindrance to their own work. While the adversarial nature of the trial system inevitably poses challenges to realising this objective, there is certainly scope for improved engagement with intermediaries. Reflecting on the discussion in Chapter 3, it should be recognised that intermediaries can further the aims and values of the criminal process. The legitimacy of the criminal trial as an institution, and indeed the criminal justice system more broadly, is strengthened if individuals within it are treated with dignity, as autonomous agents. The evidence collected as part of this research demonstrates that intermediaries seek *earlier* and *better* engagement with the lawyers involved in a case. Similarly, intermediaries view better judicial understanding of their role and its content as critical for its effective performance. It is essential that the work of intermediaries forms part of police training, barrister training and judicial training. All discussions about the future of the intermediary role must be underpinned by collaboration between police, lawyers, judges and intermediaries themselves. This thesis has made a contribution by exploring why the relationships between these different actors and the intermediary are so important.

This thesis is also significant for elaborating upon the notion of 'two tier' intermediary provision by developing the concepts of 'witness work' and 'defendant work'. It has been explored how this distinction impacts the practical demands of the intermediary role, how intermediaries approach their work and how the role is perceived by other criminal justice actors. Looking ahead, the new HAIS scheme essentially formalises this distinction in intermediary work since vulnerable suspects/defendants will continue to be excluded from the WIS. Whatever the reason for the establishment of the HAIS scheme, it is not obvious at this point that it will protect the participatory rights of the defendant better than the current ad-hoc system of judicial appointments. It is, therefore, incumbent on the MoJ to monitor and review the operation of the HAIS scheme and explain why vulnerable suspects and defendants have not instead been given access to intermediary services under the WIS. Equally, how might these developments impact the operation of the WIS and the work of Registered Intermediaries assisting complainants and witnesses? The significance of the distinction between 'witness work' and 'defendant work' will need to revisited once we have more information/data from the operation of HAIS.

The importance of this thesis goes beyond understanding the day-to-day work of intermediaries and many of the findings are indicative of broader issues within the criminal justice system. For example, doubts remain over the suitability of the criminal trial to properly accommodate the needs of vulnerable court users. It is important to reflect on the fact that the intermediary was initially introduced as one of a range of special measures aimed at improving the experience of vulnerable witnesses in criminal courts. As a result of s.29 YJCEA, communication facilitation expertise was outsourced to the intermediary as a neutral, independent actor. But it is unrealistic to expect the intermediary to unilaterally 'fix' communication issues in the criminal justice system. In reality, the structure of the adversarial trial system limits the extent to which the trial may

be reformed.[1164] Nevertheless, this thesis reveals how the work of intermediaries is changing the way in which lawyers and judges approach the treatment of vulnerable court users, in particular through their questioning. While there is undoubtedly still work to do, Cooper and Wurtzel are right that the intermediary role has initiated a 'culture change' in how the most vulnerable are accommodated in criminal proceedings.

It may be fair to ask whether intermediaries are to become a permanent fixture in criminal courts or whether their ultimate goal is to 'skill up' other court actors when dealing with vulnerable court users.[1165] This question is fundamental to whether the intermediary will be integrated further into the social world of the criminal justice system or will have its functions absorbed by the court workgroup. Indeed, many of the issues raised in this thesis relating to the intermediary's status and legitimacy are linked to the perceived future of the role. It is, however, premature to consider how the intermediary role may be 'phased out' considering this thesis has highlighted so many issues that still deserve attention. Growing recognition of the complex communication difficulties that vulnerable people face should lead to the retention of intermediary communication expertise. I saw no evidence in my research that police, lawyers and judges are currently better placed to perform the bespoke communication facilitation role of the intermediary. Central to the task of maximising the intermediary role's potential is understanding how it operates amongst the social world of the criminal justice system. This thesis has made an important contribution by illuminating the nature of the relationships the intermediary role enjoys with other criminal justice actors.

Finally, while this thesis has traced the emergence of the intermediary role and examined its current practice, there is scope for further research to question how intermediary work can and should develop. As argued above, it is appropriate that a wide range of stakeholders such as lawyers, judges, police and, of course, intermediaries themselves to be involved in such a project. However, before these questions can be seriously considered, the role of the intermediary must first be better understood. This thesis has made an important contribution to that objective.

[1164] Tyrone Kirchengast, *The Criminal Trial in Law and Discourse* (Palgrave Macmillan 2010) 119.
[1165] This was a phrase used by E&W-4 when reflecting on the how the role may develop in the future.

Appendix 1 – Interview Topic Guide

INTERVIEW TOPIC GUIDE

Introduction

Tell me a little bit about how you became an intermediary?
What was it about the role that interested you?
Training- court, feelings?

Appointment and assessment

How do you first become involved, can you tell me about that?
[Any differences between witness/suspect?]
Assessment [Where? Can you give an example of a difficult assessment?]
Initial contact with police/solicitor [How do you feel you are perceived by them?]
Police interviews [interaction with officer? When do you get involved?]

Courtroom

Can you talk me through the process of actually being asked to attend court?

Ground rules

(How would you describe GRHs? What do you do at the GRH?)
[judges- interaction?]
[lawyers- interaction?]
examples?

Testimony

Witness- If you assist a witness, tell me the stages involved?
Defendant- tell me how, if at all, that is different?
[Who decides how long you are involved for?]

Status and place

Previous occupation

[You told me what drew you to role- how would you say the reality compares to your expectations?]

Appendix 2 – Participant Consent Form

Exploring the role of the intermediary in the criminal justice system

Name of researcher: John Taggart

Law Department, LSE

Information for participants

Thank you for considering participating in this study. The data collection which will take place from around November 2018 until November 2019. This information sheet outlines the purpose of the study and provides a description of your involvement and rights as a participant, if you agree to take part.

1. What is the research about?
This project is exploring the role the role of the intermediary at all stages of the criminal justice system. Interviews will be used to learn about the experiences and perceptions of intermediaries but also of judges. The approach adopted is 'discovery lead' rather than to prove/disprove any particular view of the intermediary and it is hoped that the results of this project will help gain a better understanding of what the role involves.

2. Do I have to take part?
It is entirely up to you to decide whether or not to take part. You do not have to take part if you do not want to. If you do decide to take part I will ask you to sign a consent form which you can sign and return in advance of the interview or sign at the interview.

3. What will my involvement be?
You will be asked to take part in an interview about your experiences of the intermediary role. The interview will not involve a rigid set of questions but instead will follow a number of more general themes. The duration of the interview is not set in stone, but should take approximately 45-60mins. You do not have to prepare anything in advance of the interview.

4. How do I withdraw from the study?
You can withdraw at any point of the study, without having to give a reason. If any questions during the interview make you feel uncomfortable, you do not have to answer them. Withdrawing from the study will have no effect on you. If you withdraw from the study we will not retain the information you have given thus far, unless you are happy for us to do so.

5. What will my information be used for?
The collected information will be used primarily in my PhD thesis. However, the information collected may also be used in future academic papers and future research.

6. Will my taking part and my data be kept confidential? Will it be anonymised?
The records from this study will be kept as confidential as possible. Only my supervisors and I will have access to the files and any audio tapes. Your data will be anonymised – your name will not be used in any reports or publications resulting from the study. All digital files, transcripts and summaries will be given codes and stored separately from any names or other direct identification of participants. Any hard copies of research information will be kept in locked files at all times.

7. What if I have a question or complaint?
If you have any questions regarding this study please contact me on j.taggart@lse.ac.uk .
If you have any concerns or complaints regarding the conduct of this research, please contact the LSE Research Governance Manager via research.ethics@lse.ac.uk.

To request a copy of the data held about you please contact: glpd.info.rights@lse.ac.uk

If you are happy to take part in this study, please sign the consent sheet attached

CONSENT FORM[1]

Exploring the role of the intermediary in the criminal justice system

Name of researcher: John Taggart

PARTICIPATION IN THIS RESEARCH STUDY IS VOLUNTARY

I have read and understood the study information or it has been read to me. I have been able to ask questions about the study and my questions have been answered to my satisfaction.	YES / NO
I consent voluntarily to be a participant in this study and understand that I can refuse to answer questions and I can withdraw from the study at any time, without having to give a reason.	YES / NO
I agree to the interview being audio recorded.	YES / NO
I understand that the information I provide will be used for a PhD thesis and related future publications and that the information will be anonymised.	YES / NO
I agree that my information can be quoted in research outputs.	YES / NO
I understand that any personal information that can identify me – such as my name, address, will be kept confidential and not shared with anyone other than myself.	YES / NO
I give permission for the (anonymised) information I provide to be deposited in a data archive so that it may be used for future research.	YES / NO

Please retain a copy of this consent form.

Participant name:

Signature: _____ Date _____

Interviewer name:

Signature:_____ Date _____

For information please contact: j.taggart@lse.ac.uk

[1] Based on UK Data Service model consent form April 2018. http://data-archive.ac.uk/media/210661/ukdamodelconsent.doc)

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