

Communication and Cross-examination with vulnerable witnesses who have intellectual disabilities: What are the challenges and how might these be overcome?

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Forward

I qualified as a social worker in 2001 and have spent my career so far in the voluntary sector working with families of children and adults with intellectual disabilities, which included time as a participation worker to develop and empower the voices of vulnerable people to be heard.

My interest in communication for vulnerable people within the criminal justice system in Northern Ireland began when on the bench as a lay magistrate in Family and Youth Courts. I began this role in 2005. For some young people, attendance in a Magistrates Court is a regular occurrence, but for many young people and parents their current situation may be the first time they have had any dealings with the criminal justice system. They are unfamiliar with the format of the proceedings, the layout of the court and the language used. As in every workplace, the court has its own terminology. Language used is formal, complex and full of words that, while very familiar with those who operate within the system, are alien to outsiders. There can be no denying that the law is complex and, for fair justice, all matters have to be put forward and considered. By their very nature, cases that end up in the Family Proceedings Courts, are very complex, messy and detailed. For people without any disabilities, who have no legal training or little experience of the processes, I imagine it can be difficult to follow proceedings. It is the communication skills of the legal representatives outside of the court room that enable people to be fully informed and guided as to what is happening in their case. During my time as a lay magistrate I have felt that this is a huge responsibility placed on legal representatives and is very much dependent on their skills in being able to 'translate' and effectively communicate complex language and procedures. I then wondered how even more challenging it must be to communicate all the complexities of court proceedings to people who have difficulties with

communication, perhaps due to learning difficulties/disabilities or autism. For those who are regular visitors, familiarity with the inside of a court room does not guarantee understanding of the procedures and complex language used. One case in particular left an impression on me and was the driving force behind my application to the registered intermediary service. A young man was giving evidence during a trial. He could barely lift his head to make eye contact, the language he used was very colloquial and difficult to comprehend, and he seemed to struggle to verbalise language into full sentences. To the untrained eye he may have come across as being disrespectful to the court. No formal diagnosis of an intellectual disability or autism had been made known to the court, but I was able to communicate my observations to the rest of the panel when discussing the case.

I was recruited and completed the Registered Intermediary training in November 2014. The recruitment was vigorous and the training intense. During the training the responsibility of the role caused me to question my abilities to fulfil the role effectively and even if I wished to continue. One of my first communication assessments was for a suspect to be questioned regarding a very serious crime. The atmosphere in the police station was intense and the stress palpable, which made for a challenging work environment. However, the greatest challenge for the registered intermediaries in Northern Ireland has not been the assessment process, rather it has been our infiltration into the court process. The 18-month Intermediary Pilot scheme was evaluated in January 2015, just as I had started to practice. By this stage, there had only been four cases completed in which a registered intermediary facilitated communication at trial (Department of Justice, 2015). This new role has required change in the court process and was a move into new territory for me personally. Although I was familiar with Magistrates Courts, this role required a very different set of skills. I consider this PhD to be an amalgamation of my work and interests in intellectual disability and the courts.

From the onset the subject of the research has been influenced by my practice but it was also important for me that the research findings impacted how I work within the criminal justice system and I believe that it has achieved that goal. I often include references to research papers in court reports. When assessing the communication of a vulnerable witness I consider all the main themes of communication challenges as highlighted in the systematic review in Chapter six. I assess suggestibility and acquiescence of witnesses using the GSS2 assessment tool (see chapter eight). I regularly recommend police to use an interviewing technique (WAFA) when interviewing autistic witnesses and I give more consideration to factors impacting communication, as discussed in Chapter nine.

Acknowledgements

This PhD study has been interrelated with my life for the past five years and has remained with me through key challenges and life changes: a medical diagnosis; moving house; becoming a carer; a child leaving the home nest; and, as with the rest of the world, a covid-19 pandemic, which caused me to pause the study for 1.5 years. My purpose for taking on the extremely demanding and cerebrally challenging commitment of a PhD was not really for the end goal of receiving a doctorate and change of career, rather it was for the journey itself. This journey would not have been possible without the incredible support of my husband Mark and my three daughters, Alena, Sarea and Jana. It was Mark who planted and continuously fed the seed of doing a PhD, despite my protestations that I was not academic enough. His support continued with building an office (twice!) so that I could work outside of the busy home environment, taking me to be fitted properly for an office chair, and making my computer function as it should. From the beginning my daughters encouraged me to keep going, taking on dinner making responsibilities and grandpa caring roles when I needed to write.

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Publications

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Conference presentations

Offenders with Intellectual Disability Conference, Birmingham, 2019. 'Communication challenges for children and adults during cross-examination.

3rd International Advocacy Conference, Nottingham June 2019. 'Defendants with intellectual disabilities: communication challenges for engagement with the trial process'.

IASSID, Glasgow 2019. Poster. Challenges of communicating in court for children and adults with intellectual disabilities.

Lay Participation in Criminal Proceedings Conference. LSE London, 2020.

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Institute of Professional and Legal Studies, Queens University. Criminal Law Course on vulnerable witnesses and defendants. Barrister CPD training. 3 sessions
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Abstract

Challenges with both receptive and expressive communication are common for people with intellectual disabilities. The criminal justice system in England, Wales and Northern Ireland was slow to recognise this but now considers people with intellectual disabilities to be vulnerable witnesses and they can apply for special measures, such as, the services of a registered intermediary to assess and advise on communication to enhance best evidence of the vulnerable witness. This thesis consists of three key studies to examine communication challenges of vulnerable witnesses with intellectual disabilities when giving evidence in court, particularly when cross-examined, and how these may be overcome: a systematic review of current research; a qualitative analysis of 19 court reports to examine identified communication challenges of adult witnesses; and a quantitative analysis of the effectiveness of visual supports during cross-examination with adults with intellectual disabilities.

The systematic review highlighted a range of communication challenges: suggestibility to leading questions and negative feedback; acquiescence; accuracy; limited recall; and understanding of court language. In addition, a number of influencing factors were identified, including: age; IQ level; and question styles used. However, the systematic review also highlighted that much of the existing research has been mainly lab-based research using methods from experimental psychology and focused on specific areas of communication challenges. There is a lack of research examining the communication challenges of actual witnesses. Therefore, the second study is a qualitative empirical study analysing 19 court reports, written by registered intermediaries in Northern Ireland for adult complainants and defendants with ID. A wide range of communication difficulties for the vulnerable witnesses were identified, including those resulting from communication used by their communication partner – the advocate. Existing research

and study two identified communication challenges for people with intellectual disabilities in court, including challenges resulting from how they are questioned during cross-examination. However, the research also identified a lack of guidance on alternative methods for presenting questions during cross-examination. Finally, study three is a quantitative empirical study comparing two question styles for cross-examination, to allow the advocate to 'put the case': short and simple verbal leading questions and questions with a choice of four answers with visual aids. Results found no significant difference between the groups for accuracy, suggestibility, or likelihood of providing a 'don't know' or alternative 'something else' response. However, 1/3 of participants indicated difficulties understanding the words, victim, suspect and witness, even with explanations given. Other factors are highlighted which may have influenced the results including: use of communication rules to permit the participants to disagree with the questioner; a familiar environment; the presence of a familiar person sitting beside them; and factors relating to the experience of the questioner.

This thesis discusses the internal factors of the advocate and witness with ID, along with external factors of the court environment within the context of a cross-examination model of communication and concludes that cross-examination within the adversarial system further empowers the communication skills of the advocate while disempowering the witness with ID. However, in concluding it is also highlighted that effective communication within cross-examination is not just a straightforward matter of simplifying language and sentence structure, rather it is much more complex, is impacted by multiple factors, and requires communication skills different from those which advocates have been trained to use during a typical cross-examination.

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Abbreviations

ID	Intellectual Disability
RI	Registered Intermediary
ABE	Achieving Best Evidence
NI	Northern Ireland
PSNI	Police Service of Northern Ireland
CJS	Criminal Justice Service
ISS	Intermediaries Services Secretariat for registered intermediaries
PPS	Public Prosecution Office
DOJ	Department of Justice
MOJ	Ministry of Justice

Chapter 1. Introduction

“All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. This may mean departing radically from traditional questioning techniques in the cross-examination of a vulnerable witness. The form and extent of the cross-examination will vary from case to case.” (Lord Chief Justice’s Office, 2019, p.20)

1.1 Intellectual disability

The giving of evidence requires a witness to have effective communication skills. They need to verbally express their recall of an event and respond to questions about such recall. In addition, in order to respond to the questions a witness needs to be able to hear, process, and understand the meaning of such questions; which is part of receptive and pragmatic language. A witness with intellectual disabilities (ID) may have challenges with communication, resulting from impairments in cognitive development, conceptual (language, literacy, numeracy, self-direction) and social skills (Abbeduto & Hesketh, 1997; American Psychiatric Association, 2013; Baddeley, 2003; Cascella, 2004; Cogher, 2010; Henry, 2001; van der Schuit et al., 2011). These challenges may negatively impact on their ability to give the ‘best evidence they can’. The presence of an ID categorises a witness as vulnerable. An individual may be diagnosed with ID if three key factors are present:

1. Impairment of intelligence (IQ below 70)

2. Impairment to adaptive functioning¹
3. Occurring during the developmental stages of life (i.e. below 18 years old) (Carr et al., 2016).

1.2 The vulnerable witness

Vulnerability is a very broad term that is open to interpretation and dependant on context. Within the criminal justice system (CJS) in the UK vulnerability may imply that a witness lacks capacity or competency to engage fully within the system (Jacobson, 2017) or that they require reasonable adjustments to be made to the court processes and special measures. In England, Wales and Northern Ireland (NI) a witness² may be defined as vulnerable under specific legislation. A complainant (victim) or non-suspect witness may be deemed vulnerable under one of three categories:

1. A child (under 18 years old)
2. An adult for whom the quality of complete, coherent and accurate evidence is likely to be diminished because of: a mental health disorder; significant impairment of intelligence and social functioning; or a physical disability

¹ Adaptive functioning relates to how a person copes with day to day life and refers to conceptual, social and practical life skills.

² Throughout this thesis, unless otherwise stated, the term 'witness' will be used generically to include complainant, prosecution witness, defence witness or defendant.

3. An adult for whom the fear or distress of giving evidence is great because of certain factors such as the nature of the crime, age, background or behaviour of the accused towards the witness³

A defendant (person accused of committing a crime) may be deemed vulnerable if unable to participate effectively in court proceedings as a witness giving oral evidence in court due to one of two categories:

1. A mental disorder⁴
2. A significant impairment of intelligence and social functioning⁵.

Complainants and non-defendant vulnerable witnesses can request a range of special measures to help and enable best evidence to be given. These special measures include:

1. Screen around the witness box
2. Evidence given by live link from outside the court
3. Evidence given in private (members of the public and press excluded)
4. Removal of Judge and Barristers' wigs and gowns in crown courts
5. Video recorded police interview used as evidence in chief (Achieving Best Evidence)
6. Cross-examination may be recorded in advance of the trial

³ Youth Justice and Criminal Evidence Act (YJCEA) 1999; Criminal Evidence (NI) Order 1998

⁴ Within the meaning of the Mental Health Act 1983; Mental Health (NI) Order 1986

⁵ Sections 33A and 33BA of the YJCEA 1999; Criminal Evidence (NI) Order 1998

7. The use of an intermediary
8. Aids to communication⁶

Vulnerable defendants can potentially avail of measures two and seven; evidence via live link and the use of an intermediary. A vulnerable complainant and non-defendant witness can request that their video recorded police interview – known as Achieving Best Evidence (ABE) interview, be played to the court as their evidence in chief. This means that the ABE is used as the evidence of their version of events and they do not have to provide further live recall. Following the playing of ABE interview, a vulnerable complainant or non-defendant witness is cross-examined on the evidence they gave in the ABE. They may prefer to be cross-examined via a live link room, rather than have to enter the main courtroom. In addition, the vulnerable witness may be able to request the use of a Registered Intermediary (RI)⁷ during the cross-examination. A RI is a communication specialist, commissioned by the court to advise and recommend on best communication practices with a vulnerable witness, including the use of communication aids. The role will be discussed in greater detail in Chapter four. The RI writes a report for the court highlighting the main communication challenges for the vulnerable witness and key recommendations for enhancing best communication. As the ABE interview is usually the evidence-in-chief, the RI court report recommendations are mainly relevant for cross-examination and any re-examination. This is important as the communication approaches differ between examination-in-chief and cross-examination, mainly in

⁶ Sections 23–30 of the Youth Justice and Criminal Evidence Act 1999.

⁷ In Northern Ireland this will be a Registered Intermediary through the Department of Justice (DOJ) for all witnesses. In England and Wales RIs are only available through the Ministry of Justice (MOJ) for complainants and non-defendant witnesses. Defendant witnesses can now request an intermediary from an approved service provider – private organisations or individuals (see [HMCTS intermediary services - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/services/hmcts-registered-intermediary-services)) accessed 20/12/22.

question styles used. Communication for examination- in-chief requires open question styles and leading questions are not permitted. Conversely, leading questions are the core style of questioning used during cross-examination. Communication with vulnerable witnesses during cross-examination has been the focus of challenge and debate within recent years, both by academics, practitioners and the courts.

1.3 Cross-examination

For some witnesses the experience of attending court and cross-examination can be a harrowing and traumatic experience (Beckene et al., 2017; Hayes & Bunting, 2013). A study by Queens University and NSPCC in 2011 of young witnesses in NI found that 52.4% could not indicate anything positive about the experience of being a witness (Gillespie, 2014).

Cross-examination – the questioning of a witness on their evidence given to the court by opposing counsel, is fundamental to an adversarial court process. It has been described as the cornerstone or lynchpin of the process (Doak. et al., 2021), the hallmark (Bowden et al., 2014), an indispensable feature (Langbein, 2005), an advocate's weapon (Valdespino, 2004), and a lever for inconsistency (Morley, 2015).

Key properties of cross-examination include:

- Giving of evidence orally;
- Challenging evidence given a witness' testimony;
- Rooting out unreliable witnesses;
- Rooting out witnesses who are lying;
- Undermining the opponent's case and advancing own case;

- Recognising cross-examination as the fundamental right of defence counsel (Colman, 1973; Doak. et al., 2021; Keane et al., 2010; McPeake, 2018; Roberts, 2022).

The traditional format of cross-examination is to ask the witness short leading questions. Advocates are taught to only ask questions that they already know the answer to and therefore to imply the answer they seek within the format of the question (Bates et al., 2015; Valdespino, 2004). These leading questions are usually closed question styles that require yes or no responses. The purpose of these questions is to control the responses and therefore the information that is provided to the decision makers, the judge and/or jury (Keane et al., 2010; McPeake, 2018; Morley, 2015). Some critics suggest that cross-examination by advocates is too aggressive a method for challenging witness testimony (McEwan, 2004). Others suggest advocates should be replaced by a suitably qualified third party (Hoyano, 2015; Zajac et al., 2012) or changed to an inquisitorial system, which purportedly arrives at the truth through investigation rather than witness examination (Bowden et al., 2014). Whilst Myers agrees that inappropriate cross-examination should not be permitted, he argues that the process itself is vital, highlighting the importance of questioning the witness in the search for truth (Myers, 2017).

During cross-examination, it is suggested that *“the accuracy and completeness given by people with intellectual disabilities can be significantly improved if suitable questioning strategies are adopted”* (Kebbell et al., 2004, p.24). Open, free recall type of questions are recommended for enhancing accuracy for people with ID as more closed type of questions can cause people to be more open to suggestibility, inaccuracy and acquiescence (Brown et al., 2012; Cardone & Dent, 1996; Perlman et al., 1994; Sigelman et al., 1982). Keane suggests that there are ample studies to indicate that the traditional

form of cross-examination only causes confusion to a vulnerable witness (Keane, 2012). Henderson argues this is an advocacy model through which, "*Counsel would seek to persuade the jury of their case both directly through the content of their questions and their manner in asking, and indirectly by manipulating the witness to give only certain responses or to react in certain ways*" (Henderson, 2015a, p. 930). This manipulation is used to tell a story to the jury and this is where the focus of the advocate lies (Henderson, 2014).

A series of four Court of Appeal cases in the UK have commanded a change in the format of cross-examination for vulnerable witnesses. In *R v Barker* (2010 EWCA Crim4) many conventional cross-examination techniques were deemed inappropriate for young and vulnerable witnesses and emphasis was placed on the responsibility of advocates to adapt cross-examination to enable the child to give their best evidence (Plotnikoff & Woolfson, 2015). The other cases; *R v W & M* (2011 EWCA Crim1926); *R v Edwards* (2011 EWCA Crim 3028); and *R v Willis* (2011 EWCA Crim 1938) gave judgements criticizing the use of: developmentally inappropriate language; complex style of questions; suggestible statements and challenged the need to 'put the case' and confront the witness (Henderson, 2014; Henderson, 2016; Plotnikoff & Woolfson, 2015). These cases have directed a move towards an 'evidence based' model of cross-examination where advocates are permitted to question the facts of the evidence only. Henderson claims "*the right to cross examine is the right to a reasonable opportunity to interrogate rather than the right to an opportunity to interrogate to the examiners subjective satisfaction.*" (Henderson, 2016, p.195). The NI crown court protocols state that a radical shift away from the traditional format of cross-examination may be required in order for vulnerable witnesses and defendants to be enabled to give their best evidence (Lord Chief Justice's Office, 2019).

A resource website has been established for advocates with a number of toolkits advising on how to communicate with vulnerable witnesses⁸. Toolkit 4, which advises on communication for witnesses with ID, highlights risks of acquiescence and inaccuracies if a witness is asked leading questions requiring yes/no answers. Acquiescence is when the witness responds yes to each question regardless of the nature of the question (Gudjonsson, 1990). Training is available in England and Wales for advocates cross-examining vulnerable witnesses⁹. At the core of this training are 20 key principles, which advocate specific question styles that should not be used for cross-examination of vulnerable witnesses; statements, leading questions, tag questions, and compound (two in one) questions. These principles have received criticism from academics arguing that they do not cite a theoretical framework or empirical evidence, as there is a “*dearth of empirical evidence in respect of advocacy in general, and in particular the questioning of vulnerable witnesses in the courtroom*” (Cooper et al., 2018, p. 4). The 20 principles have been updated to include some references to empirical research, however these are more related to child witnesses and not those with ID (Inns of Court College of Advocacy, 2019). Existing research, the advocates gateway toolkits, and the 20 principles provide information on communication challenges when cross-examining a witness with ID. However, much of existing research focuses on specific communication challenges such as recall, suggestibility and acquiescence. It is dated, and most studies tended to use experimental methodologies, i.e., they did not take place in a real courtroom. The focus of the toolkits and 20 Principles is mainly on what not to do and what question styles not

⁸ See www.theadvocatesgateway.org

⁹ See [Advocacy & The Vulnerable \(Crime\) | ICCA](#)

to use. There is a lack of research to examine and test communication styles that advocates could potentially use during cross-examination.

1.4 Research questions

This present research therefore attempts to address some of this lack of research through the two key issues highlighted in the critique paper of the '20 Principles' – a theoretical framework and empirical evidence. It encompasses three distinct academic subject areas - interpersonal communication, law and psychology. Cross-examination requires interpersonal communication, mainly between an advocate of the law and a witness. Research on communication of vulnerable witnesses requires enquiring into the court provision for vulnerable witnesses and developing an understanding of the process of cross-examination and therefore the legal field. Most of the research relevant to cross-examination of witnesses with ID is psychology based and requires delving into the psychology behind communication and ID. Although separate fields of research, these subject areas are interconnected when a vulnerable witness with ID gives evidence in a UK court. This research will address the communication challenges for people with intellectual disabilities when being cross-examined in court. This will involve theory and research on intellectual disability, interpersonal communication and the vulnerable witness within the criminal justice system.

This thesis will address three key research questions:

1. What are the main communication challenges for witnesses with ID when giving evidence in court?
2. Is there a better question style for advocates to cross-examine vulnerable witness with ID?

3. What is communication within the context of cross-examination and how does this communication impact witnesses with ID?

1.5 Thesis structure

The first part of the thesis (chapters 1-4) examines the three key areas of ID, communication and the vulnerable witness. The second part of the thesis (chapters 5-10) attempts to answer the research questions through a systematic review, empirical research and the development of a new communication model.

Chapter two provides the definition and theory of ID. Firstly this chapter will provide a general introduction into ID highlighting the key definition classifications and roles of IQ and adaptive functioning in definition. The history of society's response to ID will be addressed as well as other conditions that commonly occur with ID. Secondly, this chapter will address the impact of ID on communication and alternative communication methods used with people with ID. Finally, the prevalence and challenges within the criminal justice system in England, Wales and Northern Ireland (NI) will be addressed.

Chapter three examines existing theory of interpersonal communication and the key factors that impact an effective communication exchange.

Chapter four defines vulnerability within the criminal justice system; the legislative, policy and cultural changes that have occurred. It examines the role of the registered intermediary (RI) in advocating effective communication for the vulnerable witness.

Chapter five sets out the research plan. This presents the challenges with an original research plan to gather data on communication during cross-examination of adult

witnesses with ID in NI crown courts, as well as details of an alternative empirical research plan comparing question styles during cross-examination of adults with ID.

Chapter six is a systematic review of communication and cross-examination for children and adults with ID. This chapter reviews existing relevant literature and was published in the International Journal of Evidence and Proof in 2019.

Chapter seven is a qualitative research study of communication challenges, as reported by registered intermediaries in Northern Ireland for 19 adult witnesses with ID. It raises the issue of a mismatch of communication between the advocate and the vulnerable witness with ID, as well as highlighting the role of the advocate as the communication partner. This chapter was published in the International Journal of Evidence and Proof in 2021.

Chapter eight is an empirical quantitative research study comparing two forms of question styles for cross-examination – simple leading questions and questions which provide a choice of answers with visual aids. This research involved carrying out communication assessments, initial interviews and cross-examinations online with 30 adults with ID from England and NI. The study examines the two question styles for differences in accuracy, suggestibility, and likelihood of stating ‘don’t know’ or providing an alternative response.

Chapter nine introduces a new model of communication – the cross-examination model of communication. This model has been used (by JM) in training of RI’s in England and Wales and for the first training programme in NI on vulnerable witness training for advocates. It is a transferable model that can be used to identify and highlight the communication needs and factors to consider when preparing the cross-examination of vulnerable witnesses.

Finally, chapter ten concludes the thesis. It addresses how the three research questions have been answered and identifies further area of research required.

Chapter 2. Intellectual disabilities – an overview

This chapter aims to provide an overview of intellectual disabilities (ID). It informs on the definition of ID, including the main classification systems, prevalence of ID within the UK, social history of care and attitude, and other conditions that can co-occur with ID.

2.1 What is an Intellectual Disability?

There is no one succinct, simple, straightforward definition of intellectual disability accepted and in use within academic and practice fields. Language used to define a person with an ID has changed dramatically over the years for what is accepted in practice and in academia. The language of previous years – imbecile, idiot, mental retard, mentally handicapped, feeble-minded, ament, moron – is deemed to be derogatory and unacceptable by today's standards (Dumbleton, 1998; Greenspan, 1999; Parmenter, 2011). However, it can seem like a cycle of a new term being agreed, used for a while, then attracting negative stigma, and eventually abandoned for a newer more appropriate and acceptable term (Tassé, 2013). Until more recent years, mental retardation was an acceptable term in North America, however intellectual or developmental disability is now more commonly used. Practitioners in the UK tend to favour 'learning disability', a term introduced by Stephen Dorrell MP when health minister in 1991. However, this term is constantly being confused with specific learning disabilities, such as dyslexia, and so increasingly both academics and clinicians have begun following the more widely used European and Australasian term of intellectual disability (Cullen Pullen, 2016; Gates & Mafuba, 2016; Kelly, 2000; Parmenter, 2011).

2.2 Causes

There is no one fixed cause of an ID, rather it can develop out of a wide variety of bio-medical and environmental factors that may occur before, during or after birth (Carr et al., 2016; Hatton, 2012; Kelly, 2000). A bio-medical cause may be: genetic (Jansen et al., 2023); a malformation to the central nervous system; an infection; or an accident during birth (Carr et al., 2016; Grant et al., 2010). An environmental cause may result from social, behavioural or educational agents. For example, domestic violence towards the mother, institutionalisation of the child, parental drug use, impaired parenting (Grant et al., 2010). Sometimes there is simply no known cause .

The classification of ID, as primarily a health condition or as a social disability, is a subject of debate. Depending on where the emphasis is placed determines the choice of descriptive language chosen for the definition - Intellectual Developmental Disorder or Intellectual Disability and the classification, as a 'brain based health condition' or as a 'disability' (Salvador-Carulla et al., 2011; Wehmeyer, 2013).

2.3 Classification

There are three main classification systems in use for diagnosis:

1. International Classification of Diseases, eleventh revision (ICD-11)¹⁰
2. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)
(American Psychiatric Association, 2013)

¹⁰ [ICD-11 \(who.int\)](https://www.who.int/) (accessed 2/1/23)

3. American Association on Intellectual and Developmental Disabilities Manual, eleventh edition (AAIDD 11) (American Association on Intellectual and Developmental Disabilities, 2010).

These systems have undergone changes in recent years, however for all three systems an intellectual disability is defined by the presence of three key factors:

1. Impairment of intelligence (IQ below 70)
2. Impairment to adaptive functioning
3. Occurring during the developmental stages of life (i.e. below 18 years old) (Carr et al., 2016).

2.3.1 ICD-11

The ICD-11 is a guideline of the World Health Organisation on the classification of diseases. It was updated in 2017 from the ICD-10 version which used the term mental retardation and classified ID within the grouping of psychiatric disorders. It defined mental retardation as *“a condition of arrested or incomplete development of the mind, which is essentially characterized by impairment of skills manifested during the developmental period, which contribute to the overall level of intelligence.”*¹¹

The ICD-11 classifies ID under the parent label of neurodevelopmental disorders, using the term ‘Disorders of intellectual development’. Significant limitations in intellectual functioning and adaptive behaviours are deemed essential diagnostic requirements. These limitations will be discussed in greater detail later in this chapter. In addition, early

¹¹ [ICD-10 Version:2010 \(who.int\)](https://www.who.int/publications-detail/11-version-2010)

onset during the developmental period is required. The ICD-11 further defines mild, moderate, severe, and profound disorder of intellectual development, according to number of standard deviations below the mean of standardised tests or based on clinical judgment of intellect and adaptive skills. Therefore a diagnostic requirement for mild disorder of intellectual development is intellectual functioning and adaptive behaviour two or three standard deviations below the mean, or 0.1-2.3 percentile¹². A provisional diagnosis can be made where there is evidence but the child is under the age of four.

Within the UK, there is potential for confusion with the terms learning disability and learning difficulty. However, a learning difficulty is a term used by education authorities and refers to specific difficulties, such as dyspraxia but does not necessarily imply any cognitive impairment (British Psychological Society, 2015). Within the ICD-11 this is referred to as a Developmental learning disorder, when there are specific difficulties with learning academic skills of reading, writing or arithmetic.

2.3.2 DSM-5

DSM-5 is the fifth edition of a Diagnostic and Statistical Manual of Mental Disorders, developed by the American Psychiatric Association. Published in 2013, this new edition brought significant changes to: the language of definition; further explanation of what is included in impairments of intellect and adaptive functioning (meeting the day to day practical demands of life); and greater clarification of the severity levels of disability (American Psychiatric Association, 2013). The previous term of mental retardation has been replaced with both Intellectual Disability and Intellectual Developmental Disorder.

¹² [ICD-11 for Mortality and Morbidity Statistics \(who.int\)](#) (accessed 2/1/23)

2.3.3 AAIDD

AAIDD is the 11th edition of the American Association on Intellectual and Developmental Disabilities manual of classification and system of support for intellectual disability. The AAIDD 11 classification highlights five key factors that can impact diagnosis of intellectual disability: intellect; adaptive functioning; health (physical and mental); participation interactions (e.g. education, leisure opportunities); and social roles (family and community opportunities) (Carr et al., 2016). A 12th edition has recently been published, which includes classification based on intensity of support needs and a section on borderline ID.¹³

The classification of intellectual disability has been subject to criticism, in particular, the emphasis placed on intellect and IQ (Flynn & Widaman, 2008; Greenspan, 1999; Hale et al., 2007).

2.4 The role of IQ testing in diagnosis

The DSM 5 further categorises intellectual disability into levels of severity based on IQ ratings.

- Mild intellectual disability is when there is an IQ below 70 but above 50-55
- Moderate intellectual disability is an IQ below 50-55 and above 35-40
- Severe intellectual disability is an IQ below 35-40 and above 20-25
- Profound intellectual disability is an IQ below 20-25

¹³ [intellectualdisability_subjectindex_online.pdf \(aaidd.org\)](https://www.aaidd.org/intellectualdisability_subjectindex_online.pdf)

As highlighted above, the ICD-11 also uses further categorisation of severity of disability based on standardised testing. Rather than having just one general trait of intelligences, various theories have suggested that people are made up of multiple types of intelligences (Borkowski et al., 2007). This proposes that a standardised IQ test is too limiting in its definition. Greenspan (2006) argues that *"IQ is not broad enough to cover all the ways in which one can be considered to be intelligent or unintelligent"* (p.212).

The "Flynn Effect" refers to the increase in performance levels of IQ tests that have taken place over time (Flynn, 1987). In a later publication, Flynn examined the role of IQ in ID diagnosis and highlighted that there are various factors that can affect an IQ grade, *"The IQ an individual receives is like a lottery, with the outcome dependent on when he/she was tested, what test was administered and in what year that test was normed"* (Flynn & Widaman, 2008, p. 123). However, Flynn did not suggest doing away with IQ testing, rather he emphasised the importance of it, particularly within the legal system. He suggested that in the absence of an IQ result, prosecution and defence experts would reach opposite conclusions as to whether a person has an intellectual disability or not (Flynn & Widaman, 2008). Today the upper cut off point for a diagnosis is an IQ below 70, however in previous years the AAIDD classification included a 'borderline' category with a cut-off point of 85 and encouraged taking a standard error of judgement into consideration (Parmenter, 2011). There is evidence that people with Borderline Intellectual Functioning, IQ between 71-85, have similar communication and support needs as people with intellectual disabilities (Bertelli et al., 2016).

The DSM-5 and AAIDD both define intellect as consisting of specific skills of reasoning, planning, problem solving, abstract thinking, academic learning and learning from experience (American Psychiatric Association, 2013; Carr et al., 2016).

In Northern Ireland (NI), diagnosis of ID of children is made by an Educational Psychologist and by a Clinical Psychologist for adults. The British Psychological Society advises that diagnosing ID is complex and there is considerable ongoing debate regarding definition (British Psychological Society, 2015). It refers to all three classification systems discussed above and advises cut off scores of below 70 in both IQ and adaptive functioning. While not endorsing, it does recognise, however, that services under pressure may 'shortcut' assessments which leads to an over reliance on IQ testing. Therefore, although the guidance from the classification systems has clearly moved away from reliance on IQ and more towards the day to day impact of cognitive impairment, in diagnosing intellectual disability, this may not always be reflected in practice. However, diagnosis is not the subject of this study. When assessing the communication needs of a vulnerable witness, the IQ rating is not given much, if any, consideration by a Registered Intermediary, rather it is the impact of difficulties on adaptive functioning that are considered.

2.5 The role of Adaptive Functioning in definition

Adaptive functioning measures how a person copes on a day to day basis within the demands of their environment and is related to age and socio-cultural factors (British Psychological Society, 2015). Greenspan (2006) argued that adaptive functioning has been largely ignored as a criterion for intellectual disability diagnosis as it was never adequately defined. Carr et al., (2016) have described adaptive functioning as including three specific skill areas.

1. Conceptual skills of language, literacy, numeracy, self-direction.
2. Social skills which include, making and maintaining relationships, accepting responsibility, adequate self-esteem, ability to follow informal rules for social

interactions, ability to interpret social situations accurately without being gullible, naïve or open to victimisation.

3. Practical skills include the everyday skills required for independent living such as toileting, washing and managing personal safety (Carr et al., 2016).

All of the classification systems appear to have taken some measures to address adaptive functioning. In the DSM-5 diagnostic manual, published in 2013, although the levels of severity of disability remain the same as in the previous manual (DSM-4), ranging from mild to profound, they are no longer based on IQ but on adaptive functioning, as this determines support required (American Psychiatric Association, 2013). Moreover, adaptive functioning is defined in greater detail based on the level of impairments within conceptual, social and practical domains. The AAIDD, updated in 2010, also uses these domains to further define adaptive functioning but refer to them as skills. The ICD-11 seems to be further developed in the definition, including the three criteria of adaptive functioning but also recognising the impact of environmental factors that change with age.

2.6 Prevalence of Intellectual Disability

Confusion and lack of agreement in the field of ID is not confined to language and definition. Perhaps because of this confusion, accuracy on prevalence is difficult to obtain. However, it is estimated that 1% of the world population have an ID (Maulik et al., 2011). In their study of published literature Maulik et al. reported a higher rate of prevalence of ID among lower income countries, 1.64%. The more affluent the country, the lower the prevalence, with higher income countries averaging at 0.92%. Potential factors influencing this rate are suggested to be inadequate screening methods, birth related complications, iodine deficiency and intra-uterine growth retardations. A study in

England in 2008 places the prevalence at 2% of the population (Emerson & Hatton, 2008). In a NI census in 2011, figures were recorded at 2.2%, however it must be noted that people were asked to declare if they had a learning difficulty, learning disability, social and or behavioural difficulty, therefore those without a diagnosis of intellectual/learning disability would be included in this figure. The Review of Mental Health and Learning Disability highlights the difficulty in determining the prevalence in NI, but those known to the department of Health and Social Services account for 0.97% of the population (Bamford, 2005). A main UK charity for ID estimates 1.5 million people in the UK have ID, that equates to 2.15% of adults and 2.5% of children.¹⁴

2.7 Social History

The history of society's treatment of people with ID in the UK is an important factor to consider when researching and identifying the communication skills, development and place of adults within the criminal justice system of today. It should not be overlooked that the history of societal attitudes, care and support towards people with ID seems to be one marred with exclusion and stigmatisation, people deemed as: unworthy of normal lives; takers from society; unfit and incapable of making any positive contribution (Bouras, 2016; Hansen et al., 2008; McClimens & Richardson, 2010). During the middle ages people with disabilities were considered as having supernatural powers and approached with fear (McClimens & Richardson, 2010). The 19th century brought a differentiation between mental health issues, known as 'lunacy' and those with intellectual disabilities, known as 'idiots'. Social reforms, the provision of social and health care and the introduction of legislation, such as the Poor Law Amendment Act

¹⁴ [How Common Is Learning Disability In The UK? How Many People Have A Learning Disability? | Mencap](#) (accessed 2/1/23)

1834, led to the building of large asylums to house 'idiots' and so steered the beginnings of institutionalisation (Gone et al., 2012). Around this time the idea of natural selection and survival of the fittest began to emerge, known as eugenics (Hansen et al., 2008). This school of thought proposed that impairment to intelligence was passed on genetically, that there was a link between society's social problems and people with ID, and the rest of society needed to be protected. In addition, the idea of IQ was developed along with formal testing in the early 1900s. The result of these beliefs was repression of sexuality, sterilisation and large institutionalised living, with all the facilities under one roof so that there was no need for people to go outside of the walls (Carnaby, 2011; Gone et al., 2012; McClimens & Richardson, 2010). The dark concept of eugenics was bought into by Hitler's Nazi regime who captured the genetics movement and coined the term "useless eaters" to label people with disabilities as having lives less worthy, thereby justifying the murder of 250,000 people with disabilities (Hansen et al., 2008).

Post war and European recovery resulted in greater developments and transition for people with ID. In 1959 the Danish Mental Retardation Act sparked the 'normalisation' concept. In relation to intellectual disabilities, normalisation basically means affording people with disabilities the right to have the same opportunities, access to services and legal rights as anyone else in society (Gone et al., 2012). American sociologist Wolf Wolfensberger developed this concept further to encourage society to look upon intellectual disability in a more positive light, to create greater acceptance and reduce stigma (Bouras, 2016; Carnaby, 2011). In the UK, the 1960's and 1970's opened the doors for people to be able to leave institutions and to move into community living (Mansell, 2006). Emerson and Hatton suggest four key influencing factors in this deinstitutionalization movement:

1. Economic growth.

2. Greater focus on human rights.
3. Public scandals highlighting degrading living standards of people with intellectual disabilities.
4. Emergence of an approach from professionals, such as Jack Tizard, suggesting that people with intellectual disabilities could be educated and learn to live in the community (Emerson & Hatton, 2005).

A move away from institutionalisation in recent years has been associated with a 'demedicalisation' of people with ID and it is now recognised that needs are social, not just medical. A medical model approach sees the disability as being within the person and something to be treated (Law et al., 2007). It has been criticised for viewing people with disabilities as 'lacking' and unable to have a role in society (Dewsbury et al., 2004). In recent years throughout the UK there has been a strong focus to move people out of the large institutions into smaller community living developments with support provided according to need (Emerson & Hatton, 2005; Gone et al., 2012).

A major review of mental health and learning disability law, policy and provision took place in NI in 2002, chaired by David Bamford, and became known as the Bamford Review¹⁵. The action plans that followed called for an improvement in the lives of people around five key areas: social inclusion, citizenship, empowerment, working together and individual support (DHSSPS, 2009). The vision of how services should be provided for people with ID in the next 15-20 years was set out in the "Equal Lives" report of 2005 (Bamford, 2005). The "Equal Lives" report recommends that services should be provided using a bio-psycho-social model of support, that is to take a holistic view of the person,

¹⁵ [Bamford Review of Mental Health and Learning Disability | Department of Health \(health-ni.gov.uk\)](http://www.health-ni.gov.uk) (accessed 3/1/23)

taking into account the biological, psychological and social factors of a person's condition. A 2014 monitoring report of the Bamford Review action plan (2012-2015) claimed that 83% of the 76 actions were on target progress¹⁶, however, a report in 2018 from an all-party group on learning disability¹⁷ argued that most of the actions and an evaluation had not been completed. At the time of writing no evidence of an evaluation could be found on the Department of Health website. The 2018 All Party Group report also claims that people with ID are more likely to experience: poverty; isolation and loneliness; mental health difficulties; poor physical health; poor educational attainment; and a lower life expectancy.

2.8 Intellectual Disability and other conditions

People with ID may also have other complex conditions that impact their day to day living. They may have medical needs relating to a genetic condition, such as Prader Willi Syndrome or Down's Syndrome or social impairments, such as autism. Autism is frequently associated with intellectual impairment and language difficulties (American Psychiatric Association, 2013; Brugha et al., 2009; Bryson et al., 2008; Postorino et al., 2016; Tonnsen et al., 2016). It is identified through a triad of impairments in social interaction, communication and repetitive behaviours (Wing & Gould, 1979). The ICD-11 classification expands on these impairments to include hyper or hyposensitivity to sensory stimuli. In addition, the social, communication and repetitive behaviours must be deemed severe and causing impairment in personal, family, social, education and

¹⁶ [Bamford Monitoring Report November 2014 - \(health-ni.gov.uk\)](https://www.health-ni.gov.uk/publications/bamford-monitoring-report-november-2014) (accessed 3/1/23)

¹⁷ [All Party Group on Learning Disability - Priority Issues May 2018.pdf \(mencap.org.uk\)](https://www.mencap.org.uk/publications/all-party-group-on-learning-disability-priority-issues-may-2018) (accessed 3/1/23)

occupational settings.¹⁸ The DSM-5 focuses on deficits of social communication, including reduced ability to share emotions and limited understanding of non-verbal language, restrictive or repetitive behaviours and sensory sensitivity (American Psychiatric Association, 2013). Autism without language delay or intellectual impairment (IQ above 85) has also been known as Asperger Syndrome (Baron-Cohen, 2008).

Epilepsy, cerebral palsy, sensory impairments, challenging behaviour and mental health issues are also common conditions for people with ID (American Psychiatric Association, 2013). Examples of some of the general difficulties people with ID may have on a day to day basis have already been mentioned as difficulties with conceptual, social and practical skills. The extent of impairment and consequent support required obviously varies from person to person.

2.9 Intellectual Disability and the criminal justice system

2.9.1 Prevalence

Precise prevalence of offenders with intellectual disabilities in the UK is unknown (Howard et al., 2015). Existing research demonstrates a wide range of figures with estimates ranging from 1-10% (Loucks, 2007). However, some studies outside of the UK demonstrate even higher figures. Research on 281 men from pretrial holding centres in Canada indicates 19% had IQ less than 70 (Crocker et al., 2007). No specific studies have been carried out in NI but research in Ireland show even higher figures of 29% of 264 prisoners with IQ of 70 or below (Murphy et al., 2000). Some academics therefore suggest that people with ID are over-represented in the prison population (Hyun et al.,

¹⁸ [ICD-11 for Mortality and Morbidity Statistics \(who.int\)](http://www.who.int)

2014; Tazi & Rogers, 2023), however, research that includes adaptive functioning measurements, as required for ID diagnosis, seem to refute this suggestion. Herrington's study of 185 young males in a London Youth Offender Institution found that although 10% had IQ below 69 none had adaptive functioning rate below 69 so they would not technically have a diagnosis of ID (Herrington, 2009). A further study of Hayes (2007) involving 140 prisoners in a Liverpool prison found that 7% had IQ below 70 and 10% had adaptive function below 70, however only 2.9% had below 70 results in both, which is required for diagnosis of ID. For both studies, however, there was a more significant number of prisoners when borderline scores were included for IQ and adaptive functioning (70-79) ranging from 11% (Herrington, 2009) and 21.7% (Hayes et al., 2007). In their research on understanding of Miranda rights for defendants in the USA, Tazi and Rogers (2023) argue that existing research has focused on those with ID, and overlooked those without ID diagnosis but with limitations in their cognitive abilities, i.e. 'borderline' ID. Their research of 820 defendants found this cohort, as well as those with ID, to have limited abilities to recall, understand, and follow their Miranda rights.

Murphy and Mason (2014) suggest that apparent higher representation of people with ID in the criminal justice system may be more to do with ease of convicting people with ID rather than a higher rate of committing crime. They also propose that variances in the definition of ID, along with other factors such as: processes used in different countries to keep people with ID out of the criminal justice system; different measurements used for assessing ID; and potential reluctance of care staff to report crimes, make it very difficult to ascertain the exact prevalence of people with ID in other sections of the criminal justice system (Murphy & Mason, 2014). A study in the UK showed that 9% of 156 people arrested at two London police station had IQ levels below 70 and 34% were borderline with IQ below 75 (Gudjonsson, 2002)

It is difficult to know how often people with ID observe crimes or are victims (Gudjonsson et al., 2000). What is known and agreed is that people with ID are vulnerable and at greater risk of being victims of crimes (Clare & Murphy, 2001; Henry & Wilcock, 2013). Fisher et al.'s. review of victimisation and social vulnerability of people with ID discovered nine studies reporting high levels of sexual abuse, with women more likely to be victims and multiple incidents of abuse in the majority of cases (Fisher et al., 2016). The review discovered studies reporting high levels of victimisation and intimidation among people with ID. A recent systematic review of abuse in care services claimed that abuse of adults with ID and other developmental disabilities seemed to be common. The review of 48 studies highlighted more severe ID and difficulties with communication among a number of victim characteristics associated with a greater risk of abuse (Collins & Murphy, 2022).

While there is a move away from large institutional abuse of the past, people with ID are now living, working and socialising in their community, they are socially vulnerable and may more open to a new kind of victimisation and abuse (Fisher et al., 2016). As well as difficulties associated with the intellectual disability, other factors that place people at risk have also been suggested such as: being female; escalation of challenging behaviour; previous abuse victimisation; fewer social supports; lower socio economic status, education and employment (Collins & Murphy, 2022; Marinos et al., 2014; Matta Oshima et al., 2010; Murphy & Clare, 1998); their experiences in institutions; specific vulnerabilities relating to condition (e.g. risk awareness for autistic people)(Fisher et al., 2016); over regulation in law (Marinos et al., 2014a) and being disadvantaged by the criminal justice processes and procedures that do not provide accommodation for their support needs (Loucks, 2007; Marinos et al., 2014a; Murphy & Clare, 1998).

2.92 Communication challenges for people with ID in the criminal justice system

Murphy and Mason (2014) suggest four areas of difficulty for suspects with intellectual disability in the criminal justice system:

1. Not understanding information
2. Suggestibility
3. Acquiescence
4. Making decisions

Other difficulties for suspects with ID highlighted in literature include: not understanding what is going on (Hyun et al., 2014); poor memory capacity; confabulation; and risk of making false confessions (Gudjonsson & Joyce, 2011). All of these are linked to impairments in a person's communication skills; how they input, process and retain, and output information.

There may also be difficulties around understanding cautions for suspects with ID (Gudjonsson, et al., 2000; Loucks, 2007), and it is known that 20% of people referred for pretrial competency assessments in South Carolina, USA, did not understand the terms 'guilty' and 'not guilty' (Smith, 1993). Likewise, in a Canadian study, 40 participants with ID only understood 8/34 legal terms, compared to those without ID who understood 33 (Ericson & Perlman, 2001). A study in UK prisons found that people with ID often felt confused in police stations and in the court (Talbot & Riley, 2007). People with ID are also likely to struggle to understand police questioning, the rules and regimes of custody, and may have non-compliance with community based orders, perhaps because of poor understanding of these (Loucks, 2007). A recent study examined understanding of the Miranda rights in USA (similar to police caution in UK) for 820 pretrial defendants with ID, 'borderline' IQ (70-85), and those with IQ above 85. Results found that those with

ID and 'borderline' IQ had greater difficulties with memory recall of the Miranda rights and in understanding the vocabulary used, as well as higher likelihood of acquiescing (Tazi & Rogers, 2023).

Whether a person is a witness or a suspect, the difficulty of identifying that they have an ID when they come into contact with the criminal justice system has been highlighted in a number of studies (Cant & Standen, 2007; Douglas & Cuskelly, 2012; Henshaw & Thomas, 2012; Howard et al., 2015). Although identification alone does not provide information on what support or adaptations should be made for an individual with ID (Marinos et al., 2014a), identification is even more challenging if no screening tool is available for police, courts or the prison service to use (Hayes et al., 2007; Loucks, 2007; McKenzie et al., 2012).

These challenges for people with ID in the criminal justice system are generic and many apply to both suspects and witnesses. However, not all the challenges apply to every individual with an ID who finds themselves in the criminal justice system. Some are not overly suggestible or prone to acquiescence (Gudjonsson & Joyce, 2011). Each person will have their own unique areas of vulnerability and challenges to overcome and therefore they require appropriate support personalised to these needs. Chapter four examines steps that have been made to legislation, policy and procedures attempting to identify and address the needs of those with ID, who are recognised as vulnerable witnesses.

2.10 Summary

In summary, intellectual disability is associated with an impairment in cognitive function or intellect and impairments in adaptive functioning. These skills include conceptual skills of language, literacy, numeracy and self-direction; social skills which include

awareness of intentions of others and risk of vulnerability; and practical skills for everyday independent living. This thesis is interested in the cognitive and adaptive skills that impact on communication, in particular how the presence of ID impacts on a person's communication needs and skills when being cross-examined in court. Firstly we need to examine what is meant by 'communication'.

The next chapter will examine the theory behind communication in more detail through discussion of key communication theory; models of communication, skills required for effective communication and factors influencing communicative exchanges. In addition, it will introduce the impact of ID on communication.

Chapter 3. Communication

This chapter examines existing interpersonal communication theory, in particular communication models and the factors that influence a communication exchange. It highlights the key skills that are required for effective communication and the impact an intellectual disability (ID) may have on the development and administration of these skills.

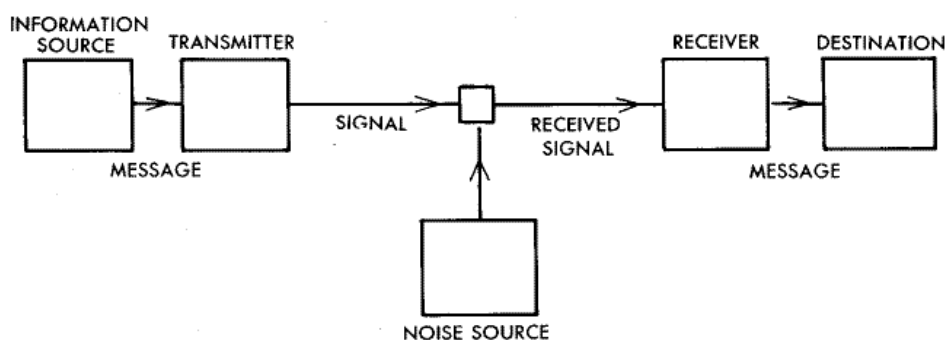
3.1 Models of communication

Communication is an action performed by every human being. However, universality of use does not denote simplicity. Communication, as a topic, covers a vast subject area; from a short, minimal interaction between two people to mass media communication. How individuals communicate requires a complex and intricate process that is difficult to define (Airenti, 2017; Hargie, 2016). Various theories exist of what communication actually is and how it occurs. This research thesis focuses on communication within the context of cross-examination of witnesses in court, which usually involves communicative exchange between an advocate of the court and a witness. Communication between two people is known as 'interpersonal communication' (Berger, 2014), which requires some form of interaction; that is between two or more people in two or more directions (Griffiths & Smith, 2017). This chapter will examine existing theories behind interpersonal communication and in chapter nine these theories will be further examined within the context of cross-examination.

A simplistic linear model of communication theorises that the interaction during a communication exchange can be used as a way to transmit messages between two people, a communicator and a receiver. As originally defined by Shannon and Weaver in 1949, the transmitter model of communication, as seen in Figure 3.1, has the potential to be interrupted by interference, referred to as 'noise' (Thompson, 2011). As well as

actual sound interference, this 'noise' can refer to anything that impacts on the ability to receive information as intended by the transmitter, such as a chair causing discomfort or lights causing distraction (Fiske, 1990). This 'noise' has also been referred to as a 'barrier gesture', which is any action, behaviour or physical arrangement that can cause discomfort and thereby reduce the likelihood of a communication exchange being successful (Moss, 2015). Even though the transmitter model was really designed to explain technology based communication, it is accepted as *"one of the main seeds out of which communication studies has grown"* (Fiske, 1990. p.6). However, it is deemed too basic to fully explain the complexities of interpersonal communication (Thompson, 2003).

Figure 3.1 Transmitter model of communication



Other writers developed the transmission linear model to introduce other factors as relevant and influencing in a communication exchange. Laswell's 5W model (1948) introduced the concepts of a 'medium' or way in which the message is sent and the effect of the message on the receiver (Sapienza et al., 2015). Miller and Steinberg stated that many face-to-face interactions between individuals are not technically interpersonal communication; rather they are impersonal or non-interpersonal exchanges (Miller &

Steinberg, 1975). Such interactions do not require the communication partners to know each other; rather they depend on cultural and sociological information to guide the interaction, for example between a service provider and customer (Berger, 2014). However, this omission from interpersonal communication has been challenged with the argument that it focuses on relationship rather than actual communication and influencing the behaviour of the communication partner would constitute as interpersonal communication between strangers (Capella, 1987).

Other models argue the importance of relationship, claiming that communication is actually based on the relationship between the communication partners. Fogel describes relationships as communicative systems that continuously develop, and not just social relationships but any form of individual-environment connection (Fogel, 1995). He argues that the transmitter model does not take human social interaction into account. Rather than a sender and receiver of signals, communication is a 'continuous process system' where both partners are continuously active and modifying their actions. It is therefore not always possible to determine who is the sender and who is the receiver (Fogel, 1993). This also implies that what is communicated, and how effectively, depends on both communication partners. The grounded theory interpersonal communication model was developed through analysis of 288 articles on interpersonal communication and summarised with 17 categories that impact on communication. The overall focus is on relationships and interaction between the partners, as well as internal and external factors that influence the effectiveness of any exchange (Stamp, 1999). Johnson's socio-communicative filter model also refers to internal and external factors which form a filter through which the quality of the communication emerges (Johnson et al., 1996). The internal and external factors highlighted by communication models will be introduced in more detail using a specific format of Form, Content and Use (See Bloom et al., 1980).

3.2 Form

The form of a communicative exchange refers to what is actually said in an exchange, the mode of communication. The common modes are verbal and non-verbal language. As with communication in general, the study of language, known as linguistics, is a vast and complex field of study with various theoretical approaches. Swiss linguist Saussure saw language as made up of a system of vocal symbols based on random choice and differences. For example, in order to understand the meaning of a word, such as 'blue', an individual needs to understand how blue differs from other colours (Hornsby, 2014). Perhaps one of the best known linguists, Chomsky, coined the term 'universal grammar' indicating that we are all born with an innate predisposition to learn language (Chomsky, 2006). Chomsky uses the nonsensical sentence 'Colourless green ideas sleep furiously', to explain that grammatical correctness is not based on having meaning (Hornsby, 2014). For Chomsky, system of thought is the core of language, with communication being only one purpose of language (Chomsky, 2011). For other linguists, language is a form of action and primarily a communicative tool (Airenti, 2017).

Language is further complicated by its use within social settings. Sociolinguistics studies the correlation between the social setting, relationships and external variables, and the language used (Mesthrie et al., 2009). This highlights the influence of external factors on language used and language abilities. Different language is used within different settings. Within the court setting advocates are likely to use more informal style of language when conversing with each other in the court corridors than they do when addressing the Judge during court proceedings. Opposing counsel, on first name terms in the corridors, become 'my learned friend' during court proceedings.

Non-verbal language can be described as falling within five domains: facial actions; vocal cues; use and perception of space; gaze; and kinesics (head, body, arm and leg

movement) (Harrigan, 2013). Some scholars also suggest further factors could be considered non-verbal language such as physical attractiveness and time factors – punctuality, accents, pauses and silences (Guerrero, 2014). Vocal cues can also be referred to as paralanguage; the vocal, but non-verbal, dimension of speech such as volume, pitch and tone of voice (DeVito, 2017). Fogel uses the example of a smile to explain that non-verbal language does not take the form of sending and receiving individual messages, rather it is a continuous process of adjustment. He explains how a person can begin to smile but then adjust this if the communication partner displays a distant or disapproving non-verbal action at that moment in time (Fogel, 1995). Fogel refers to this modification of action in response to ongoing and anticipated actions of the partner as ‘co-regulation’ (Fogel, 1995, p. 11).

Verbal and non-verbal language can also be influenced by knowledge and life experiences, opportunities to communicate, attitude towards the communication partner, willingness to communicate and personality characteristics that impact the style and cognitive complexity of language used (Johnson et al., 1996; Stamp, 1999).

In summary, what is said during a communicative exchange can be influenced by each communication partners’ abilities to use verbal language and non-verbal language, the co-regulation adjustments during the exchange, the context or environment in which the exchange takes place, and internal characteristics of each partner.

3.3 Content

Communication is not just dependent on what is said, but requires the meaning of the verbal and non-verbal language to be understood. Words that are said and written the same can have different meaning to different people and non-verbal language is subject to personal interpretation (Saeed, 2015). A ten-aspect model of communication,

developed by Gerbner, introduces the concept of what the communication partners perceive. According to the model, someone must perceive an event in order to initiate communication, and the partner then has to perceive the event in order to receive the communication and react. The reaction is influenced by the situation or context in which the exchange takes place and there must be some 'means' by which to carry the message (Gerbner, 1956). However, the continuous process model argues that the information is not in the event or in the perception of the event, rather in the meaning of the perception that is created during the communication (Fogel, 1993). These meanings are dynamic and socially constructed between individuals, suggesting that there is not one meaning, rather a set of meanings which are subject to the perception of the communication partners (Grove et al., 1999).

Understanding the meaning of language also requires pragmatic skills to understand and interpret the 'intention' of the speaker in using such words. According to Lockean theory, communication takes place when the hearer grasps the 'mental object' behind the words the speaker expresses (Gauker, 1992). This 'mental object' has been described as a variety of meanings such as: intention; attitude; abstract object; and belief. Gauker combines these meanings together with the term 'speaker's message'- what is the specific message the speaker wishes to give to the listener? When this message differs from the actual language used by the speaker, the listener is required to adopt pragmatic skills to understand and decipher the meaning of the message (Cummings, 2017). These skills require hearing beyond the literal language the speaker uses to decipher and interpret the actual message the speaker intends on giving. This has been referred to as having 'communicative intelligence' to be able to decipher the intentions behind communicative behaviour (Chambers, 2013; De Ruiter & Levinson, 2008) and go beyond what the speaker actually says (Clark, 1996).

During conversations our language and meaning do not always match up. We often use words that require a non-literal interpretation. For example, I may look out the window on a cold, wet morning and exclaim “What a delightful day!” A literal interpretation of my words is that I am happy with the weather that I see outside the window. However, my language has a sarcastic overtone that requires a non-literal interpretation. To interpret my communicative intention correctly the listener requires skills of reading my non-verbal language and para-language – tone and volume of speech. Moss (2015) refers to tone of voice as “*music behind the words*”, claiming that the ‘music’ conveys the real meaning of the words (p.6). It is only by interpreting the non-verbal language that the listener can accurately receive the message I am giving – that the weather is bad today and I am not happy about that.

In summary, the content of what is spoken requires understanding the meaning of the verbal and non-verbal language used. This requires pragmatic communication skills to consider the intention of the speaker, the message they are giving, and interpreting the meaning of the non-verbal language used. However, the meaning of the verbal and non-verbal language used can change throughout the communicative process as each partner co-regulates their communication in response or anticipated response of each other’s actions.

3.4 Use

In addition to what is communicated and understood, consideration must be given to the use, or how communicative exchange takes place. A number of linguistic theories claim that the possession of relevant cognitive skills is required for language to be used effectively as a communication tool. A cognitive linguistic approach to language is based on the assumption that our ability to use and understand language is based on our cognitive abilities. This ‘non-existence approach’ claims that language follows no

linguistic rules but is grounded in a collection of cognitive capabilities (Chomsky, 2011). The 'existence approach' defines that language follows a system of rules: grammar (syntax); pronunciation (phonetics and phonology); creating whole words from combinations of words (morphology); meaning of language (semantics); vocabulary (the lexicon); and the meaning within context (pragmatics) (Chomsky, 2011; Hornsby, 2014; Thompson, 2011). This theory defines that grammar is developed by using: we can build up language systems and develop language skills; and the purpose of language is to convey meaning (Dabrowska & Divjak, 2015).

Communication, however, is not just dependent on language, nor its interpretation. It can be said that effective social skills are acquired when verbal and non-verbal behaviours co-ordinate and lacking when contradictory, e.g. yawning, with no head nods, and no smiling while stating "that's very interesting" (Hargie, 2016). However, individual social skills and non-verbal language are also defined by cultural norms and traditions, factors external to the individual (Hall et al., 2019). For example, in Nepal a nod is not used to indicate agreement, rather the head is tilted from side to side. Social skills are acquired and further developed through learning and opportunities to communicate with others and have social experiences. It is argued that using social skills with a conscious approach and within our control is required for developing effective communication skills (Hargie et al., 1994; Thompson, 2011). This includes being able to actively listen to the communication partner to interpret not only the language they use but also their underlying thoughts and emotions (Moss, 2015). Emotions are an intricate part of social skills - the ability to display appropriate emotions and to keep emotions in check during a communication exchange. Psychologist and neuroscientist, Feldman Barrett challenges the classical view of identifying emotions through facial expressions, and that there is a 'fingerprint' for identifying a particular emotion. For example, the common belief that sadness is demonstrated through a number of non-verbal behaviours and

facial expressions mainly: frowning; shoulders stooped; crying; rapid breathing; sweating and increased heartrate. Instead she introduced the theory of constructed emotions to explain that individual non-verbal expression of emotion is developed from three constructions: social values; psychological perceptions - thoughts and feelings; and neuro-construction – the wiring of the brain (Feldman Barrett, 2018). The continuous process model of communication also argues that a particular emotion may be constructed according to the actions of the communication partner at that actual moment in time (Fogel, 1993).

The non-verbal language used during a communicative exchange may provide information on each partners' emotional state, their identity, social position and attitude toward the subject area under discussion (Fiske, 1990). The information may be conveyed intentionally or unintentionally, however, process-based and message perspective approaches argue that non-verbal language or behaviour becomes communication when it is used with intent by the communicator or interpreted as meaningful by the receiver (Guerrero, 2014). Likewise in managing the exchange each partner may use non-verbal language such as: gestures; facial expressions; posture and tone of voice as a way of controlling the situation. This may be skilled and practised behaviours used to the communicators' advantage (Hargie, 2016).

However, non-verbal language can be difficult to accurately interpret. Barker suggests four key reasons for this: it is continuous; ambiguous; multi-channelled; and culturally determined and even when not talking our non-verbal behaviour can continue to communicate (Barker, 2019). A communication partner's use of verbal and non-verbal language may be influenced by multiple factors such as: cultural influences; personality traits; emotions; physical and sensory abilities; predisposition to respond in a certain way; personality characteristics; age; gender; level of development and opportunities for

learning (Hargie, 2016; Johnson et al., 1996; Nowiski & Duke, 2013; Stamp, 1999). In addition, the use of non-verbal language is linked to the goal or intent of the communicative exchange. For example, adjusting tone of voice to exert power or status. A study of 161 students on hierarchy and vocal acoustic cues found that participants in a higher ranking position used a higher, louder and less variable pitch than those placed in a lower ranking position (Ko et al., 2014). A measure of perceived intelligence judged by 103 participants on verbal and non-verbal behaviours of 30 young people found that perceived intelligence was linked to less halting speech and more words spoken (Reynolds & Gifford, 2001). Therefore, purposeful adjustment of verbal and non-verbal language could, in itself be used with the intention of exerting power or intellectual dominance over the communication partner. Moore proposes that this can be defined as power of knowledge, displayed through the discourse (what is said), as well as a social power to influence the perception of power and the actions of the communication partner (Moore, 2017). Finally, the context or environment in which a communicative exchange takes place can impact on each partner's use of verbal and non-verbal language, e.g., a court setting requires more formalistic language and sentence structure than during a casual conversation with friends. Formalistic settings, however, can also raise stress and anxiety levels, which can impact on communication skills required for processing information (Edwards et al., 2015).

In summary, how verbal and non-verbal language is used may be linked to a wide number of internal and external factors such as: cognitive abilities; linguistic rules; social skills; emotions; cultural factors; personality; age; gender; goals/purpose of communicating and the environment of the communicative exchange. Communication difficulties is one of the criteria for diagnosis of an intellectual disability.

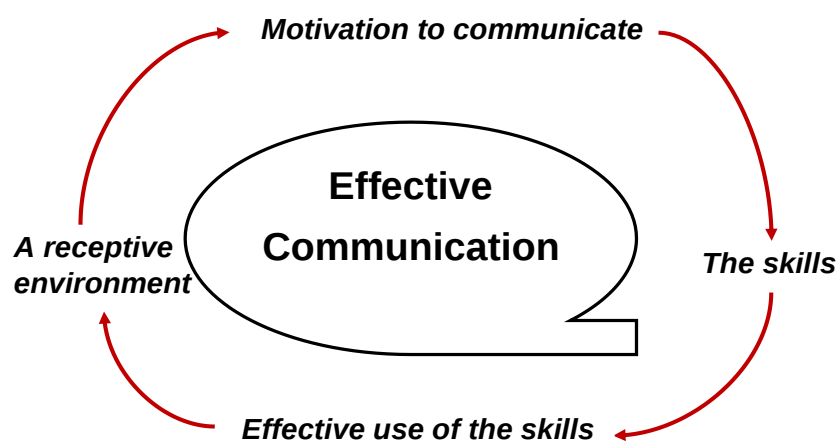
3.5 Communication and ID

“Developing communicative competence allows us realize the essence of our humanity – to touch the lives of others and to be touched by others.”(Light, 1997, p. 61)

Communication is a basic human right that serves to meet human needs through connection with others. It is a tool to convey and receive information, to form and develop relationships and to share feelings, emotions and ideas. Adaptive functioning impairments are key components of an intellectual disability diagnosis for individuals (American Psychiatric Association, 2013). Communication is one of the adaptive functioning skills commonly impaired in people with ID . There is little research to inform on the prevalence of communication difficulties for adults with ID, however a recent population study of 601 adults with ID in Ireland has informed that 57.9% experienced communication difficulties, with 23.5% reporting severe communication difficulties (Smith et al., 2020). A study of 14,500 primary and secondary school children in Australia reported a highly significant association between students identified as having a communication disorder and also having ID (McLeod & McKinnon, 2007).

Although there are individual variations of communication impairments and even specific condition variations (Sigafoos et al., 2016), people with ID may have difficulties with receptive (inputting and processing) and expressive (outputting) language, as can be seen in Figure 3.2 (adapted from Cogher, 2010; Kelly, 2000).

Figure 3.2. Effective communication



- Input Hearing/attention/listening
- Process Extract meaning(receptive)
 Think
 Generate response (expressive)
- Output patterns Pronunciation/intonation/stress
 Mouth movement
 Alternatives to speech—e.g. sign,
 writing, objects
 Pragmatic competence – social use
 of language

3.5.1 Attention

In order to input information a person needs to be able to hear it. Hearing loss is associated with some levels of ID (Mcclimens et al., 2015) and the extent of this can be underestimated by staff working with people with ID (Purcell et al., 1999). There is a need not only to hear information but also to listen attentively. Limitations in concentration will negatively impact how much information is listened to. There is considerable overlap

between ID and autism¹⁹. Autistic people can also have particular difficulty in joint attention, that is the ability to divide attention between at least two things at the same time (Chaplin et al., 2013). There is also a correlation between ID and Attention Deficit (Hyperactivity) Disorder (ADHD) which can impact the length of time and ability to listen and focus during a communication exchange.²⁰

3.5.2 Receptive language

Once information has been heard the individual has to process this, understand and make sense of what has been communicated. Cognitive impairments can make this process slower and may limit the amount of information that can be processed at any one time, indicating limitations with working memory skills (Baddeley, 2003; Henry, 2001; van der Schuit et al., 2011). Studies have found that staff working with people with ID can overestimate an individual's ability to understand verbal language (Blackwell et al., 1989; Bradshaw et al., 2013; Purcell et al., 1999).

Differences in receptive and expressive language skills for people with ID can lead to errors being made as to the level of understanding. It can often be assumed that a person's understanding and expression of language are on the same level (Kelly, 2000). In other words, an individual's ability to use complex sentences with abstract concepts means that they can probably follow conversational speech (Bradshaw, 2016). Communication research seems to indicate that, in the general population, receptive language skills are developmentally ahead of expressive language skills (Brown, 1973;

¹⁹ [ICD-11 \(who.int\)](#) (accessed 2/1/23)

²⁰ [ICD-11 for Mortality and Morbidity Statistics \(who.int\)](#) (accessed 2/1/23)

Ingram, 1974). This is echoed by a more recent large study of over 100,000 children aged from two to nine years old, including those from under researched developing countries (Bornstein & Hendricks, 2012). However, it is reported that comprehension of language slightly exceeded production of language. The authors also highlighted the importance the environment plays in a child's development of language skills. In contrast, a study on 36 autistic children with ID found their expressive language level was above their receptive language level, therefore a communication partner may assume a higher level of understanding, than they should, based on the person's speech (Maljaars et al., 2012). Likewise, it may be assumed that an individual who is non-verbal must have a very limited cognitive functioning and level of understanding. While this may be considered a good guide for some, it is not always the case (Bradshaw, 2016). For example, someone with cerebral palsy and ID may have very limited use of speech but have a good level of understanding of the spoken word.

3.5.2.1 Understanding verbal language

In general people with ID can have difficulties understanding vocabulary, the difference in meaning of words, different contexts in which they can be used, construction and length of sentences (Cogher, 2010; Kelly, 2000; Law et al., 2007). The severity of cognitive impairment, the extent of social experiences in which to learn and develop new language, the encouragement from others to communicate and the development of language retrieval skills, can all be factors affecting the extent of difficulties experienced in understanding (Abudarham & Hurd, 2002; Cogher, 2010; Kelly, 2000). In response to questions, people with ID are also more likely to demonstrate acquiescence (Prosser & Bromley, 2012) (to say yes to everything) and nay-saying (saying no to everything) and find it difficult to say when they do not understand (Bradshaw, 2011; Heal & Sigelman, 1995). Heal and Sigelman suggest that 'nay-saying' is more likely in response to

questions regarding social taboos as people want to present themselves in a socially acceptable light (Heal & Sigelman, 1995).

3.5.2.2 Understanding non-verbal language

People with ID may have difficulties in being able to accurately read and interpret the non-verbal behaviours of others and the subtle messages portrayed through paralanguage such as: changes to tone of voice or emphasis on specific words. Minskoff argued that four non-verbal skills are required in order to communicate effectively in social situations: reading non-verbal cues; understanding the social meanings of such cues; making sense of them within social interactions; and being able to use social cues accurately within social interactions (Minskoff, 1980a, 1980b). Nowiski and Duke have developed this concept further by defining accuracy in non-verbal behaviours. They argued that, in order to accurately understand non-verbal behaviours of others, individuals need to: recognise differences in non-verbals; label the differences in e.g., facial expressions or tone of voice; bring these skills into use in social interactions; and maintain this use through development of relationships (Nowiski & Duke, 2013). However, there is a development of thought that questions how we accurately read and interpret non-verbal behaviour. We can revert back to the research of Feldmann Barrett who challenges the commonly held view that there are fingerprints of non-verbal expressions of emotions and that our facial expressions are clear indications of inner feelings. *“Emotions do not shine forth from the face nor from the maelstrom of your body’s inner core. They don’t issue from a specific part of the brain”* (Feldman Barrett, 2018, p.42). Rather, Feldman argues, our expressions of emotions are constructed through the brain’s perception, based on previous experiences. This is a particularly important factor to consider when interpreting the expressive non-verbal behaviour of individuals with ID. People with ID and autistic people may display non-verbal behaviours and para-language that may appear odd to those unfamiliar and uneducated

in the conditions, or they may be misinterpreted. For example, autistic people may flap their hands as part of 'stimming' as an effective method for regulating emotions or for 'grounding' of senses at risk from overloading. They may use more limited eye contact and less facial expressions than others, and this may be misinterpreted by others as 'shiftiness' or lack of interest.

3.5.2.3 Understanding pragmatic language

As well as the challenge of understanding vocabulary and the meaning of language, used people with ID may struggle to understand the meaning or inferences behind the words spoken and the non-verbal language expressed; the pragmatic language. Understanding pragmatic language requires going beyond the language used to decipher the inference of the utterance and/or non-verbal behaviour, and the intention or goal of the speaker in using such language (Airenti, 2017; Grove et al., 1999). It has also been described as understanding: turn taking; linguistic formats to use (Abbeduto & Hesketh, 1997); topic maintenance; and being able to indicate when not understanding or when confused (Martin et al., 2017). Autistic individuals and those with ID are likely to have more limited skills in their pragmatic language (Lapadat, 1991; Martin et al., 2017; Nydén et al., 2010; Rice et al., 2005; Stothers & Oram Cardy, 2012).

In summary, people with ID have limitations in their receptive language skills, that is inputting and processing information. They may experience hearing loss, have limited attention and focus, slower processing and working memory skills and have difficulties understanding unfamiliar vocabulary, reading and interpreting non-verbal language. In addition, there may be limitations with pragmatic skills for interpreting inference of what is said and the intention of the communication partner.

3.5.3 Expressive language

Expressive language may be uttered in response to a question asked or comment made by a communication partner, alternatively it may be intentional and proactive to make a request, express a thought, feeling or opinion. This is communicating with intent in order to make wants and needs known to others (Light, 1988). Expressive communication difficulties for people with ID may be related to delays in all aspects of speech and language (Abudarham & Hurd, 2002), as well as speech deficits and even absence of speech (Sigafoos et al., 2016). Specific challenges may include: fluency; (Kelly, 2000); pronunciation; organisation, sequencing of mouth movements and co-ordination of speech sounds (Cogher, 2010); articulation of speech; and limitations in vocabulary (Hollomotz, 2018). For some people with ID spoken language may be very limited resulting in non-verbal language being the most effective form of communication, e.g., vocalisation, eye gaze, body orientation, facial expressions, and gestures (Casella, 2005; Stephenson & Dowrick, 2005). Autistic individuals, in particular, may express using non-verbal language in a manner considered to differ from social norms, such as: stimming, rocking, hand and finger movements.²¹ A person with ID may also experience challenges with knowing when and how to intentionally use language within differing social contexts. This is often referred to as pragmatic competency (Abbeduto & Hesketh, 1997; Cogher, 2010), for example, knowing what language to use and manner of speech when greeting a Judge, compared to greeting a friend, and turn taking as part of conversation.

²¹ [ICD-11 for Mortality and Morbidity Statistics \(who.int\)](https://www.who.int/iapec/publications/ICD-11-for-Mortality-and-Morbidity-Statistics)

Developing communication skills can be seen as a priority for people with ID for quality of life (Van der Gaag, 1998). McGill et al.,(2020) pointed out that although the move from institutions for people with ID into community living may have had a positive influence on quality of life, research shows that their communication does not necessarily improve (Bradshaw, 2000). Various studies on support staff communication with people with ID have indicated little emphasis given to communication within support services. Research on interactions between staff and 22 adults with ID, waiting to be moved from a hospital setting to community living, reported on a mismatch between the communication partners in that staff did not adapt their communication to the needs of their partners, staff overused complex language, and overestimated the level of understanding of their communication partners with ID (Bradshaw, 2001). These findings are in line with other research into communicative interactions between staff and adults with ID, in that staff overuse verbal language (McConkey et al., 1999); overestimate level of understanding of verbal language (Bartlett & Bunning, 1997) and rarely use aids or alternatives to verbal communication (Stans et al., 2013). Likewise, in a study of 110 participants living in residential and supported living services, staff communication was rated as consistently matching participant communication level for just over one third of the participants. One of the issues raised was a lack of opportunities for meaningful communication to take place (Bradshaw et al., 2013). Difficulties in communicating can contribute to low self-esteem, social isolation and loneliness, learned habits of compliance, lack of trust, frustration, anger and disempowerment, and challenging behaviour adopted as a more effective method of communication (Van der Gaag, 1998). In contrast people with ID who have higher levels of communication skills are more likely to experience better health, improved quality of life, better social inclusion and fewer behavioural problems (Van der Meer et al., 2017).

It is argued that individuals with more profound ID may have stronger abilities to respond to the communication of others (receptive) than they have to communicate their own wants and needs (expressive)(Belva et al., 2012). Language assessments on 19 adolescents with Down's Syndrome and 19 children with specific language impairment reported expressive language to be more impaired than receptive (Laws & Bishop, 2003). Individuals with ID can also have challenges with their reading and writing skills, integrating both receptive and expressive communication, particularly those with more profound ID (Belva et al., 2012).

ID can also be associated with a greater prevalence of displaying challenging behaviours (Alimovic, 2013; Bowring et al., 2017; Dworschak et al., 2016; Matson et al., 2011). Often this behaviour is accepted to be a form of communication for the individual and interventions can be focused around improving communication (Kurtz et al., 2011). However, consideration should be given to communicative intent; whether a behaviour is purposely displayed as a way of communicating a need or wish (Grove et al., 1999). This also highlights the social challenges associated with ID. Language and social communication skills are learned, developed and enhanced through social interactions with others throughout the lifespan. However, despite greater acceptance of the concept of normalisation (Gone et al., 2012) and governmental drives for greater inclusion and independence for people with ID to be able to live a life like everyone else (see Valuing People Now 2001,2009),²² opportunities for developing social networks and environments conducive to promoting social skills are more restricted for people with ID.

²² [Improving outcomes for people with learning disabilities - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204442/Improving_outcomes_for_people_with_learning_disabilities_-_GOV.UK.pdf) (accessed 16/1/23)

This is particularly true if living in residential or community living services (Bradshaw et al., 2013; Power & Bartlett, 2018; Smith et al., 2020).

In summary, people with ID may have challenges in being able to make their wishes known, to verbally respond to a communication partner, to use non-verbal language, and to display pragmatic competence. These impairments may also be linked to social opportunities for learning and developing language skills.

3.6 Augmentative and alternative communication

The spoken word can be the most demanding form of communication for people with intellectual disabilities to understand. Once spoken, the information is gone (Bradshaw, 2016). For people who need more time to process information, they can easily miss some pieces that are vital to gaining full understanding. Communication aids can complement speech and assist with the communication process. They can include: objects; drawing and writing; pictures and photographs; signs, symbols and gestures (Bradshaw, 2016; Cogher, 2010; Pouliot et al., 2017). There can be some distinct advantages for using communications aids along with speech: they cause the speaker to slow down and simplify language; they provide emphasis of key words which aid understanding; and they rely on visual processing (specific skills of autistic people)(Bradshaw, 2016).

For those who do not or cannot use speech alternative forms of communication are necessary and more detailed groups of aids may be required such as: symbol sets (e.g. Widgit, Rebus); alphabet charts; Talking Mats (visual option and rating scale); and VOCAs (Voice Output Communication Aids, e.g. using an iPad (Cogher, 2010; Goldbart

& Caton, 2010). Any method used that compliments or replaces speech is known as Augmentative and Alternative Communication (AAC).²³

In 1989, Light introduced the notion of communication competence for people who require the use of AAC (Light, 1989). An individual's ability to use AAC effectively is dependent on three fundamental concepts: functionality of communication – ability to use within context; adequacy of communication – that it meets the communication goals; and sufficiency of knowledge, judgement and skill – to understand the language code of the system and accept the constraints that come with it (Light & McNaughton, 2014).

3.7 Summary

Communication theory describes a complex and intricate process of interpersonal communication. It has developed from a basic linear model of information transmitted from a sender to a receiver, to models of more dynamic and ever-changing interactions between communication partners. These interactions are impacted by internal factors of each partner, as well as external factors such as social context and environment. Interpersonal communication commonly takes the form of verbal and non-verbal language which require interpretation of meaning and intention. The success of an exchange is also dependent on how language is used, the social context, skills and experiences of each partner, cultural influences, and intention of the communication. People with ID may have challenges in hearing and attending to the communication partner, receptive language skills – inputting and processing information, as well as expressive language skills – responding to the partner and making wishes and feelings

²³ [Using communication aids in the criminal justice system \(theadvocatesgateway.org\)](https://theadvocatesgateway.org/)(Toolkit 14)

known. They may also be limited by fewer social opportunities for development of communication skills.

The next chapter examines how the criminal justice system in England, Wales and Northern Ireland has responded to the communication challenges of vulnerable witnesses, such as those with ID.

Chapter 4. The vulnerable witness with intellectual disability within the courts in England, Wales and Northern Ireland.

4.1 Introduction

The aim of this chapter is to identify the action within the UK criminal justice system (CJS)²⁴ in attempting to meet the needs of the vulnerable witness. It will inform on legislative and policy changes, the use of special measures and the role of the Registered Intermediary (RI) in meeting communication needs of vulnerable witnesses. Unless otherwise stated, 'witness' will be used as a generic term for victim/complainant, witness or defendant.

The UK operates an adversarial court process within the CJS. This requires evidence to be gathered and presented through the giving of oral evidence in court. Prosecution advocates call witnesses to give their account of the event/s in question – their evidence, and this is referred to as 'evidence-in-chief'(Keane et al., 2010; McPeake, 2018). This evidence is then tested by the defence advocate by 'cross-examining' the witness. This usually takes the format of asking leading questions in order to highlight inconsistencies with the witness' evidence and therefore discredit their testimony. Defendants and defendant witnesses can also give evidence and be cross-examined by the prosecution advocate. There are usually three examining stages for each witness: examination-in-

²⁴ As the CJS differs in Scotland, within this thesis, 'UK' refers to the CJS in England, Wales and Northern Ireland only.

chief; cross-examination; re-examination. There has been a lot of criticism in recent years of the process of cross-examination. For some critics, cross-examination is seen as a way to discredit the witness (Clark, 2011), to control and undermine confidence (Valentine & Maras, 2011) and challenge credibility (Wheatcroft et al., 2004). Cross-examination can cause inaccuracies in eye-witness accounts (Keane, 2012a; Keane & Fortson, 2011; Wheatcroft et al., 2004; Wheatcroft & Woods, 2010), particularly for witnesses considered to be vulnerable (Geddes, 2016; Gerry & Cooper, 2017; Henderson, 2014; Hoyano, 2015; Keane, 2012a). The use of leading questions during cross-examination has come under particular scrutiny and criticism (Keane, 2012a; Sharman & Powell, 2012; Valentine & Maras, 2011; Wheatcroft et al., 2004), especially when used with vulnerable witnesses (Agnew & Powell, 2004; Sharman & Powell, 2012).

4.2 What is vulnerability?

Vulnerability can be difficult to define. It can have various meanings, depending on the context; it is influenced by the mindset of the person at a particular time and the environment in which they find themselves. According to the Oxford Dictionary a vulnerable person is *“in need of care, support or protection because of age, disability or risk of abuse or neglect.”*²⁵ Vulnerability can manifest itself in different ways. Some people may have lifelong vulnerability due to severe intellectual or physical disabilities; others may live fairly normal lives but be vulnerable in terms of needing support for specific tasks such as handling money or keeping a home, which are more challenging

²⁵ [Enoxforddictionaries.com/definition/vulnerable](http://enoxforddictionaries.com/definition/vulnerable)

due to cognitive or physical impairments; for others vulnerability can occur and only last for specific points in time.

While a child's vulnerability by way of age is obvious, for adults vulnerability can be much more complicated. Research suggests that intellectual disabilities and personality disorders can be the most difficult to identify (Burton, Evans, & Sanders, 2006; Gudjonsson, 1993). Gudjonsson identifies four types of psychological vulnerability:

1. Mental disorder (mental illness, intellectual disability, personality disorder).
2. Abnormal mental state (anxiety, mood disturbance, phobias, intoxication, withdrawal symptoms).
3. Intellectual functioning (Low IQ score).
4. Personality characteristics (such as suggestibility, compliance, acquiescence)(Gudjonsson, 2006, 2010; Pearse, 1995).

The CJS in England, Wales and Northern Ireland (NI) has recognised the need for provision of services and support for a vulnerable person when going through the justice system.

4.3 Vulnerability within the criminal justice system

Within the CJS, vulnerability can be linked to the need for capacity of a witness to be determined or potential challenges identified for a witness (Jacobson, 2017). However, there is no one accepted definition (Bull, 2010; Davies, 2016) which means that the extent of a person's vulnerability may be contested (Gerry & Cooper, 2017), depending on context and application to specific court groups (Talbot & Jacobson, 2010).

Legislation defines a vulnerable victim or non-suspect witness according to one of three categories:

1. A child (under 18 years old).
2. An adult for whom the quality of complete, coherent and accurate evidence is likely to be diminished because of: a mental health disorder, significant impairment of intelligent and social functioning or a physical disability.
3. An adult for whom the fear or distress of giving evidence is great because of certain factors such as the nature of the crime, age, background or behaviour of the accused towards the witness.²⁶

Definition for vulnerability in suspects is provided under Code C of the police Codes of Practice²⁷. It states that a suspect may be vulnerable if:

- A juvenile (under 18 years old);
- Is mentally disordered;
- Is mentally vulnerable;
- Has significant communication difficulties (unable to speak, unable to read, speech impediment, hearing difficulties);
- Is blind or seriously visually impaired;
- Is unable to speak or understand English.

²⁶ Youth Justice and Criminal Evidence Act (YJCEA) 1999; Criminal Evidence (NI) Order 1998

²⁷ Police and Criminal Evidence Act 1984; Police and Criminal Evidence (NI) Order 1989

It has been suggested that vulnerability of witnesses should be seen as a matter of a spectrum rather than a categorisation, *“Vulnerability is, in other words, a matter of degree and type, the impact of which will vary from one circumstance to another”* (Burton et al., 2007,p.5). Gudjonsson claims the need for a generic definition of psychological vulnerabilities within the criminal justice system (Gudjonsson, 2010), having previously described it as *“psychological characteristics or mental state which render a witness prone, in certain circumstances to providing information which is inaccurate, unreliable or misleading”* (Gudjonsson, 2006, p.68). As can be seen from the data gathered through a systematic review, summarised in Chapter six, it is not just the presence of an intellectual disability (ID) that renders a witness liable to providing inaccurate information (Bettenay, Ridley, Henry, & Crane, 2014; Brown, Lewis, Lamb, & Stephens, 2012; Henry & Gudjonsson, 1999, 2007; Michel, Gordon, Ornstein, & Simpson, 2000; Perlman, Ericson, Esses, & Isaacs, 1994), it is also the manner in which they are questioned about an event that can negatively impact the accuracy (Bettenay et al., 2014; Brown et al., 2012; Dent, 1986; Perlman et al., 1994; Sigelman, Winer, et al., 1982).

Vulnerability is often associated with victimhood, particularly for people with disabilities (Engle & O'Donohue, 2012; Fisher et al., 2016; Hughes et al., 2012; Jones et al., 2012; Mosby & Galloway, 2017). It is suggested that this association is stigmatising and a more powerful view would be to see vulnerable people as people with potential for whom the government is obliged to ensure equality (Fineman, 2008). Previously within the UK CJS vulnerable people were not seen as viable witnesses, they were often ignored²⁸ with suspects not charged (Harris & Grace, 1999), little value placed on the evidence from a young child (Cooper & Wurtzel, 2014), testimonies not considered accurate enough

²⁸ www.huffingtonpost.co.uk/felicity-gerry/witness-cross-examination_b_5495091.html

(Bowden et al., 2014; Stobbs & Kebbell, 2003) and few cases going to court (Gudjonsson et al., 2000). High profile enquiries, such as Confait (1977), Cleveland (1988) and Pigot (1989); Court of Appeal decisions²⁹; reports from research (Bradley, 2009; Home Office, 1998), changes in legislation (Youth Justice and Criminal Evidence Act 1999, Criminal Evidence (NI) Order 1999) and subsequent implementation of policies and procedures (Achieving Best Evidence in Criminal Proceedings Guidance 2003, 2008 and PACE) have led to significant changes in the treatment, credibility and support provided to vulnerable witnesses.

4.4 Legislative and policy changes

Legislation, policies and procedures are of relevance for witnesses, victims or suspects when reporting a crime, being questioned about a crime, or being examined/ cross-examined in a court hearing.

4.4.1 Police interviews

4.4.1.1 Suspects

Making provision for vulnerable suspects has been a process of development, beginning with the identification of the need for change following miscarriages of justice. The Confait Enquiry of 1977, led by Sir Henry Fisher, was carried out following serious concerns around the confessions of three vulnerable suspects, followed by other similar miscarriages of justice including the 'Guilford Four', 'Birmingham six' and 'Tottenham three' (Gudjonsson, 2003). This enquiry, which highlighted the risk of false confessions

²⁹ See (R v W and M [2010]EWCA Crim 1926; R v Barker [2010]EWCA Crim 4; R v E [2011]EWCA Crim 3028; R v Edwards [2011]EWCA Crim 3028; R v Will [2012]EWCA Crim 1938)

among young people and those with ID, led to the introduction of the Police and Criminal Evidence Act (PACE) 1986 and accompanying Codes of Practice to govern the treatment of suspects in custody (Gudjonsson, 1993).

Under PACE, specific allowances must be made for the vulnerable suspect with regards to their arrest, booking in, detention, interview, disposal and bail/remand conditions (Bevan, 2017). One of these allowances is the duty for the suspect to have the support of an appropriate adult at the police station (Jessiman & Cameron, 2017). An appropriate adult is an independent volunteer whose services are requested by the police custody sergeant when a child or vulnerable adult is detained or attending voluntarily for questioning.³⁰ They provide support with practical matters, understanding the processes and rights, understanding the caution and assist with communication.³¹ This is often a family member or guardian, but in NI a solicitor can also take on this role (Quinn & Jackson, 2007).

4.4.1.2 Victims and witnesses

Victims and witnesses are interviewed by police when a crime has been alleged. Changes in the UK process of interviewing vulnerable victims and witnesses followed a major inquiry into how child sexual abuse was dealt with in the County of Cleveland in 1987. In the May and June of that year, 125 out of 165 children examined had been reported by doctors to have been either sexually abused or to bear signs consistent with sexual abuse (Butler-Sloss, 1989). This was considered to be an unusually high rise in

³⁰ www.appropriateadult.org.uk

³¹ www.appropriateadult.org.uk/images/pdf/2014_easy_read_for_AAs.pdf

the diagnosis of child abuse in Cleveland, leading to protests by parents, nurses, police, children, and MPs, which resulted in a statutory inquiry (Valman, 1988). Concern was raised regarding the process and procedures used that led to over-diagnosis and subsequent recommendations were made regarding the processes of an investigation including: the need for greater communication among agencies; training for interviewers; greater emphasis on open-ended questions and free recall; recording of the interview and no more than two interviews to be carried out (Bentovim, 1988). The inquiry led to a Memorandum of Good Practice (MOGP) introduced in 1992, and the Achieving Best Evidence (ABE) guidance for interviews in 2001 and 2011 (Ministry of Justice, 2011). ABE guidance advocates for early identification, video-recording of the interview and a four stage approach to interviews:

1. Rapport-building
2. Free-narrative
3. Questioning
4. Closure (Bunting et al., 2015)

Video recorded evidence is one of eight special measures under the Youth Justice and Criminal Evidence 1999 Act (YJCEA) for England and Wales and the Criminal Evidence (NI) Order 1998, for Northern Ireland, which can be applied for to assist vulnerable witnesses when giving evidence in court.

4.4.2 In court

Legislative, policy and procedural changes for vulnerable witnesses have also taken place within the court environment. Around the same time as the Cleveland investigation the Government set up an interdepartmental working group to identify measures for improving the treatment of witnesses. This group published the Speaking Up for Justice

Report in 1998 outlining 78 recommendations (Ellison, 2002). In addition, a committee, led by Judge Thomas Pigot QC, was formed to provide advice on video recorded evidence, recommending it for evidence in chief and cross-examination. This was based on two guiding principles for court proceedings involving children; that proceedings are conducted quickly and take place in an environment that does not overawe or intimidate (Hoyano, 2000). Recommendations from Speaking Up for Justice and the 'Pigot Report' were implemented within the YJCEA and the Criminal Evidence (NI) Order with eight special measures created for vulnerable and intimidated witnesses. The special measures include:

1. Screen around the witness box
2. Evidence given by live link from outside the court
3. Evidence given in private (members of the public and press excluded)
4. Removal of Judge and Barristers' wigs and gowns in crown courts
5. Video recorded police interview used as evidence in chief (ABE)
6. Cross-examination may be recorded in advance of the trial
7. The use of an intermediary
8. Aids to communication³²

Victims and non-defendant witnesses vulnerable due to age, intellectual disability, physical disability or mental health disorder, can apply for any of the special measures. Those vulnerable due to fear or distress around testifying and other influencing factors such as: nature of the offence and behaviour of the accused toward the witness, can

³² Sections 23-30 of YJCEA 1999; Criminal Evidence (NI) Order 1998, as amended by the Justice Act (NI) 2011

apply for the first six special measures.³³ In NI provision has also been made for defendants to apply for the use of an intermediary and for evidence given via live link.³⁴ However, in England and Wales, the only legal provision for special measures in place is under the s46 of the Police and Justice Act 2006 for the giving of evidence via live link (Wurtzel, 2017).

4.5 Special measures and cultural changes

It has been suggested that changes to legislation, policies and procedures are not the main drivers to creating a judicial system whereby vulnerable witnesses can effectively participate. Rather a change in culture is what is required. A change in culture signifies an acceptance of the changes resulting in more effective practice of the legal profession (Birch, 2000; Henderson, 2016b).

There has been some, albeit limited, research into special measures regarding the opinions and attitudes of the judiciary and advocates. Special measures were first officially evaluated through interviews with victims and witnesses in 2004 (Hamlyn et al., 2004) and with professionals involved in the criminal justice system in England and Wales in 2006 (Burton et al., 2006). The RI service had just begun and therefore had little to report. The 579 witnesses interviewed reported to be more satisfied with their experience of the system and were less anxious overall when a special measure had been available, with the live link highlighted as the most effective measure (Hamlyn et

³³ Youth Justice and criminal Evidence Act 1999; Criminal Evidence (NI) Order 1998, as amended by the Justice Act (NI) 2011

³⁴ Criminal Evidence (NI) Order 1998, as amended by the Justice Act (NI) 2011

al., 2004). However, among professionals there was only evidence of two measures being readily accepted; video recorded evidence through ABE interviews and live links for cross-examination but the uptake for these was poor, only 1/3 of vulnerable adults and just over 1/4 of children having an ABE interview. The other special measures were rarely used (pre-recorded cross-examination was not yet available) and the use of screens was not rated highly among the professionals (Burton et al., 2006).

A further evaluation in 2009 of vulnerable young witnesses showed an increase in the use of ABE interviews to just over a half (55%) for the 182 young witnesses interviewed in England, Wales and Northern Ireland (Plotnikoff & Woolfson, 2009). This report concluded with 42 recommendations for improving the experience of young witnesses based around: tailored support; appropriate questions; avoiding delay; witness views around using special measures; safety; and listening to the young witness' voice. A follow up report in 2011 noted that significant changes had been made, however there were still areas where the state was failing to enable young witnesses to give their best evidence. Further action was recommended for a number of areas around questioning, avoiding delays, support for the safety of victims and protocols such as: more access to a registered intermediary; methods of cross-examination; training for advocates; pre-trial cross-examination; and further research needed into the impact of special measures on jury decision-making (Plotnikoff & Woolfson, 2011b).

Evaluations of special measures provided for vulnerable witnesses could be deemed ineffective unless they bring about actual change in practice. Responses have brought about some changes in the training of advocates, protocol to reduce delay for children under 10 years of age and implementation of the final special measure of pre-recorded cross-examination.

Specialist training in England and Wales is now available for advocates through the Inns of Court College of Advocacy (ICCA) when questioning vulnerable witnesses³⁵. The focus is for advocates to understand general key principles, such as: keep to chronological order; do not make statements; do not ask leading questions or tag questions; draft questions in advance; and no repetition. However, this training drew criticism from a number of academics highlighting a lack of empirical evidence that the twenty key principles apply only to vulnerable witnesses. The 20 principles document used in the training has been updated³⁶ to include references to research, although mainly regarding research for children. Until recently there was no similar training available to advocates in NI. However, the current author was recently involved in preparing and delivering a three session training programme to advocates through the Institute of Professional and Legal Studies (IPLS) at Queens University Belfast, based on the ICCA training programme used in England and Wales. This training had the addition of live mock cross-examinations with actors from a local acting company for people with ID.³⁷

Pre-recorded cross-examination (Section 28 of the YCEA 1999) has been piloted in three crown courts in England with the aim of assisting recall for vulnerable witnesses by reducing delay of cross-examination and to make the process less traumatic and stressful (Baverstock, 2016). Findings show that on average it took about half the time for cross-examination to take place when pre-recorded, compared to during the trial

³⁵ [Advocacy & The Vulnerable \(Crime\) | ICCA](#) (accessed 5/1/23)

³⁶ [20-Principles-of-Questioning-rev-July-22.pdf \(icca.ac.uk\)](#) (accessed 5/1/23)

³⁷ [Kids in Control](#)

process. However, the implementation has not been without challenges and a number of concerns were raised such as: inadequacy of IT equipment and rooms; better communication to witnesses required; and some difficulties over identification of vulnerability of witnesses (Baverstock, 2016). Pre-recorded cross-examination has now been rolled out to all crown courts in England and Wales.³⁸ Although a recommendation of the Gillen Review,³⁹ an independent review carried out by Sir John Gillen on the delivery of justice in serious sexual offences, pre-recorded cross-examination is not yet widely available in Northern Ireland.

4.6 Special measure for communication – the registered intermediary

While the other special measures address factors within the court environment the intermediary focuses on communication between witnesses and the court. This special measure has been described as the *“first real incursion ever into the substance of cross-examination”* (Henderson, 2014, p.9). It is claimed to be the first active role introduced into trials in the UK for hundreds of years (Plotnikoff & Woolfson, 2015). The first registered intermediary pilot service commenced in England and Wales in 2004 (Plotnikoff & Woolfson, 2015) and in NI in 2013 (Department of Justice, 2015). A RI’s role is to assesses the communication needs of a vulnerable complainant or witness and to advise the police or court on the best way to communicate with the individual. The RI is also usually present at the police interview and when the witness is giving evidence in

³⁸ [New courtroom protections for vulnerable victims available nationwide - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-courtroom-protections-for-vulnerable-victims-available-nationwide) (accessed 5/1/23)

³⁹ [gillen-report-may-2019.pdf \(justice-ni.gov.uk\)](https://www.justice-ni.gov.uk/gillen-report-may-2019.pdf) (accessed 5/1/23)

court (Department of Justice, 2016b; Ministry of Justice, 2015). In England and Wales, intermediaries trained by the Ministry of Justice and commissioned through the Witness Intermediary Scheme, are known as Registered Intermediaries and are available for complainants and witnesses. Defendants in England and Wales can request the services of HM Courts and Tribunals (HMCTS) intermediaries Service supplied by privately managed and approved service providers⁴⁰. In NI all Registered Intermediaries, trained by the Department of Justice, provide a service for victims, witnesses, suspects and defendants.⁴¹

4.6.1 The role of Registered Intermediaries in Northern Ireland for vulnerable witnesses⁴²

In NI Registered Intermediaries (RIs) are self-employed communication specialists from either speech and language therapy or social work professions. They play one of the few neutral roles within the criminal justice system, with the purpose of assisting with the presentation of questions to be asked in such a way that is appropriate for the witnesses' ability to answer (Cooper & Wurtzel, 2014). This is to ensure quality of evidence in terms of completeness, coherence and accuracy (Department of Justice, 2019).

Referrals are accepted by the Intermediaries Services Secretariat (ISS) office from the police, Public Prosecution Service (PPS)(equivalent to Crown Prosecution Service, CPS, in England and Wales) or solicitors. A suitable RI is then identified according to type of

⁴⁰ [HMCTS intermediary services - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/services/hmcts-intermediary-services) (accessed 5/1/23)

⁴² From author's practical knowledge as a RI, through discussion with ISS office and The RI Procedural Guidance Manual (NI).

vulnerability of the witness and matched with the skill set of the RI. The RI must then contact the person referring to arrange a communication assessment. To ensure neutrality, this assessment must take place in the presence of a third person, ideally the police officer or social worker carrying out the ABE interview for victims or witnesses or the solicitor for suspects and defendants. For referrals from the police, the RI will provide either a written or verbal preliminary report advising on the most effective ways to communicate with the individual and any communication aids that could be used. The RI also attends the ABE or police interview to provide any guidance or assistance on communication as required and directed by the interviewer (Department of Justice, 2019). Re-referrals from the PPS are then made for complainants and witnesses when a case is deemed eligible for prosecution and for new referrals for whom their vulnerability had not been identified during interview stage. It may be that information of a diagnosis was not made known earlier, a diagnosis was made in between interview and court proceedings, or there is no formal diagnosis but counsel have identified difficulties when communicating with the witness.

There has been some research into the importance of identifying vulnerabilities at interview stage and the challenges with this⁴³ (see Dehaghani, 2017; Gudjonsson, 2010; McKenzie et al., 2012; Young et al., 2013). Chapter two highlights the complexity of ID and common co-occurrence with other complex medical, physical, mental health and social conditions. The presence of these and the general complexities of individual personalities, behaviours, communication skills and life experiences may further complicate the likelihood of accurate identification of vulnerability of witnesses. For suspects, the pressure of time limitations for questioning and possible presence of drugs

⁴³ [vulnerability-in-criminal-case-files.pdf \(justiceinspectorates.gov.uk\)](#) (accessed 5/1/23)

or alcohol may pose additional challenges. It is therefore perhaps not surprising that issues with identification of vulnerabilities is a common theme throughout the evaluations of special measures (Burton et al., 2006; Plotnikoff & Woolfson, 2007; Victims Commissioner, 2018) and an ongoing issue highlighted in the literature (Dehaghani, 2016; Gudjonsson, 1993, 2010; Jacobson, 2008; O'Mahony et al., 2012). Previous research records that identification of vulnerabilities in police stations has mainly been through observational methods. On examining observations of booking in procedures in a large custody suite and interviews with fifteen custody officers, Dehaghani reports that vulnerabilities are mainly identified through self-reporting by the suspect during risk assessment as well as the custody officers' own detection skills of the suspect's behaviour, responses to questions and reason for arrest (Dehaghani, 2016).

In NI referrals from solicitors can be made at either police interview or court stage. Regardless of the source of the referral, the assistance provided by the RI and the processes followed are the same for each witness.

At court stage the RI writes a report for the court highlighting the communication difficulties of the witness and makes recommendations to encourage effective communication. The report is based on information gained from the RI assessment and feedback from others familiar with the witness such as parents, teachers or social workers and any other reports such as from: psychology; psychiatry; speech and language therapy or educational authorities. This report is made available only to the Judge, prosecuting and defending solicitors and barristers. Once the report is available the relevant counsel applies to the court for the application of the special measure for the use of the RI. For complainants and witnesses this is often accompanied with an application for the use of the ABE DVD to be used as evidence-in-chief and for the use of live link during cross-examination. Although provision for the use of live link for

defendants is available, this special measure does not seem to be commonly requested for defendants (Fairclough, 2018, 2021).

Included in every RI report is the recommendation for a Ground Rules Hearing (GRH) to be held prior to commencement of the case. The GRH provides opportunity for discussion around procedures and questioning of a vulnerable witness/defendant to allow the Judge to set directions to ensure fair treatment and effective participation of the witness (The Advocate's Gateway, 2016b). Matters discussed may include: styles of questioning that should not be used; manner of questioning – pace, tone of voice, language used, frequency of breaks, etc.; acceptance of the use of specific communication tools; where the RI will take the oath and how he/she will indicate if a communication issue arises; where the RI will sit during examination/cross-examination; and any other recommendations made in the RI report (Cooper & Farrugia, 2017; The Advocate's Gateway, 2016a).

During the hearing the RI is usually only required to attend court on the day(s) of examination/cross-examination of the witness.

4.6.2 Evaluations of the RI role

There have been a small number of reports evaluating the RI service in England and Wales. The first, in 2007, was funded by the Office for Criminal Justice Reform to evaluate the first pilot projects in England and Wales (Plotnikoff & Woolfson, 2007). This was followed up by a further evaluation in 2011 by the same authors based on information gathered through queries from practising RIs on a SMARTSITE online support system (Plotnikoff & Woolfson, 2011). In addition, regular feedback was gained from RIs through online surveys between 2009 and 2014 (Cooper, 2009, 2011, 2012, 2014). Interviews were carried out with 25 Judges, 16 Advocates and 10 RIs in 2013 to

ascertain their opinion on reforms of cross-examination practices for vulnerable witnesses, including the RI role (Henderson, 2015a) and responses compared to those previously gathered from Judges and barristers in the 1990's (Henderson, 2015b). There have been two evaluations into the RI pilot project in NI (Department of Justice, 2015, 2016a).

The general feedback from these evaluations is overwhelmingly positive towards the input the RI role makes in assisting effective communication with vulnerable witnesses. Some go as far to say that the RI has changed the way in which cross-examinations are carried out with vulnerable witnesses, claiming that they have helped 'rewrite the rules' of cross-examination (Plotnikoff & Woolfson, 2015) and assist with the 'entire machinery of the trial' (Henderson, 2015a). Feedback from police, advocates and judges have praised the role of RIs for the influence they have in ensuring best evidence is gained and the voices of vulnerable people are heard (Department of Justice, 2016a; Henderson, 2015b; Plotnikoff & Woolfson, 2015; Victims Commissioner, 2018) with some believing that the input of RIs in trials has made them more aware of vulnerabilities of witnesses and has positively influenced their own practice (Henderson, 2015b; Plotnikoff & Woolfson, 2015). Some reports have also provided feedback, albeit limited, from carers or family members, which have also been very positive (Department of Justice, 2016a; Plotnikoff & Woolfson, 2007).

It seems that the role has not only assisted communication with the vulnerable witness but can also impact factors such as: helping the witness to manage stress (Plotnikoff & Woolfson, 2007); increasing access to justice for vulnerable people (Department of Justice, 2016a; Henderson, 2015b; Plotnikoff & Woolfson, 2007); potentially assisting to bring offenders to justice (Henderson, 2015b; Plotnikoff & Woolfson, 2007); and potentially leading to cost savings (Plotnikoff & Woolfson, 2007).

4.6.3 Research on impact of the RI role

The implementation of the RI role within England, Wales and Northern Ireland has not been without some challenges. We cannot confidently state that it is fully accepted by all professionals involved and effectively functioning in all police stations and courts. The evaluations have highlighted various practical issues that needed addressing to improve the implementation of the role such as: late applications (Cooper, 2011, 2012); issues around lack of or ineffective Ground Rules Hearings (Cooper, 2009, 2014; Plotnikoff & Woolfson, 2011a); lack of planning (Plotnikoff & Woolfson, 2007); and RIs not present at contested applications (Cooper, 2011; Plotnikoff & Woolfson, 2011a). Therefore, throughout the evaluations some themes emerge that, despite recommendations made in each evaluation paper, appear ongoing.

Research into the RI role is surprisingly limited, considering the changes to court procedure that it demands. A small number of papers have focused on the perceptions of quality of evidence and credibility of a child's testimony with and without a RI present during interview. These papers show how the different roles of participants involved can perceive communication with a child with alternative emphasis and interpretation. Ridley et al.(2015) gave twenty mock jurors, twenty police and twenty barristers transcripts of interviews with and without a RI present and with the RI intervening five times. Findings show that the quality of the testimony was perceived as better with the RI present but there was no impact on perceptions of the child's credibility. However, the barristers perceived the child more negatively than the others and the police found the child to be more credible (Ridley et al., 2015). Collins found similar results regarding quality of cross-examination from the perspective of 100 mock jurors. These participants also found the communication of the child to be improved with the presence of the RI (Collins et al., 2017). In contrast, a more recent paper with 217 mock jurors found no difference in the perception of the overall credibility of the child's evidence (Krahenbuhl, 2019). In

this study, the mock jurors observed a recording of mock cross-examinations of a child with and without the presence of a RI, with intervention from the judge and with intervention from the RI. They were asked to rate the child witness' credibility and understanding, judge and barrister's behaviour, and likely progression of the case. The only factor that demonstrated a different result due to the presence of the RI was the case progression, in that the mock jurors' ratings of the likelihood of the case progressing towards a guilty verdict was higher when the RI was present, but only if there was no intervention from the RI during cross-examination. Similar results were found for when there was no RI present, but the judge intervened. The authors suggest that this is because the jurors considered the behaviour of the professionals when considering the progression of the trial. The authors suggest the results show that as long as the child witness' evidence is deemed credible it was unimportant for the mock jurors' consideration whether or not the child understood everything.

However, although these papers provide useful and relevant information on the impact of the RI on the quality of the evidence provided by the child witness, as with the evaluations into the RI role, the 'quality' is based on the opinion of others involved in the criminal justice process rather than actual evidence of improved quality. These opinions are subjective and influenced by the training, work experience within the criminal justice system, focus, and purpose of the job role. It could be argued that the most important people to convince about the quality of the witness evidence are the jurors, as they are the ones who make the final decision regarding guilt or innocence. However, the role of the RI is not to influence jury decision making. As an impartial character the RI should not have any concern as to the verdict of a trial, only as to whether the witness can understand, follow and fully participate in proceedings and their evidence be fully comprehended by the court, i.e. effective communication.

Other empirical research, carried out with 71 children with autism, aged 6-11 years old and 199 typically developing children provides some factual insight into the impact of the RI role on communication with the witness (Henry et al., 2017). Three types of investigative interview were used: verbal prompting; sketch-reinstatement, which involved the child drawing an event while verbally describing each element; and involvement of a RI (usual 'best practice' interview with input according to RI communication assessment). The aim was to test whether these interview types resulted in an increase in the amount of accurate information recalled from a live event witnessed, or viewed on DVD, by the participants, compared to the usual best practice interview types currently carried out in England and Wales. The results showed no benefits when a RI was involved in interviews with autistic children, in fact there was no impact from any of the interview types. However, there were benefits for the typically developing children, in that they recalled more in RI and verbal prompting interviews. However, this research has come under criticism from a number of academics who advise on caution when applying the results. Concerns are raised on a number of issues namely: watching a DVD may be more effective for memory recall than a live event for autistic children, but 30% saw the live event; an initial interview makes the use of the different interview types and second interview less effective; no specialist training in ABE protocol or autism is noted for the interviewers; and transformation was only for some of the dependent variable data (Dando et al., 2018).

Finally, Taggart's work into the scope and nature of the intermediary role is also instructive (Taggart, 2018, 2021, 2022). Using a sociolegal research method, he conducted 31 interviews with intermediaries in England and Wales and NI as well as judges in NI. This research concluded that the emergence of a 'two tier' intermediary system in England and Wales had led to the emergence of what he terms 'defendant work' and 'witness work'. Taggart suggests that intermediaries working with defendants

often carry out a broader role in terms of their involvement in case compared to intermediaries working with witnesses. Overall, Taggart's work highlights the importance of the intermediary role in ensuring the participatory roles of witnesses and defendants are respected.

4.7 Summary

A person with ID is recognised by the criminal justice system (CJS) in the UK as a vulnerable witness. Academics, practitioners and the UK courts have criticised the CJS in how vulnerable witnesses are communicated with and the negative impact the experience can have on their ability to give best evidence. Concerns around injustice and subsequent enquiries have resulted in changes to legislation, policies and practice when interviewing vulnerable witnesses at police investigation stage. In addition, the courts have adapted to making changes to the process and providing 'special measures' applications, including the service of a RI to assist the court with enhancing more complete, coherent and accurate evidence from the vulnerable witness. There has been very limited research carried out on the RI role and the impact it has made on the communication between the courts and vulnerable witnesses with ID. The next step of this thesis is to identify and examine the communication challenges for witnesses with ID when attending a court to be questioned on their evidence through the process of cross-examination.

The next chapter introduces the research plan and highlights specific challenges encountered when trying to carry out research within the courts in NI.

Chapter 5. Research Plan

This chapter will outline the original research plan of this thesis, adjustments that had to be made and the final research plan delivered.

From the initial scoping exercise of existing empirical research into the UK criminal justice process and people with ID two key factors were identified that influenced the direction of this thesis. Firstly, the limited research that existed focused mainly on police interviews for complainants and suspects (Agnew et al., 2006; Antaki et al., 2015; Gudjonsson, 2010; Henshaw & Thomas, 2012). Secondly, the very limited research that existed for court and ID consisted mainly of qualitative interviews with professionals involved; mainly advocates and judges (Fairclough, 2016; Henderson, 2015b) and complainants (Beckene et al., 2017). Therefore, from the onset the plan was to examine further what was actually happening in practice regarding communication with individuals with ID when giving evidence in court.

5.1 Initial plan

The initial plan was to review existing literature regarding communication challenges faced by witnesses with ID when giving evidence in court. For vulnerable complainants and witnesses the court allows for the request of a special measure enabling a pre-recorded police interview, known as the ABE (Achieving Best Evidence) to be used in court as 'evidence-in-chief'. This means that the vulnerable witness does not need to give a live account of their version of events and only needs to attend court for cross-examination and any subsequent re-examination required. Therefore, the literature review focused more on communication required for cross-examination and did not include police interview research. A systematic review was chosen as it is considered the 'gold standard' of literature reviews (Petticrew & Roberts, 2005; Wormald & Evans,

2018). Empirical studies were included that used experimental methodologies or actual cross-examinations for children or adults with ID. A range of communication challenges and influencing factors were highlighted. This review was published in the International Journal of Evidence and Proof in 2019.

A key research area for this thesis was to explore what was happening in practice – how were vulnerable witnesses with ID being cross-examined in court? This required obtaining transcripts or recordings of cross-examinations of vulnerable adult witnesses with ID in crown courts in Northern Ireland when a RI was present. At the beginning of the PhD research, in 2017, a request was made to the Northern Ireland (NI) Lord Chief Justice office to enquire about the possibilities of accessing court transcripts. A usual route was available with transcripts requested on a case by case basis. Information provided at that time advised that general information on the case was required, such as name, date and court the case was heard in, in order to receive the accurate information. The minimal amount of information needed was sought and a process on how to receive this information was investigated. Permission and support was gained from the NI Bar of advocates and from local registered intermediaries (RIs) to identify relevant cases. In autumn of 2018, the second year of the PhD, contact was made again with the Lord Chief Justice Office to receive permission to access crown court recordings for research purposes. Unfortunately GDPR⁴⁴ had come into force in 2018 and therefore the usual process could not be followed. The Lord Chief Justice office requested that the author research the legal basis for provision of the court recordings for research purposes, under the guidelines of GDPR. Support for this was received from the University of Kent,

⁴⁴ The Data Protection Act 2018 is the UK's implementation of the General Data Protection Regulation (GDPR). [Data protection: The Data Protection Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/data-protection-the-data-protection-act)

research undertaken and the request made for research purposes, outlining the GDPR legislative framework to justify the release of the information for research purposes in the public interest. As the NI Court Service was the data holder for the court recordings/transcripts permission then had to be requested from the Court Service. Following numerous emails and phone calls all contact with the author was carried out through the Intermediaries Services Secretariat (managing body of RI service in NI). Following investigations it was decided that the information had been collected for a purpose different to what was now being requested and in line with new GDPR legislation it could not be provided for research purposes. A meeting was held within the Courts Service in August 2019 and it was decided by the court service that a specific policy would have to be written to allow the release of court transcripts/recordings for research purposes. The author changed the PhD from full time to part time to wait for this policy to be written. Contact had also been made with the MOJ to enquire about requesting transcripts from English courts instead. Initially, there was an online request service, however identifying relevant cases would have been more challenging and it was considered that the process was likely to also change due to implementation of GDPR legislation.

By January 2020, despite an email from Sir Justice Gillen⁴⁵ supporting the research and requesting access be granted, no progress had been made with the NI request and no correspondence was forthcoming from the Courts Service. It was therefore decided that

⁴⁵ Author of the Gillen Review into the [gillen-report-recommendations.pdf \(justice-ni.gov.uk\)](https://www.justice-ni.gov.uk/gillen-report-recommendations.pdf) accessed 9/1/23)

Recommendation 11 states that the DOJ should commission research on prevalence, extent, nature and experiences of serious sexual offences, specifically identifying people with ID.

a completely new research plan was required. The following section details the alternative research plan for studies two and three.

5.2 Alternative research plan

Study two

In the interim period of waiting for access to NI court recordings a second study was completed to investigate the challenges identified for adults with ID when going through the court process. It was decided to focus only on adults as children are considered vulnerable witnesses due to age alone and adults would allow for the challenges related to the presence of an ID to be identified more accurately. A research proposal was written and University of Kent (Tizard) ethics approval granted along with permission from the Intermediaries Service Secretariat (ISS) in NI. Although, this process was eased by the author's role as a RI in NI, a detailed anonymising process was put in place to ensure that all information was redacted for potential identifying information prior to being forwarded. The aim of this study was to identify the communication challenges for 25 RI court reports written for adults with ID. The ISS agreed to identify relevant cases, redact the reports and forward. However, during this time a member of staff left their post and the office could not provide this service for all of the reports identified. Individual intermediaries offered to redact their own reports and sent to the office for checking before being forwarded. A total of 19 reports were received. Results of this study have been published in the International Journal of Evidence and Proof in 2021.

The study of RI court reports highlighted a wide variety of communication challenges for the witnesses with ID. However, it also raised interesting research regarding the impact of the communication skills of the communication partner, i.e. an advocate, on a communicative exchange during cross-examination. This included the style of questions

that are used by the advocate during cross-examination. In particular, questions that lead the witness to agree with the suggestion that is placed within the question; known as 'leading questions'. As leading questions are the principal tool of communication used by advocates during cross-examination, in order for them to 'put the case' of their own client, they became the focus of the third and final study of this thesis.

Study three

Study three is an empirical study of an alternative to verbal leading questions for adult witnesses with ID. It is a follow up study of one of the papers in the systematic review which found that choice questions with visuals resulted in greater information provided and less suggestibility than leading verbal questions (Sigelman, Budd, et al., 1982). This research plan was devised and approved by University of Kent ethics, however, this research plan also had to undergo various changes due to very unforeseen circumstances that impacted worldwide, Covid 19.

Other agencies had been contacted and were to be involved in the research, including: Positive Futures, a local charity, to identify participants and host the research days; Police Service of Northern Ireland (PSNI) to provide a recording of a mock crime and assist with police style interviews; Public Prosecution Office (PPS) to provide advice and guidance and assist with cross-examinations; and Registered Intermediaries to carry out communication assessments prior to the research days. Recruitment of participants was due to commence in March 2020 but was prevented by the first lockdown for Covid 19. In April the author made the decision to halt the PHD studies until it would be possible to carry out the research. It was September 2021 before this was possible. However, a decision was made then to simplify the study and carry out the research online. A number of factors influenced this decision. The member of staff responsible for participant recruitment was leaving her post within Positive Futures and due to staffing

pressures continuing with Covid, no other staff member could be identified. In addition, the other agencies involved were also under pressure due to backlogs of work within the criminal justice system and there was no desire to add more pressure to individual workloads. The likelihood of continuing restrictions for face to face research was also imminent and some participants may be medically vulnerable for face to face research.

A number of RIs had availed of online training with the PhD supervisors on BPVS and GSS2 for the communication assessments required for the research. The plan was for them to carry out some of the assessments for the 50 participants sought. However, as recruitment was challenging, the author carried out all assessments for the 32 participant communication assessments and all of the research interviews for 30 participants.

5.3 Summary

There are three key studies to this thesis examining communication for individuals with ID when cross-examined in court:

- Study one is a systematic review of existing research
- Study two is an examination of reported communication challenges for adult witnesses with ID.
- Study three is an empirical study comparing two forms of cross-examination for adults with ID; simple verbal leading questions and choice questions with visuals.

These studies are presented in the following chapters.

Chapter 6. Communication and cross-examination for children and adults with intellectual disabilities: a systematic review.

6.1 Introduction

Previous research concerning social vulnerability of people with intellectual disabilities (ID) has reported a greater level of risk of individuals with ID being victims of crime (Clare & Murphy, 2001; Henry & Wilcock, 2013) compared to the general population. They may be over-represented as alleged perpetrators of crime too, at the police station stage. In prison, the precise prevalence figures for the number of people with ID have been much disputed in the UK and elsewhere; they undoubtedly vary enormously with the method for screening for ID and the jurisdiction in question (Murphy and Mason, 2014).

It has been recognised for some time that, regardless of prevalence, people with ID who are victims or witnesses of crimes are vulnerable in the criminal justice system at various stages so that in England, Wales and Northern Ireland, people with ID come under the legal category of ‘vulnerable witnesses’ (Youth Justice and Criminal Evidence Act 1999, Criminal Evidence (NI) Order 1999). In response to recommendations made in the 1998 Speaking up for Justice report (Burton et al., 2006) the courts are required to consider applications of eight special measures for vulnerable witnesses:⁴⁶

1. Screening witness from the accused

⁴⁶ Sections 23–30 of the Youth Justice and Criminal Evidence Act 1999.

2. Evidence given by live link
3. Evidence given in private
4. Removal of wigs and gowns
5. Video recorded evidence-in-chief
6. Video recorded cross-examination or re-examination
7. Examination of witness through an intermediary
8. The use of aids to communication.

These special measures were initially intended for non-defendant witnesses, although following a challenge under Human Rights legislation in *SC v UK* (40 EHRR 10), there has been some limited provision made for defendants in England and Wales⁴⁷ (Fairclough, 2016, 2018). In Northern Ireland legal provision is made for intermediaries for the accused during police interview, examination and cross-examination and for live link when giving evidence in court⁴⁸ (Cooper & Mattison, 2017).

6.1.1 Cross-examination

Keane et al., (2010) describe two main purposes of cross-examination: first, to extract evidence supporting the opposing party's version of the facts and secondly, to cast doubt on the witness's version of events. In his 'Ten Commandments of Cross-examination' Pratt suggests that advocates can use the skills of personality, presence and persuasion to carry out successful cross-examination (Pratt, 2003). However, these skills have been subject to criticism. For some, cross-examination is seen as a way to discredit the

⁴⁷ Defendant witnesses can now request an intermediary from an approved service provider – private organisations or individuals (see [HMCTS intermediary services - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/services/hmcts-intermediary-services)) accessed 20/12/22

⁴⁸ Sections 21A and 21B of the Criminal Evidence (NI) Order 1999

witness (Clark, 2011), to control and undermine confidence (Valentine and Maras, 2011), and challenge credibility (Wheatcroft et al., 2004). Cross-examination can cause inaccuracies in eyewitness accounts (Keane, 2012a; Keane & Fortson, 2011; Wheatcroft et al., 2004; Wheatcroft & Woods, 2010), particularly for vulnerable witnesses (Geddes, 2016; Gerry and Cooper, 2017; Henderson, 2014; Hoyano, 2015; Keane, 2012). The use of leading questions during cross-examination has come under particular scrutiny and criticism (Keane, 2012; Sharman and Powell, 2012; Valentine and Maras, 2011; Wheatcroft et al., 2004), especially when used with vulnerable witnesses (Agnew & Powell, 2004; Sharman & Powell, 2012).

The English Court of Appeal, however, has also demonstrated dissatisfaction with the cross-examination process, with a series of judgments declaring the inappropriateness of leading and ‘tag’ questions⁴⁹; advocating short simple questions with the onus placed firmly on the advocates to adjust to the needs of the vulnerable witness;⁵⁰ declaring that advocates do not have a given right to ‘put the case’ to the witness;⁵¹ and recommending ground rules hearings,⁵² where the judge directs on what needs to be put in place to ensure fair treatment of the witness, particularly during cross-examination (Cooper et al., 2015).

⁴⁹ R v W and M (2010) EWCA Crim 1926

⁵⁰ R v Barker (2010) EWCA Crim 4.

⁵¹ R v E (2011) EWCA Crim 3028; R v RK (2018) EWCA Crim 603; R v Wills (2011) EWCA Crim 1938.

⁵² R v Lubemba; R v JP (2014) EWCA Crim 2064.

However, these rulings were mainly based on cases for child witnesses. An exception is a more recent case⁵³ in which questions asked of an adult defendant with significant intellectual difficulties were deemed unfair and a factor in the quashing of his conviction. Do the same challenges as highlighted for children in the Court of Appeal apply for children and adults with ID, or do these latter witnesses face even greater communication challenges during cross-examination?

The aim of this paper is to report a systematic review of previous empirical research that could inform the key communication challenges for people with ID during cross-examination. The objectives were to unearth key communication challenges relating to the cognitive impairments and adaptive functioning of both children and adults with ID and the impact of the challenges for the cross-examination of these vulnerable witnesses.

Various non-systematic reviews have been carried out that have relevance for this subject. Kebbell and Hatton's review in 1999 reported that witnesses with ID could provide accurate accounts of events even though such accounts might have contained less information and could have been adversely affected by question style (Kebbell & Hatton, 1999). Gudjonsson and Joyce's review of interviewing adults with ID also discovered difficulties with: understanding the oath and legal rights; suggestibility; acquiescence (saying yes to every question); compliance; and perceptions of the consequences of false confessions (Gudjonsson & Joyce, 2011). Milne and Bull highlighted the need to find ways to enhance recall (Milne & Bull, 2001) and Bowles and

⁵³ R v Jones (2018) EWCA Crim 2816.

Sharman's review of the impact of leading questions called for the need to avoid them when interviewing people with ID (Bowles and Sharman, 2014a). Nevertheless, previous literature on this topic has not been reviewed systematically—a systematic review (SR) being regarded as the 'gold standard' of literature reviews, since it requires a more rigorous search of literature, detailed and transparent selection and screening of articles, and a critical appraisal of evidence (Petticrew & Roberts, 2005). Our work therefore attempted to fill this gap.

6.2 Methodology

6.2.1 Search strategy and sources of literature

For the identification of primary studies on communication for people with ID during cross-examination, the following search terms were used:

(Intellectual disabilit* or Intellectual difficult*or Learning disabilit*or Learning difficult*or Developmental disabilit*or Cognitive impairment or Mental retardation or Mental handicap) AND (Communication or Acquiescence or Memory or Recall or Leading questions or Accuracy or Suggestibility or Expressive language or Reflective language or Question styles or Question types or Questioning) AND (Cross-examination or Court or Courtroom or Witness or Defendant or Eyewitness or Testimony)

A series of databases were used for the search, to provide a wide and comprehensive search of criminal justice, social science and psychological papers: IBSS, EBSCO criminal justice, EBSCO academic search complete, PsycINFO EBSCO, PsycARTICLES EBSCO, SCOPUS, Lexis, Westlaw UK, Campbell, Cochrane.

Titles and/or abstracts were read for all papers found in the searches (after removal of duplicates), and this was followed by reading the full text for those articles where the

abstracts indicated that the inclusion and exclusion criteria had been met, or if further clarification was required. Reference lists were also checked on the papers chosen following full text searches, and some authors contacted to locate older papers and request any current research. The initial searches were carried out in January and February 2018.

6.2.2 Inclusion and exclusion criteria

Specific search fields were not chosen, to avoid excluding relevant documents. An exception was made for the IBSS database, as 155,999 papers were found with the initial search. A search under 'main- subject' was therefore applied. All retrieved studies were assessed against the inclusion and exclusion criteria in Table 1.

Once inclusion and exclusion criteria were applied, 24 papers remained and were accepted into the review. The PRISMA (Preferred Reporting Items for Systematic Reviews) framework was used to structure the review (Moher et al., 2009) and can be seen in Figure 6.1.

Table 6.1. Inclusion and exclusion criteria.

Parameters	Inclusion Criteria	Exclusion Criteria
Participants	Participants with diagnosis of intellectual disabilities. i.e. IQ below 70. Participants with no diagnosis, but lower IQ, i.e. 'borderline'	Learning difficulties without presence of cognitive impairment, e.g. dyslexia. Other conditions that result in cognitive impairment but are not present from childhood e.g. Parkinson's, stroke
Methods used in the studies	Studies that assessed or tested understanding and expressive (spoken) communication using an experimental methodology similar to that of witnessing/experiencing an event, examination and cross-examination. Studies that address communication using actual	Papers testing for competency/capacity (Assumed for cases that proceed to cross-examination)⁵⁴. Juror/advocate/witness/judiciary perceptions Papers that concentrate only on police investigative interviews.

⁵⁴ S.53 Youth Justice and Criminal Evidence Act 1999

Parameters	Inclusion Criteria	Exclusion Criteria
	cross-examinations of people with ID.	Papers that only concentrate on memory recall of an event, without follow up interview questions.
Study type	Empirical research Peer-reviewed	Reviews Book chapters Theses Single case studies
Results	Studies that report on specific communication challenges for people with ID. Studies that specifically address communication and cross-examination	Studies that address communication issues for people with ID but not using research in a format that is relevant to examination and cross-examination, e.g. interview style questioning about an event/alleged event.
Country of origin and language	Studies conducted in any country were eligible but only those reported in English language.	Not English language.

6.2.3 Data synthesis

A thematic analysis was carried out, based on the six phases outlined by Braun and Clarke (Braun & Clarke, 2006). The papers were read in detail and codes extracted according to the data-driven results that demonstrated relevance for communication challenges for people with ID. Six key themes emerged and mind maps were created according to each theme with the information from the codes included. A list of authors was recorded beside the information from the codes to ascertain the most common findings. An additional subject (court language) was added as one of the papers was different in its area of research compared to the other papers included (Ericson and Perlman, 2001). The data were also analysed by the second two authors for inter-rater reliability in terms of including papers and to guard against any inclusion bias from the primary author.

6.2.4 Participants

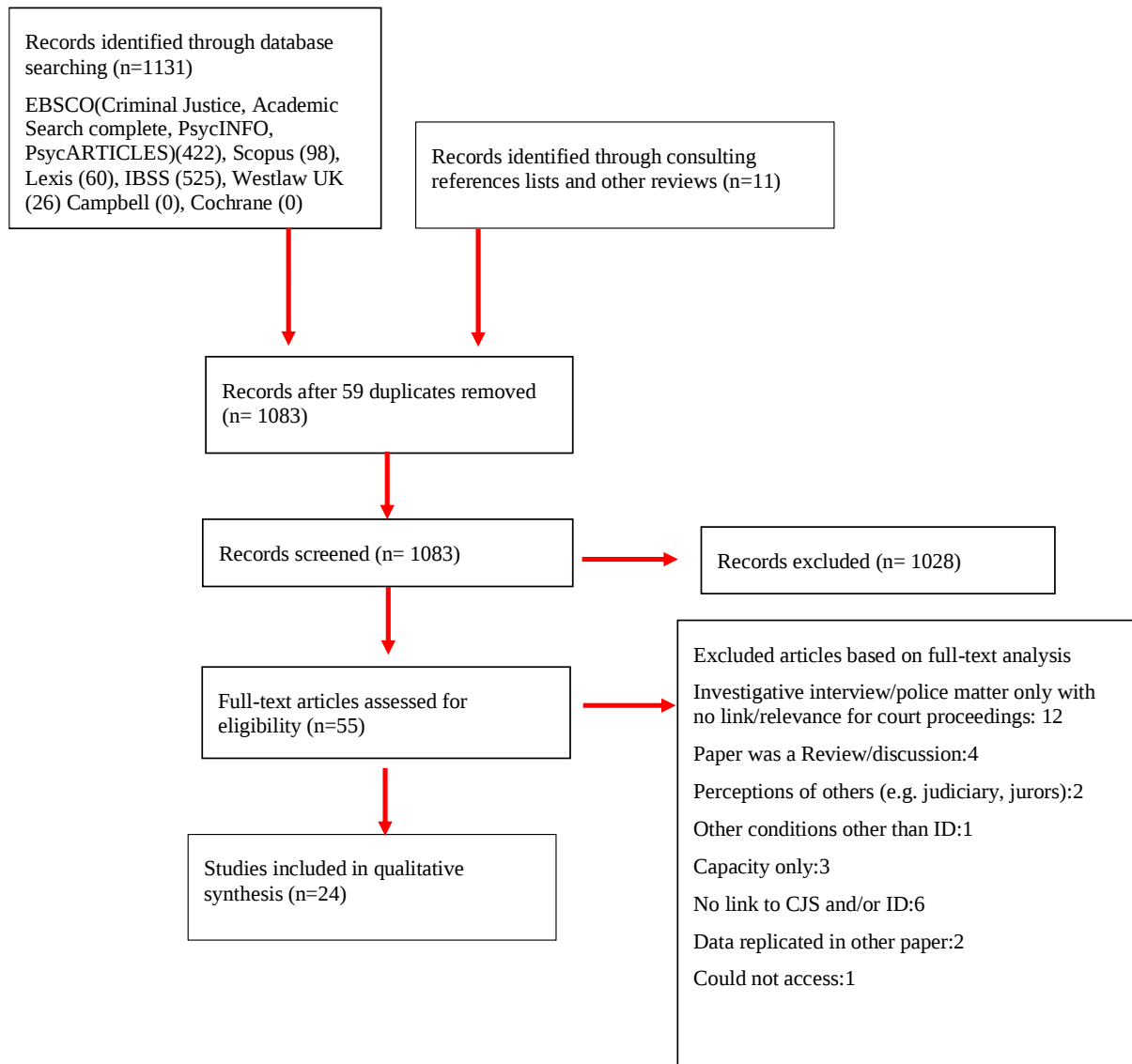
The papers were mainly from the UK (15), also USA (4), Australia (3) and Canada (2). There were 9 studies involving adults with ID, 10 involving children with ID and 5 involving both adults and children. The 24 papers found resulted in research findings for a combined total of 1,427 participants with ID, including:

- 652 adults;
- 690 children (aged 6-17 years);
- 85 children and adults (Collins & Henry, 2016; Gudjonsson, 1990) (No age breakdown given).

And 801 control participants including:

- 223 adult controls;
- 578 children controls.

Figure 6.1. PRISMA flow diagram for study selection



6.2.5 Methods used by the studies included

Most (16 of the 24 studies) compared the children or adults with ID to control groups of children or adults without ID (and/or with borderline ID). Of the studies with children, almost half used matched control groups: 7 had a control group matched for mental age and 6 matched for chronological age (4 of the studies matched for both).

The majority of the studies (19) employed analogue designs, mimicking court procedures experimentally, most often by questioning participants following verbal stories (for example on the Gudjonsson Suggestibility Scale, GSS) or filmed events (for example of a mock crime), but sometimes following real or imagined events (such as magic shows or health checks). Only one of these followed up with a mock cross-examination (Bettenay et al., 2014). Two studies used retrospective analysis of pre-existing information, either court transcripts (Kebbell et al., 2004) or court reports (Gudjonsson, 1990). Three studies simply assessed understanding of court language (Ericson and Perlman, 2001) or acquiescence (Sigelman et al., 1981; Sigelman, Budd, et al., 1982).

The most common variables investigated were the effects of ID on accuracy of recall and correct response to questions. Inaccuracy was often characterised as due to acquiescence (5), suggestibility (9), confabulation (4) or compliance (1). The relationships of these latter variables were investigated in relation to question styles (11 papers); free recall (11); time delay (6); level of ID (6).

Further information can be seen in Table 6.2.

6.2.6 Quality assessment

The quality of each included study was assessed based on systematic research review guidelines from the Social Care Institute for Excellence (SCIE) (Rutter et al., 2010) (see Table 6.3). The grade in the final column indicates the overall quality of the paper with a higher grade indicating higher quality. SCIE is a support agency and an independent charity working with adults', families' and children's services across the UK and as such, their quality assessment process was regarded as the most relevant for this review. All of the papers were also assessed by the second and third authors as being of sufficient quality and accepted into the review.

It was noted that there was no commonality of IQ tests used in the research with children. In particular, while some used the WAIS or WISC assessments (considered the gold standard IQ measures) others used the PPVT or BPVS which are only simple tests of language skills. This may have caused problems with the mild and moderate categorisations, in that a participant in the upper end of the moderate category in one study could actually be in the mild category in a different study.

In six papers there was evidence of measures put in place to reduce the likelihood of selection bias and in two papers evidence of measures to avoid performance bias. Attrition bias relates to the difference between groups who withdraw from a study (Higgins & Green, 2011) and two papers recorded attrition bias, in that some participants were not available for testing (White and Willner, 2005) or delayed interviews (Brown et al., 2012). No specific reasons were given. Detection bias addresses if the researchers recording the outcomes were blinded to the treatment the participants received (Greenhalagh & Brown, 2014) and three papers took measures to prevent detection bias. Consent from participants was recorded in fourteen papers. Only two papers recorded that the participants were representative of the population. Six papers recorded equal

chance of recruitment for participants, in that it was highlighted that everyone within the particular setting was eligible to participate. All papers provided a rationale for purposive sampling and all recorded outcomes. There is some uncertainty as to whether there is enough data for valid results in four papers. This is because of low overall sample size compared to the other papers (Dent, 1986) low sample size for each method measured (Cardone and Dent, 1996; White and Willner, 2005) and only one question of each type used (Bowles & Sharman, 2014b).

Table 6.2. Characteristics of included papers

	Paper	Design	Participant details	Methods used	Results
			Adults:		
1	Bowles & Sharman (2014)	Analogue study of witnessed event using DVD	Single ID group: 41 participants	Participants assigned to watch 1 of 2 versions of a DVD, identical except for 8 critical items. Visual-verbal presentation	Overall = 52% accuracy
	(Australia)	Single group of people with ID. Within group comparisons of question types & misleading/correct information	Verbal IQ 50-75 (mild) Mean age 32 years (range 22-48)	12 minute distractor task Misinformation interview – questioned on 8 critical items.	Correct information: Closed and closed presumptive questions = greater accuracy
				½ critical items = correct information	Closed specific = least accurate
				½ critical items = misleading information	
				4 question types:	Misleading information:

Paper	Design	Participant details	Methods used	Results
			Closed questions	Closed presumptive = least accurate.
			Closed specific	
			Closed presumptive (tag)	More suggestible to misleading information in presumptive question style.
			Open presumptive	More confident about answers to misleading questions than control questions
			Recognition test and confidence in answer	
			PPVT-iv verbal IQ test	

	Paper	Design	Participant details	Methods used	Results
2	Cardone & Dent (1996) (UK)	Analogue study, using visual &/or audio story Two ID groups (2 modes of story presentation) 3 recall/question conditions)	2 ID groups: 60 participants divided randomly into 2 groups. IQ 53-74(mild) Mean age 36.8 years (range 24-56)	Group 1 received a verbal presentation of GSS2 Group 2 received a verbal and visual presentation. Each group received 1 of 3 recall/question methods: 1. Free recall 2. General questions 3. Specific questions IQ: Wechsler Adult Intelligence Scale - Revised (WAIS-R)	Visual-verbal presentations resulted in greater recall, accuracy and less yield suggestibility in immediate and delayed interviews There was no impact on shift Specific questions resulted in more information provided in free recall and greater accuracy Question type does not affect yield or shift.

	Paper	Design	Participant details	Methods used	Results
3	Clare & Gudjonsson (1993) (UK)	Analogue study, using verbal story Two groups (ID; no ID) compared.	ID group:	GSS 2 - verbal	ID group (c.f. no ID group):
			20 participants	Suggestibility	More suggestible
			Mean age 27 years (range 20-48)	Confabulation	Confabulated more
			IQ 57-75	Acquiescence	More acquiescent
			Control group:	IQ: WAIS-R	More suggestible to leading questions
			20 participants, no ID		Not suggestible to negative feedback
			Mean 30 years (range 18-50)		
			IQ 83-111		

	Paper	Design	Participant details	Methods used	Results
4	Ericson & Perlman (2001) (Canada)	Assessment of comprehension of court language Two groups (ID, no ID)	ID group: 40 participants Mean age 31.85 years (range 18-50) IQ: 50-75 Control group: 40 participants, no ID Mean age = 32.57 years (range 18-50)	Interview: Knowledge of word/term More detailed information about the word/term	ID group: 40% previously involved in criminal court cases as defendant, victim or witness. Only understood 8/34 terms. Familiarity of terms in ID group was not necessarily linked to the difficulty of the term. Control: 12.5% previously involved in court case. Understood 33/34 terms.

	Paper	Design	Participant details	Methods used	Results
5	Gudjonsson & Clare (1995) (UK)	Analogue study (verbal story)	Single mixed group:	GSS 2:	Lower IQ is linked to greater level of suggestibility
		Single group, range of IQs	145 participants:	Recall	No significant links between confabulation and IQ, memory, suggestibility and acquiescence.
			Mean 31-32 years (range 17-69)	Suggestibility	
			Mean IQ = 81.1	Confabulation	
			66 with ID attending day centre/residential	Acquiescence	
			58 unemployed with no ID identified	IQ: WAIS-R	
			21 staff in mental health service		

	Paper	Design	Participant details	Methods used	Results
6	Kebbell et al (2004) (UK)	Retrospective analysis of court transcripts Two groups (ID; no ID)	ID group:16 court transcripts of witnesses with ID Control group:16 court transcripts of witnesses without ID, matched for crime, year and court. All participants were alleged victims of rape, sexual assault or assault with trials between 1994-1999. No further participant information provided	Response coding for 15 question types	Significantly more questions asked in cross-examination than in examination in chief Also more yes/no, leading, negatives, multiple, repeated questions. Those with ID provided less information and were more suggestible to leading questions. No significant group differences in how cross-examination is carried out.
7	Milne et al (2002) (UK)	Analogue study (visual/verbal story) Two groups (ID; no ID)	ID group: 46 participants Mean age 35 years (range 19-59) Mild IQ	Visual-verbal presentation Interview based on GSS: 4 misleading questions 4 non-leading	ID associated with more yield suggestibility Better recall associated with less yield False alternatives: both groups likely to select last option

	Paper	Design	Participant details	Methods used	Results
			Control group: 38 participants recruited via job centre and newspaper. Mean age 39 years (range 19-62) No IQ level provided	4 false alternatives Negative feedback-shift	No significant effect of negative feedback on shift.
8	Perlman et al (1994) (Canada)	Analogue study (short film) Two groups (ID; no ID)	ID group: 30 participants Age range 17-26 years IQ 55-80 Control group: 30 participants, no ID Normal IQ but likely to be higher than general population (57% students)	Observation of short film Immediate interview: Free recall General questions Short answer – non-leading/misleading Specific yes/no questions Statement questions	ID group: Remember ½ as much as control group Less able to make inferences Same level of accuracy as control group Non-leading short answer questions and misleading statements cause less accuracy. Misleading short answers cause more confabulation.

Paper	Design	Participant details	Methods used	Results	
Age range 17-26 years					
9	White & Willner (2005) (UK)	Analogue study (verbal story, vs witnessed events 1 mth ago or 18 mths ago)	ID group: 20 participants (16 completed both ASS 1 and ASS2)	GSS 2	Those who had witnessed an event in the past were 1/3 less suggestible than those who heard about it.
				Verbal passage read	
			No age provided	ASS 1	Those who had recently witnessed an event were 2/3 less suggestible than those who heard about it.
		Two ID groups, were told the story, one witnessed live event, one did not)	IQ <70	Verbal passage read based on live event at Centre E 18 months previously.	Within the results of the participants in the control group there were no differences between the recall or suggestibility scores of the GSS, ASS1 or ASS2.
			Attended day centre E		
			ID Control group:	ASS 2	
		20 participants (12 completed both ASS 1 and ASS2)	Verbal passage read based on live event at Centre E 1 month previously		
				IQ<70	
		Attended day centre C	WASI (IQ)and BPVS (receptive language) tests		
Children:					

	Paper	Design	Participant details	Methods used	Results
10	Bettenay et al (2014) (UK)	Analogue study (witnessed a live scene) Three groups (mild ID; borderline ID; no ID)	Mild/Moderate ID group: 18 participants Mean age 9 years (range 7-11) IQ 47-67 Borderline ID group: 13 participants Mean age 10 years (range 9-11) IQ 70-82 Control group: 59 participants, no ID	Live scene witnessed Interview 1 – 3-6 days afterwards Cross-examination 10 months later Questions challenging and unchallenging evidence.	ID + borderline groups provided less accurate recall Borderline group performed no differently to control for prompted specific recall questions. During cross-examination all children changed ½ answers or more. 97.8% of all children ceded to at least 1 challenge. No significant group differences. Lower recall ability resulted in children being more suggestible to challenges.

	Paper	Design	Participant details	Methods used	Results
			Mean age 8.6 years (range 4-11)		
			IQ 85-121		
11	Brown & Lewis (2012)	Analogue study (real event)	Mild/borderline ID group:	WISC-111, WPPSI-111 IQ tests	ID groups:
	(UK)	4 groups: mild ID; moderate ID: non-ID CA matched;non-ID MA matched.	46 participants	Interactive training session on 1 st Aid	A delay in interview resulted in less information recalled, more prompts required and less accuracy.
			IQ 56-78		
		Delay: 1 week or 6 mths	Age range 7-12 years	½ participants interviewed after 1 week	Direct questions gained most information.
		Several question styles	Moderate ID group:	½ participants interviewed after 6 months	Open invitations gained most accuracy.
			35 participants	Open invitations	Moderate ID participants performed lower in all areas and were more suggestible.
			Age range 7-12 years	Cued invitations	
			IQ 44-53	Direct questions	Mild ID were similar to MA-matched participants.
			No ID CA-matched control:	Misleading	

Paper		Design	Participant details	Methods used	Results
			60 participants	Leading	
			Age range 7-11.5 years	Open/closed	
			IQ 84-125		
			No ID MA-matched control:		
			65 participants		
			Age range 4-9 years		
			IQ 85-124		
12	Dent (1986) (UK)	Analogue study (live event witnessed) Single group (all ID) 3 recall/question styles	Single ID group: 23 participants Age range 8-11 years IQ 49-70 Mean IQ 61.6	Live scene witnessed Next day interview: Free recall (8 participants) General questions (8 participants)	More information is remembered in response to specific questions. General questions result in the most accurate responses.

Paper	Design	Participant details	Methods used	Results
		No controls	Specific questions (7 participants)	
13	Gordon et al (1994) (USA)	Analogue study (real vs imagined events) Two groups (ID; no ID)	ID group: 23 participants Mean age 10.3 years (range 8-13) Mean PPVT -R 57.35 No ID MA-matched control group: 23 participants Age 6 years (Mean PPVT-R 95.96)	24 interactive activities: 10 imagined 10 performed 4 performed and probed with misleading questions at interview. 1st Interview - immediate 2nd Interview 6 weeks later Open ended – specific questions 12 misleading questions Peabody Picture Vocabulary Test-Revised (PPVT-R)
				Few group differences. Mental age is a good indicator of performance Children with ID are more likely to remember performed activities rather than imagined.

	Paper	Design	Participant details	Methods used	Results
14	Henry & Gudjonsson (1999)	Analogue study (live event)	Mild/borderline ID group:	Live scene in classrooms	ID group:
	UK	4 groups: mild ID; moderate ID; no ID CA matched; no ID MA matched	17 participants	Interview 1 day later:	Remember less than CA matched controls group but more than MA matched controls.
			Age range 11-12 years	Free recall	
		Several recall/question styles	IQ 55-79	4 general questions	More suggestible to closed misleading questions than CA group but similar to MA grp.
			Moderate ID group:	12 open ended specific questions – 6 non-leading, 6 misleading.	No significant differences for:
		11 participants	GSS	General Questions	
		Age range 11-12 years	WISC=III IQ test	Open -ended non-leading or misleading	
		IQ 40-54		Yes/No non leading	
		No ID CA matched control group:		Accuracy	
		19 participants			
		Age range 11-12 years		More suggestible to negative feedback than MA matched group	

Paper	Design	Participant details	Methods used	Results
		IQ 81-132		
		No ID MA matched control group:		
		21 participants		
		IQ 80-140		
15	Henry & Gudjonsson (2003) (UK)	Analogue study (live scene witnessed)	Mild/borderline ID group:	All children recalled more in 2 nd interview but were less accurate.
		30 participants	1 st Interview 1 day later	Mild ID:
		5 groups: mild ID; moderate ID; no-ID CA matched; no ID mild MA matched; no ID moderate MA matched.	2 nd Interview 2 weeks later	Remembered as much as CA matched group & more than MA matched group
		Age range 11-12 years	Free recall	Not more suggestible than CA or MA matched groups.
		Mean IQ 65.6	Open ended specific questions – leading and non-leading	Lower scores on open ended nonleading questions and changed answers more in repeated recall.
		Delay: 1 day vs 2 weeks	Closed yes/No questions	

Paper	Design	Participant details	Methods used	Results
	Several recall/question styles	Moderate ID group: 17 participants IQ 40-54 Age range 11-12 years Mean IQ 45.5 No ID CA matched control group: 25 participants Age 11-12 years Mean IQ 104.5	GSS 2	Moderate ID: lower performance on every type of question compared to CA matched group. Remembered more than MA matched control group. More suggestible than CA group and changed answers more in repeated recall.

Paper	Design	Participant details	Methods used	Results
		No ID Control group MA matched for Mild ID group: 14 participants Age 5-8 years Mean IQ 106.3		
		No ID Control group MA matched for moderate ID group: 14 participants Age 5-8 years Mean IQ 100.6		

	Paper	Design	Participant details	Methods used	Results
16	Henry & Gudjonsson (2007) (UK)	Analogue study (video clip of event) 4 groups: mild ID; moderate ID; no ID CA matched for each ID group Several recall/question styles	Mild ID group: 18 participants Age range 8-9 years Mean non-verbal IQ 69.94 Mean verbal IQ 69.94 Moderate ID group: 34 participants Age 12 years Mean non-verbal IQ 55.56 Mean verbal IQ 58.94	Short video clip of an incident Interview: Free recall General questions Specific questions Yes/no questions GSS 2 (shortened version) Speed of information processing test BAS 11 and BPVS-11 IQ tests	ID groups: Provided less information during free recall and in response to general and specific question types Older children recalled more. Were more suggestible to yes/no questions than control groups Those with higher verbal IQ's were less suggestible. More significant relationships were found between mental age and measures of eyewitness memory performance than presence of ID. This suggests that mental age is a better indicator of eyewitness performance.' A correlation was found between a faster processing speed and more information provided at free recall and

Paper	Design	Participant details	Methods used	Results
		Control group CA matched for mild ID group:		in response to non-leading specific questions
		20 participants		
		Age 8-9 years		
		Mean non-verbal IQ 102.85		
		Verbal IQ 101.60		
		Control group CA matched for Moderate ID group:		
		20 participants		
		Age 12 years		

Paper	Design	Participant details	Methods used	Results	
		Mean non-verbal IQ 105.40			
		Verbal IQ 98.20			
17	Jens et al (1990) (Australia)	Analogue study (real or imagined events) Two groups (ID; no ID MA matched) Immediate and 8 week delay interviews Several recall/question styles	ID group: 24 participants Mean age 10 years (range 7-16) IQ 47-76.5 Mean 63.25 MA matched control group: 30 participants Mean age 6.5 years (range 5-7)	20 performed or imagined activities Interview 1 Free recall Open ended probes Specific probes 4 misleading questions Interview 2 after 8 weeks. Memory test (McCarthy Scales)	Few group differences All children remembered more and gave more accurate responses to questions of the activities they had performed rather than imagined. Both groups provided more correct responses to specific questions than open ended. A delay in the interview resulted in less information and less accurate recall for both groups. Both groups were initially likely to say that they had done something, which in fact they had only imagined.

	Paper	Design	Participant details	Methods used	Results
18	Michel et al (2000) (USA)	Analogue study (of a real event) 3 groups (ID; no ID MA matched; no ID CA matched) Delays: immediate; 6 weeks later Several recall/question styles	ID group: 20 participants Mean age 11.7 years (range 9-14) PPVT-R verbal IQ mean 58 CA matched control group:20 participants Mean age 11.7 years (range 9=13) PPVT-R verbal IQ mean IQ 109 MA matched control group:19 participants Mean age 6.3 years (range 4-8) PPVT-R verbal IQ mean IQ 104	Simulated Health Check Immediate Interview: 2 nd interview 6 weeks later: Free recall Elaboration Absent features (suggestibility) Intrusions (incorrect info given) PPVT-R test of verbal IQ	ID does not necessarily mean increased suggestibility, but other factors may be at play, i.e individual personalities and the manner in which the questions are asked. Time delay negatively impacted free recall for all groups. ID group was lower than CA matched group in all areas except for intrusions, but similar to MA matched group. Children with ID were more distractible and harder to focus. Also more likely to make irrelevant comments.

	Paper	Design	Participant details	Methods used	Results
19	Young et al (2002) (Australia)	Analogue study (verbal story) Two groups (ID; no ID)	ID group: 75 participants	GSS 2	ID group
			Mean age 11.44 years (range 6-13)	Immediate & 2 weeks later:	More suggestible to yield but not shift (negative feedback)
			Mean IQ 61.61 (range 55-79)	Child Temperament Inventory for shyness	Lower IQ = more suggestible
			Control group:83 participants, no ID	Vineland Adaptive Behaviour scales for communication	Lower communication skills = more suggestible.
			Mean age 9 years (range 5-12)	WASI IQ tests	Gender and shyness did not have any impact on performance for any group.
			Mean IQ 103.59		For both groups older children are less suggestible.
			Children and adults		
20	Collins & Henry (2016) (UK)	Analogue study (video clip)	ID group: 25 participants with Downs Syndrome	Short video clip of an incident Interview:	No group difference for any question type, therefore mental age represents best estimate of witness performance.

Paper		Design	Participant details	Methods used	Results
		Two groups (ID; no ID MA matched)	Mean age 19 years (range 9-26)	Free recall	
		Several recall/question types	No ID MA-matched control group: 42 participants	General	
				Non-leading specific	
				Misleading specific	
				Correctly leading yes/no (tag)	
				Misleading yes/no (tag)	
21	Gudjonsson (1990) (UK)	Retrospective analysis of court reports	Single ID group: 60 participants	GSS	Lower IQ results in more acquiescence, strongest correlation.
		Single group (all ID)	Age range 16-62 years	Gudjonsson Compliance Questionnaire	Lower IQ also results in more suggestibility.

Paper		Design	Participant details	Methods used	Results
			Mean age 31 years	Acquiescence	No correlation between IQ and compliance.
			Referred by solicitors for court reports.	WAIS -R	No correlation between acquiescence and suggestibility or compliance.
			No controls		
22	Gudjonsson & Henry (2003)	Analogue study (verbal story)	Mild ID group: 38 participants	GSS 2	Children with ID
	(UK)	3 child groups: mild ID; moderate ID; no ID CA matched	Age range 11-12 years	Recall	Those who remembered less were more suggestible.
			IQ 55-75	Delayed recall (adults only)	Children remember more than adults.
			1 mixed adult group		
		Various recall/question styles	Moderate ID group: 28 participants	Yield 1 (number of leading questions given into before negative feedback)	Adults:
			Age range 11-12 years	Yield 2 (number of leading questions given into after negative feedback) (Adults only)	The lower the IQ, the less they remembered and the greater yield suggestibility
			IQ below 54		
			No ID CA-matched control: 44 participants	Shift	There is no correlation between IQ and shift suggestibility.
			Age range 11-12 years		

Paper	Design	Participant details	Methods used	Results
		Single Adult group: 221 Adults referred to author for IQ and suggestibility assessment. Mean age 30.6 years 101 adults IQ 55-75 (mild) 27 adults IQ below 54 (moderate) 93 adults No ID	WISC-111 and BAS-11 IQ tests	
23	Sigelman et al (1981) (USA)	Assessment of acquiescence 3 groups all with ID (children in institutions; children in community; adults in institutions)	Child ID group 1: 52 participants living in institutions Age range 12-16 years	Item-reversal technique for measuring acquiescence, e.g. "Are you usually happy?" "Are you usually sad?" interspersed with unrelated questions. Acquiescence present in 40-50% of respondents. Lower IQ is linked to higher likelihood or acquiescence Correlation between question type and acquiescence. Lowest when

Paper		Design	Participant details	Methods used	Results
24	Sigelman et al (1982) (USA)	Various question types.	Mean IQ 42.08	63-142 questions within 5 general topic areas.	information is most immediate and concrete but more if not fully understood or correct answer is unknown.
			Child ID group 2:		
			57 children living in community	Interview 1 year later with those in institutions with lowest IQ and answered fewer questions.	Those more likely to acquiesce are particularly susceptible to questions requiring yes/no answers.
			Age range 12-16		
			Mean IQ 47.53		
			Adult ID group:		
			42 adults living in institutions		
			Mean IQ 39.76		
Mean age 23.49 years					
24	Sigelman et al (1982) (USA)	Interview style (Responsiveness, agreement with informants, freedom from systematic	Participants as study above except age range of children given as 11-17 years	Interviews of alternative questions on the same topics regarding activities, e.g. "Do you play indoor games?" "Which ones?"	Open ended questions were not adequate to gain information
					More information was provided in response to Yes/No questions but

Paper	Design	Participant details	Methods used	Results
	response bias) = dependent variable		Carers/staff also asked questions to check accuracy.	they resulted in greater acquiescence.
	Question style = independent variable		Community children had one interview.	There were no signs of preference for last option given.
			People in institutions had 2, one week apart.	Multiple choice questions, especially pictorial ones, provided good information without increased acquiescence.
			Open ended questions	
			Probes	
			Yes/No questions	
			Verbal and pictorial multiple choice	
			Parallel data was collected from parents or staff (informants).	

Table 6.3. Quality assessment of included studies

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
ADULTS:																
1	Bowles & Sharma n (2014)	P	U	N	U	N	Y	Y	N	Y	Y	Y	U	Y	N	17
2	Cardon e & Dent (1996)	P	P	N	U	N	U	U	U	Y	Y	N	U	Y	N	13
3	Clare & Gudjon	P	P	N	U	N	U	U	U	Y	Y	Y	Y	Y	Y	18

⁵⁵ All Bias are reverse scored: Y=-1; P=0; U=1; N=2. For all other results: Y=2; U=1; N=0 Y=yes, N=no, U=uncertain, P=potential

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
	sson (1993)															
4	Ericson & Perlman (2001)	P	P	N	N	Y	Y	N	U	Y	Y	Y	Y	Y	Y	21
5	Gudjon sson & Clare (1995)	U	P	N	P	N	U	U	U	Y	Y	Y	Y	Y	y	18
6	Kebbell et al (2004)	P	U	N	P	N	U	U	N	Y	Y	Y	Y	Y	Y	17
7	Milne et al (2002)	P	U	N	U	N	U	U	U	Y	Y	Y	Y	Y	Y	19
8	Perlman et al (1994)	N	P	N	N	N	U	Y	Y	Y	Y	Y	Y	Y	Y	20

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
		Y(contr ol)														
9	White & Willner (2005)	P	P	Y	P	N	Y	U	U	Y	Y	N	U	Y	Y	12
CHILDREN:																
10	Bettena y et al (2014)	P	N	N	U	N	U	U	U	Y	Y	U	Y	Y	Y	20
11	Brown & Lewis (2012)	U	P	Y	N	N	Y	U	U	Y	Y	Y	Y	Y	Y	18
12	Dent (1986)	P	N	N	U	N	Y	Y	U	Y	Y	N	U	Y	Y	19
13	Gordon et al (1994)	N	P	N	U	N	Y	U	Y	Y	Y	Y	Y	Y	Y	22

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
14	Henry & Gudjon sson (1999)	P	P	N	N	Y	Y	U	U	Y	Y	Y	Y	Y	Y	22
15	Henry & Gudjon sson (2003)	P	P	N	P	N	Y	U	U	Y	Y	Y	Y	Y	Y	18
16	Henry & Gudjon sson (2007)	P	P	N	P	N	Y	U	U	Y	Y	Y	Y	Y	Y	18
17	Jens et al (1990)	P	P	P	P	N	Y	N	U	Y	Y	Y	Y	Y	Y	15
18	Michel et al (2000)	N	P	U	N	N	Y	N	Y	Y	Y	Y	Y	Y	Y	21

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
19	Young et al (2003)	P	P	N	P	N	Y	U	U	Y	Y	Y	Y	Y	Y	18
ADULTS AND CHILDREN:																
01	Collins & Henry (2016)	U	P	N	P	N	Y	U	U	Y	Y	Y	Y	Y	Y	19
21	Gudjon sson (1990)	N	P	N	P	N	U	U	U	Y	Y	Y	Y	Y	N	19
22	Gudjon sson & Henry (2003)	N	P	N	P	N	U	U	Y	Y	Y	Y	Y	Y	Y	20
23	Sigelm an et al (1981)	N	P	N	P	N	Y	U	Y	Y	Y	Y	Y	Y	N	21

	Study	Selecti on Bias	Perfor mance Bias	Attritio n Bias	Detecti on Bias ⁵⁵	Design Partici pation	Clear Conse nt	Rep. of pop.	Equal chance of recruit ment	Ration ale for purpos ive sampli ng	All outco mes record ed	Sample size sufficie nt	Enoug h data for valid results	Enoug h data for useful results	Control group	Total Quality Rating
24	Sigelm an et al (1982)	N	P	N	P	N	U	U	Y	Y	Y	Y	Y	Y	N	18

Eleven papers used the GSS/GSS 2 test. Nineteen of the papers included a control group (16 of these included control groups without ID) and two of the studies that used non-GSS testing tried out the tests on a pilot group of individuals with ID.

6.3 Results

Six interrelated themes were derived from the synthesis. These included interrogative suggestibility; challenges with memory; challenges with accuracy; confabulation; acquiescence; and court language.

6.3.1 Theme 1. Interrogative Suggestibility

Interrogative suggestibility (IS) was a theme running through 15 of the 24 papers reviewed and related to how willing and susceptible a person was to changing their mind in response to questions during an interview (see Gudjonsson & Clark, 1986). Many of the studies reviewed had used Gudjonsson (1984, 1987) tests (GSS and GSS2) assessing 'yield'—how susceptible individuals were to a 'suggestion' in a question, and 'shift'—changing their mind in response to negative feedback from the questioner (Gudjonsson, 1984). The tests included a simple, short story read out, after which participants were asked to recall all that they could remember about the story, followed by 20 questions, of which 16 are leading, for example, 'Did the woman's glasses break in the struggle?' when the story did not mention that the woman was actually wearing glasses. Some authors referred to these as misleading questions. There were three subthemes within this main theme as described below:

6.3.1.1 Subtheme: *Suggestibility related to yield*

Some of the papers that used the GSS/GSS 2 test compared results with control groups of people without ID. Of the papers that provided raw data for children or adults

(Bettenay et al., 2014; Cardone & Dent, 1996; Clare & Gudjonsson, 1993; Gudjonsson & Clare, 1995; Gudjonsson & Henry, 2003; Henry & Gudjonsson, 2003; Milne et al., 2002; White & Willner, 2005; Young et al., 2003) it appeared that adults with ID were more suggestible to yield than children with ID. The control groups indicated significantly lower ranges of yield for typically developing children and adults, indicating that the presence of an ID in a witness raises the likelihood of that witness being suggestible to leading questions during examination and cross-examination.

A heavy reliance on auditory memory is one of the main criticisms of the GSS/GSS 2 test (Cardone and Dent, 1996; Henry and Gudjonsson, 2003; White and Willner, 2005). To compare, White and Willner (2005) created two Alternative Suggestibility Scales (ASS), based on the style of the GSS/GSS 2. However, the story read out was of an actual event which half of the participants had witnessed. The study reported that for those who witnessed the event 18 months before (ASS), suggestibility was decreased by a third, compared to those who had not witnessed the event. However, for those who witnessed the event and were questioned about it a month later (ASS 2), suggestibility was decreased by two thirds.

This indicates that interviewing adults with ID about an event they have witnessed as soon as possible after the event is highly important in reducing their likelihood of being suggestible to leading questions. However, higher levels of suggestibility following delay may be linked to memory.

Recall and suggestibility

A number of the studies reported that the less information a participant with ID could recall, the more suggestible they were to leading and misleading questions (Gudjonsson and Henry, 2003; Henry and Gudjonsson, 1999, 2003; Milne et al., 2002; White and

Willner, 2005). Gudjonsson and Henry (2003) found that the children with ID were able to remember more of the story without prompting than the adults. The authors suggest two potential reasons for this: that adults' intellectual abilities deteriorate with age (however, the mean age of the adults was only 30.6 years); and that children are in an educational setting and therefore more used to retaining new information.

Mental Age and suggestibility

The papers that included controls of children matched for the mental age (MA) of the participants with ID recorded that, although those with ID were suggestible in relation to yield, they were no more so than the control groups (Bettenay et al., 2014; Gordon & Jens, 1994; Henry & Gudjonsson, 1999, 2003). None of the studies for adults specifically utilised MA matched controls. However, the Collins and Henry (2016) paper matched children and adults to an MA control group and also found no differences.

Level of IQ and suggestibility

All of the papers that compared IQ and suggestibility found that children with mild ID were not any more suggestible than typically developing children of a similar chronological age, whilst children with moderate ID were more suggestible (Bettenay et al., 2014; Brown et al., 2012; Henry and Gudjonsson, 2003; Young et al., 2003). Gudjonsson and Clare (1995) also discovered a link between lower IQ and greater suggestibility among the 66 adults with ID in their study.

Additional influencing factors

Young et al. (2003) tested for other factors that might predict suggestibility for 75 children aged 6–13 including: gender; shyness; and communication ability. No correlation was found between gender and suggestibility or shyness and suggestibility, however some

concerns were raised regarding ease of use of the tool testing shyness. Further research would help with clarification. When IQ was removed from the analysis, the participants with greater communication (receptive, expressive and written) skills were found to be less suggestible. Perlman et al. (1994) also highlighted that adults with ID had more difficulty deducing there was a conspiracy in the murder plot in the short video of the crime they had witnessed. This required the capacity to make inferences and therefore suggests the participants with ID had more difficulty in doing this.

6.3.1.2 Subtheme: Suggestibility related to negative feedback

Adults

There were mixed results regarding 'shift' suggestibility (i.e. changing the answer in response to negative feedback from the questioner). Four papers showed that adults with ID were generally not more suggestible to changing their minds following negative feedback (Cardone and Dent, 1996; Clare and Gudjonsson, 1993; Gudjonsson and Henry, 2003; Milne et al., 2002). However, White and Willner (2005) found that it depended on the assessment tool used and the delay between event and questioning. Those who listened to a verbal story did show signs of shift but those who witnessed a live event one month previously were significantly less likely to be susceptible to negative feedback. It must also be noted that all of these studies involved adults with mild ID. We therefore do not know if adults with moderate ID are more suggestible to shift.

Children

Three papers reported on shift suggestibility for children and found that the participants with moderate ID were more likely to change their mind following negative feedback than the children without ID, whereas those with mild or borderline ID were not (Gudjonsson and Henry, 2003; Henry and Gudjonsson, 1999; Young et al., 2003). However, the Henry and Gudjonsson (1999) study did find the children to be more suggestible than both control groups of children matched for mental and chronological age. This study

included a mixed group of 11 children with moderate ID and 17 with mild/borderline ID, therefore it is possible that those with moderate ID have inflated the shift scores. The Young et al. (2003) study included children with mild ID and found that, when ID was controlled for, age of the child did have a significant impact on shift suggestibility. However, this was greater for the typically developing children. Young suggested that this was because shift is more affected by social factors like self-esteem, independence and confidence rather than cognitive abilities, and younger children may be easier influenced by adult opinion. Children with ID may develop less of these social factors due to their greater dependence on caregivers.

6.3.1.3 Subtheme: Question style and suggestibility

Adults

Some studies looked at the influence of question style on suggestibility. Suggestibility has been defined as the extent to which a person accepts information and changes their response when that information is presented within a question (Gudjonsson and Clark, 1986). Milne et al. (2002) introduced misleading questions to the interview. All participants were more likely to choose the last option, however there were only four questions of this type. Cardone and Dent (1996) compared general and specific questions for adults but did not find any significant impact on suggestibility. In contrast, Bowles & Sharman, (2014b) found that the adults with mild ID were most suggestible to misleading information if asked in a 'presumptive' (suggestible) style such as a 'tag' question, for example, 'Eric helped himself to a Pepsi, didn't he?' A 'tag' question is more of a statement, with the question 'tagged' on at the end, to invite confirmation. This study was limited in that only one of each question type was asked. Nevertheless, it did provide interesting information in that the participants rated their confidence to be significantly higher for their responses to the leading questions, suggesting that they

based their response on the information suggested rather than their own memory. Perlman et al.'s study introduced three types of leading and misleading questions: those that required short answer responses, for example, 'What was blocking the doorway of the apartment?'; specific questions requiring yes/no responses, for example, 'Was the stranger wearing a scarf?'; and statement style questions, for example, 'The stranger knew where to find the key to the apartment. Yes or no?' (Perlman et al., 1994). There was no significant difference between the adults with ID and the control group in response to correct leading specific and statement questions but the misleading questions (containing incorrect information) in specific and statement formats caused the most difficulties, particularly the statement format. As there were 16 questions within each of the three question types this study gives a more robust analysis of question types on suggestibility. Perlman et al. suggest that the statement question style causes greater risk of suggestibility as the statement carries a *"stronger assertion of veracity, which DH (ID) participants may find difficult to deny in the face of an authority figure"* (Perlman et al., 1994, p. 186).

Children

Henry and Gudjonsson also looked at specific questions with children. The children were not more suggestible than the chronological age matched control group in response to correct leading specific questions. However, they were more suggestible to the closed yes/no style misleading questions. The example provided of this style was also a 'tag' question (Henry and Gudjonsson, 2003). In 2007 Henry and Gudjonsson again looked at the impact of question styles and found that the children with ID did obtain higher scores on the correctly leading yes/no questions, although they were even more suggestible to misleading information in specific and yes/no question styles.

All of the examples given in these studies showed questions of short length containing only one subject and using simple language. This reduces the risk that the participants simply agreed with the questioner because they did not fully understand the question and makes it more likely that, although they understood the question, they were suggestible to the implied truth presented in the question by a person in authority

6.3.2 Theme 2: Challenges with memory

Challenges for people with ID being able to remember and recall details of an alleged event was not a focus of this review, as memory is more of an issue in police interviews than cross-examination. Research into memory and ID, however, is relevant to cross-examination. Half of the 24 papers addressed the recall abilities of the participants based on either verbal or visual stories, live events or, as in Kebbell et al. (2004), events of personal experience. The majority found that people with ID were able to recall less about the event than those without ID. The studies that included controls with children matched for mental age (MA) with the children with ID found that they recalled as much as the control group (Brown et al., 2012; Collins and Henry, 2016; Henry and Gudjonsson, 1999, 2003; Michel et al., 2000). This suggests that children with ID can remember events and during cross-examination the expectations of what they can be expected to remember about an event should be according to their MA rather than chronological age. Other studies with children show a link between lower IQ and less recall provided (Bettenay et al., 2014; Brown et al., 2012; Gudjonsson and Henry, 2003; Henry and Gudjonsson, 1999, 2003).

A number of papers found that for both children and adults, delay between the event and the interview could have a negative impact on memory (Brown et al., 2012; Gordon & Jens, 1994; Jens et al., 1990; White & Willner, 2005). Contrary to these findings, Henry and Gudjonsson's study on 47 children with ID found that they recalled more in a second

interview (only free recall and not in response to general questions) (Henry and Gudjonsson, 2003). However, as this was only two weeks following the first interview compared with between 6 and 18 months in the other studies mentioned, it is likely that two weeks simply was not long enough to be considered a delay and other factors such as familiarity with the surroundings, greater awareness of the process and being more comfortable with the interviewer perhaps enabled the participants to have greater confidence to recall what they remembered of the event.

Gudjonsson and Henry's study of children and adults found that the 66 children aged 11–12, with ID, had greater recall skills than the 221 adults with ID (Gudjonsson and Henry, 2003). The lower the IQ level of these adults, the less they could remember.

6.3.3 Theme 3: Challenges with accuracy

The papers that addressed accuracy of recall did not find any significant reduction in witness accuracy as a result of ID (Bettanay et al., 2014; Brown et al., 2012; Henry and Gudjonsson, 1999, 2007; Michel et al., 2000; Perlman et al., 1994). However, how the participants were subsequently questioned did have some impact. Bettanay et al., carried out mock direct examination interviews and cross-examinations with 90 children in total (41 with ID). They found that all the children made few errors, confabulations or 'don't know' responses during direct examination but they were all vulnerable to the pressure of questioning that challenges the information they provided, changing their mind on at least half of the answers during cross-examination (Bettanay et al., 2014). This paper only provides limited information on the cross-examination actually carried out. However, the few examples of questions provided clearly show leading, mainly tag style questions and negative questions. Kebbell et al. (2004) found that more leading and negative questions were asked during cross-examination compared to examination-in-chief (the questioning of a witness by the party calling him/her) (Keane et al., 2010).

Two papers examined the accuracy of children's recall for activities they participated in compared with activities they were asked to imagine (Gordon and Jens, 1994; Jens et al., 1990). Children with ID were no less accurate than those without ID.

Brown et al.'s study of children also found specific (for example, 'Which plaster did you choose?') and option posing questions ('Did you or your partner wear the bandage first?') to result in less accurate recall than more open free recall ('Tell me about that time') (Brown et al., 2012). Dent (1986) also found less accuracy in response to specific questions. This is in contrast to the adult studies which found no difference between those with ID and the control group for accurate responses to specific questions (Perlman et al., 1994) or even greater accuracy to specific questions (Cardone and Dent, 1996). This is despite the control group used in the Perlman et al. study containing participants of potentially higher intellectual functioning than would be expected of the general population. However, with non-leading short answer questions, for example 'How did the stranger try to kill the woman?', only 63% of the information participants with ID provided was correct.

One paper offered an alternative style of questioning. Sigelman, Budd, et al., (1982) compared open-ended questions, yes-no questions and multiple-choice questions for amount of information provided and degree of accuracy. They found that open-ended questions, such as 'Most days, how do you get to school?' were not adequate to gain enough information in response. Yes-no questions gained further information but at the expense of accuracy. However, multiple-choice questions, particularly when pictures were used, provided 100% responsiveness and did not impair accuracy. The children were shown pictures of, for example, ways of getting to school and informed 'Here are some ways people get to school', and were then asked, 'Which way do you get to school

most days?' Moreover, they found no systematic bias, when the last option is likely to be chosen, for the verbal or picture multiple-choice questions (Sigelman, Budd, et al., 1982)

6.3.4 Theme 4: Confabulation

Confabulation occurs when people imagine experiences they believe to be true in response to gaps in their memory (Gudjonsson, 1992). Four papers addressed the likelihood of confabulation for people with ID. It can be measured in two parts via the GSS/GSS 2: distortion (change in details) and fabrication (entirely novel element) (Gudjonsson & Clare, 1995). Two papers found that people with ID were prone to confabulation (Clare and Gudjonsson, 1993; Perlman et al., 1994) and two found that they were not (Bettenay et al., 2014; Gudjonsson and Clare, 1995). A link between poor memory and likelihood of confabulation was found by Clare and Gudjonsson in the 1993 paper for adults with ID (Clare and Gudjonsson, 1993). However, in 1995 the same authors found no link between confabulation and IQ, memory, suggestibility or acquiescence (Gudjonsson and Clare, 1995). The complexity of measuring confabulation was acknowledged by Gudjonsson and Clare in their 1995 paper and the likelihood of other influencing factors coming into play, such as personality.

6.3.5 Theme 5: Acquiescence

All of the four papers that reported on acquiescence found that adults and children with ID were more prone to acquiescence when undergoing questioning during an interview (Clare and Gudjonsson, 1993; Gudjonsson, 1990; Sigelman et al., 1981, 1982). Acquiescence occurs when a person answers a question in the affirmative, regardless of the content of the question (Gudjonsson, 1990). Both the Sigelman et al. papers found that question style impacted acquiescence and people with ID were more susceptible to acquiescence following a question requiring a yes/no answer. Gudjonsson (1990) suggested that there were also other influencing factors, such as personality,

temperament and coping skills. All papers also found the lower the IQ, the higher the rate of acquiescence. Gudjonsson and Clare (1995) also examined acquiescence but only for any correlation with confabulation, of which none was found.

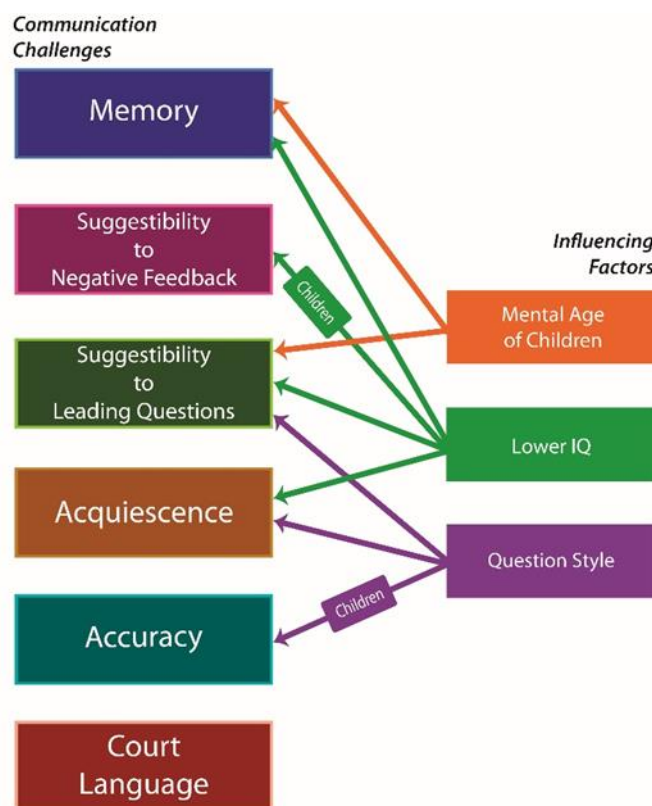
6.3.6 Theme 6: Court language

Only one paper (Ericson and Perlman, 2001) examined challenges for people with ID in understanding the language used in court. The 40 adults with mild to moderate ID could only understand 8 out of the 34 terms tested (23.5%) in comparison to 33/34 for the control group. The 34 legal terms tested were commonly used terms within the court system. The participants were asked if they knew the term and, if so, were then asked a probing question to gather further evidence of understanding. In addition, 40% of those with an ID had come into contact with the courts before, either as a witness, victim or defendant. This compares with only 12.5% of the control group. The authors provided a list of the key terms not understood by at least 40% of the participants with ID, which includes terms regularly used and of great significance and importance to understand, such as 'guilty', 'prosecute', 'trial', 'charges' and 'evidence'.

6.4 Discussion of findings and relevance to cross-examination

The systematic nature of this review captured much more than what could have been achieved with a non-systematic review. It has also reduced the risk of researcher-bias (Gough et al., 2012), that is a subjective and personal view of the literature being taken by the authors, as systematic reviews allow for more 'observational research' (Wormald and Evans, 2018). The main communication challenges for people with ID during cross-examination, as highlighted by the papers in this systematic review, are visually presented in Figure 6.2.

Figure 6.2. Communication challenges for witnesses with ID and influencing factors



The extent of impact of these challenges can be influenced by the mental age of the child, the level of IQ and the style in which questions are asked. Findings showed that the more severe the cognitive impairment, the more likely a child witness with ID will be susceptible to: agreeing with suggestions placed in a question from an advocate putting their case to the witness (Bettenay et al., 2014; Gudjonsson and Henry, 2003; Henry and Gudjonsson, 2003; Young et al., 2003); changing their mind following negative feedback from the advocate (Gudjonsson and Henry, 2003; Henry and Gudjonsson, 1999; Young et al., 2003); and acquiescing with questions asked (Sigelman et al., 1981, 1982). Children with milder ID have greater resistance and are not any more suggestible to negative feedback than typically developing children (Gudjonsson and Henry, 2003;

Henry and Gudjonsson, 1999; Young et al., 2003), but they are more suggestible to agreeing with leading and misleading questions (Bettenay et al., 2014; Brown et al., 2012; Henry and Gudjonsson, 2003; Young et al., 2003). Therefore, introducing new information or making alternative suggestions to the child about what happened during an event may lead to inaccuracies in that the child will simply agree with the suggestion being made rather than what they actually recall of the event.

Any delay between an alleged event and the police interview may have a negative impact on the amount of information a witness with ID will remember (Brown et al., 2012; Gordon and Jens, 1994; Jens et al., 1990; White and Willner, 2005). Therefore, a long delay between the alleged event, interview and cross-examination in court may negatively impact on their memory and potentially cause greater suggestibility during cross-examination. In England and Wales the average time for a case to reach completion in the crown courts is 51 weeks.⁵⁶ This is even longer in Northern Ireland, with an average of 73.6 weeks (1.4 years). For 12% of cases between 2011 and 2016 it actually took 2.7 years (Donnelly, 2018). Adults alleging crimes committed during their childhood have even greater challenges of delay to overcome in what they remember and how suggestible they are to questions and question styles impacting on the accuracy of their testimony. Fast tracking cases that involve witnesses with ID would help limit the negative impact of delay for these vulnerable witnesses. Alternatively, rolling out of pre-recorded cross-examination across courts may be a viable option. Findings of a pilot in 2013 in three crown courts in England show that, although it took a similar length of time

⁵⁶ <http://open.justice.gov.uk/courts/criminal-cases/> (accessed 8 May 2019).

for cases in the pilot to reach trial, it took half the time for the witnesses to be cross-examined (Baverstock, 2016).

It has been highlighted in this review that hearing a verbal story of an event is much less effective on memory and reducing suggestibility than actually witnessing an event (Cardone and Dent, 1996; White and Willner, 2005). For memory refreshing prior to a hearing, defendants have to read through pages of a transcript of their version of events, taken from the investigative interview, or rely on others to read out. Due to more limited cognitive abilities of having an ID this will be more challenging for those with an ID. Although victims and non-defendant witnesses with ID do not view a DVD of the event in question, they do have the benefit of a visual aid to assist memory, as the visually recorded ABE interview (video recorded investigative interview used with vulnerable victims and witnesses) shows their body language and perhaps reminds of emotions they experienced when recalling the event. This means that vulnerable victims and witnesses may benefit more from memory refreshing of their testimony than vulnerable defendants.

People with ID are less likely to understand legal language (Ericson and Perlman, 2001). Familiarity with the court setting does not guarantee understanding. This raises concern particularly for defendants in being able to follow and understand what is happening in their trial and to be able to raise important points regarding statements made. If a person with ID does not have a good understanding of the language that is being used and important key terms of the justice system, could it be assumed that they also have limited understanding of the process, the importance of the evidence they give and of their responses to cross-examination? An understanding of the term 'guilty' is surely of great importance for a defendant to be able to accurately give his/her plea. Research by Jacobson et al. (2015) with defendants, victims and witnesses without an ID would

confirm this. Observations of Crown Court cases highlight examples of a lack of understanding of the fundamental aspects of the case by victims and defendants (Jacobson et al., 2015). As part of this same research victims, witnesses, defendants and professionals are interviewed and language (verbal and non-verbal) is highlighted as an influencing factor in creating a 'them and us' culture within the court setting, where court users and professionals are 'poles apart' socially and educationally. The authors claim that a defendant's understanding is not limited to specific questions asked but also to the wider understanding of court proceedings, legal language used throughout and any sentence given. Research by Gibbs, surveying the opinions of professionals on the use of video hearings, further highlights communication challenges for defendants by suggesting that video hearings reduce their understanding of and participation in the court process (Gibbs, 2017). Although, as Gibbs claims, there has been no research into the use of video hearings with defendants with disabilities so the extent of this for defendants with ID is unknown. A search for similar research documents to Ericson and Perlman (2001), on legal language and ID, was carried out by the author but none were found. Further research is required.

Question format can have significant impact on suggestibility, accuracy and acquiescence for both adults and children. Although children and adults with ID can give accurate accounts of an event, particularly during free recall, how they are subsequently questioned on the event can greatly influence the accuracy (Bettenay et al., 2014; Brown et al., 2012; Dent, 1986; Gordon & Jens, 1994; Jens et al., 1990). This poses challenges for cross-examination as the purpose is for the witness to be questioned on the information provided in their examination-in-chief, but a witness with ID may simply agree with alternative suggestions put to them or agree if accused of being mistaken or lying about details of an event. Statements and closed style questions requiring yes/no answers, particularly 'tag' questions result in higher levels of suggestibility (Bowles and

Sharman, 2014b; Henry and Gudjonsson, 2003, 2007; Perlman et al., 1994). Yet the Kebbell et al. (2004) paper showed that closed questions were the most common question type used during cross-examination. Research by Wheatcroft et al., with 60 adult witnesses to look at the influence of question styles on eyewitness confidence and accuracy used question styles taken from several court transcripts. An examination of these transcripts found that the advocates tended to phrase the majority of questions so that a 'yes' response was encouraged (Wheatcroft et al., 2004). Sigelman et al.'s (1981) research found that witnesses with ID who are likely to acquiesce will do so in response to yes/no answer type questions. More up-to-date research is required to see if this is common practice in courts today for witnesses with ID, particularly following the implementation of special measures, Court of Appeal rulings and toolkits for advocates on The Advocate's Gateway.⁵⁷ Susceptibility to acquiescence could have grave consequences for a person with ID during cross-examination. If this weakness is not identified and made known to the court, a question such as 'You'd be likely to steal someone's watch if you found it Mr X, isn't that right?' could be answered in the affirmative, not necessarily because the witness agrees that he would steal a watch, but because he has an intellectual disability and is acquiescing with the positive response suggested in the question.

Multiple-choice questions and pictures may provide further recall without negatively impacting accuracy (Sigelman, Budd, et al., 1982), but more research is needed to confirm these findings and to explore how they could be used effectively during cross-examination. Pictures are regarded as a visual aid and there is very little research into how these can be used within the criminal justice system. The main source of guidance

⁵⁷ www.theadvocatesgateway.org (accessed 8 May 2019).

on the use of any communication aid in court is from Toolkit 14 of The Advocates Gateway⁵⁸ as there is no ABE equivalent guidance (Mattison, 2016).

Papers in this review conclude that children with ID should be communicated with according to their mental age rather than chronological age (Bettenay et al., 2014; Gordon and Jens, 1994; Henry and Gudjonsson, 1999, 2003), but caution should be applied to this conclusion. People with ID are not a homogeneous group, people are individuals. In addition, ID can have different causes (Tassé, 2013) and be linked to other medical, social and behavioural conditions (American Psychiatric Association, 2013) which can influence communication skills. It can therefore not be assumed that every older child with a mental age of 7 will have the same communication abilities and needs as a typically developed 7-year-old. Research has not yet addressed whether mental age is a good predictor of performance during cross-examination for adults. Although mental age is used in research as a comparison variable with adults (Nijman et al., 2010) and in particular in research with adults with Down Syndrome (Arstein-Kerslake, 2017; Jacola et al., 2014; Ringenbach & Balp-Riera, 2006; Roberts & Richmond, 2018) comparing adults to children does not fit with the concept of normalisation. Normalisation, inspired by Nirje and developed by Wolfensberger, basically means to afford people with disabilities the right to have the same opportunities, access to services and legal rights as anyone else in society (Gone et al., 2012). Social role valorisation claims that how people are treated depends extensively on the roles they occupy in society, those with roles that have greater value are treated better than those in roles of lower value and people with ID are greatly devalued by society (Wolfensberger, 2000).

⁵⁸ www.theadvocatesgateway.org/images/toolkits/14-using-communication-aids-in-the-criminal-justice-system-2015.pdf (accessed 8 May 2019).

Childish images and the ‘child role voice’ used by others when communicating with adults with ID are examples given by Wolfensberger of how society fuels this devaluation.

Despite this, an adult with an ID may be at even more risk than a child of agreeing with the force of an alternative sequence of events being suggested to them. Being a victim, eye witness or accused of a crime, going through a trial process and ultimately being cross-examined on your account of events can hardly be considered a ‘normal’ and everyday process of events. It is not difficult to imagine that it may be challenging for an advocate to effectively adjust questioning accordingly when faced with a 50-year- old defendant who can engage in verbal conversation, lives independently and has a family. Having information on the defendant’s mental age, for example as being that of an eight year-old, may assist the advocate - although, in the absence of a Registered Intermediary assessment⁵⁹ (as is possible in England and Wales), information about the person does not give specific information on communicating with that person and assumes that the advocate has skills to effectively communicate with an eight year-old child. This complexity of communicating with vulnerable witnesses has led to demand for specialist training for advocates to offer key general principles to adhere to.

Specialist training on vulnerability, through the Inns of Court College of Advocacy (ICCA) is now available for advocates in England and Wales and will become mandatory for those working in sexual offence cases involving vulnerable witnesses.⁶⁰ The focus is for advocates to understand general key principles, such as: keep to chronological order; do not make statements; and do not ask leading questions or tag questions. A recent

⁵⁹ For information on Registered Intermediary assessments see Cooper and Mattison (2017).

⁶⁰ www.icca.ac.uk/advocacy-the-vulnerable (accessed 27 August 2018)

paper by academics, from a range of disciplines, reviewing the training has criticised this emphasis on 20 key principles and claims that for all but two of the principles, no 'tag' or leading questions, there is a lack of empirical evidence from research to show they apply to vulnerable witnesses only. The results of this review would echo this criticism, however there is evidence from the Perlman et al. (1994) paper that statement style questions may also increase the risk of suggestibility. In addition, a witness with mild ID who recalls good detail of the event may not have difficulty with tag and leading questions. In 2019, perhaps in response to this criticism, ICCA updated the 20 principles to include research references for vulnerability, mainly due to young age, rather than ID⁶¹. A lack of empirical evidence in general into advocacy, and in particular for vulnerable witnesses, is also highlighted in the Cooper et al., review (Cooper et al., 2018).

6.5 Limitations of findings in the review and further research

Research into capacity or competency to stand trial was excluded in this review on the basis that competency is assumed by trial stage. However, this exclusion may have limited findings. Competency papers that had been excluded at abstract/full paper stage were re-examined. Differing results were found in two papers: IQ did not impact on acquiescence; IQ and memory were not effective estimates of suggestibility (Gudjonsson et al., 2000); adults with ID were suggestible to changing their mind following negative feedback (Everington & Fulero, 1999). Gudjonsson et al. (2000) suggest that a simpler version of the acquiescence test used may explain some differing results and Everington and Fulero (1999) suggest a difference in race between the interviewer and participants

⁶¹ [20-Principles-of-Questioning-rev-July-22.pdf \(icca.ac.uk\)](#) (accessed 5/1/23)

as a reason for suggestibility to negative feedback. In both papers participants were actual witnesses (Gudjonsson et al., 2000) and defendants (Everington and Fulero, 1999), therefore other factors relating to the court process, such as stress and anxiety, may have impacted on the results in these studies. This further highlights the need for research on communication and cross-examination with actual trial cases.

We do not know the role any co-existing conditions played in the results of papers in this review. Only two papers (Brown et al., 2012; Ericson and Perlman, 2001) purposely excluded people with other conditions that may have influenced findings, such as autism, Attention Deficit Disorders, diabetes, hearing or visual impairments (also considered in Collins and Henry, 2016), and mental health diagnosis. In their review of papers on eyewitness testimony for autistic people, Maras and Bowler record the specific difficulties associated with autism regarding memory, personally experienced events, processing information and processing emotional stimuli that would impact on their performance during cross-examination (Maras & Bowler, 2014). However, at the time of their review all research into autism and eyewitness testimony had only been with participants with 'high-functioning autism', that is, with no ID. A scoping exercise of literature did not find any new papers in this area that included and examined both autism and intellectual disability (searches for 'eyewitness testimony' and autism or ASD or autistic spectrum disorder in EBSCO academic search complete, criminal justice extracts, PsychARTICLES, PsychINFO, and SCOPUS).

The papers in this review have not taken into consideration factors specifically associated with cross-examination and the impact these may have on communication for people with ID. Factors such as: delay on the day of cross-examination; time of day of questioning; length of cross-examination; rapport with the questioner; nature of the alleged crime; complexity of sentence structures used; complexity of language used;

pace of questioning; physical presence of the advocate; and characteristics and communication style of the advocate. The majority of interviewers in the papers in this review were the authors or research assistants; only one paper used trainee barristers (Bettenay et al., 2014). None of these interviewers will have come close to questioning in a manner and style familiar to skilled and experienced advocates representing their client: to direct the interview, lead the witness, pick up and respond to the witness' non-verbal language presented such as hesitant pauses or change in eye contact. There is a need for research into the impact of the cross-examination process on communication for people with ID.

6.6 Conclusion

There is a dearth of research into actual court cases and the lived experiences of the cross-examination process and communication challenges faced by people with ID. This systematic review, has also highlighted the need for further research in some key areas: confabulation; mental age of adults and performance indication; using multiple-choice questions with and without pictures for enhanced recall and accuracy; witness understanding of court language; and research that takes into consideration other factors beyond IQ levels. Intellectual disabilities are diverse and complex and any research into the communication challenges people with ID face during cross-examination can only give a generalised overview. Witnesses are all individualistic, therefore any intervention to support and enhance communication during cross-examination needs to be person-centred to the individual witness. As stated by the Cooper et al. review of the advocates training programme, *'Advice to advocates should capture the importance of research evidence-based, contextual questioning and the need for flexible adaptation to suit the needs of each vulnerable individual'* (Cooper et al.2018,p.12). Additionally, more evidence-based research into communication for people with ID during cross-

examination is required to fully inform advocates and fully open the criminal justice system to these vulnerable witnesses. The next chapter takes steps to address this need by examining the communication challenges for adult witness with ID, as identified in registered intermediary court reports.

Chapter 7. Reported communication challenges for adult witnesses with intellectual disabilities giving evidence in court

This chapter examines 19 court reports written by registered intermediaries (RIs) in Northern Ireland (NI) for adult witnesses with intellectual disabilities (ID). It identifies all of the communication challenges recorded in the reports and presents the findings within two key themes: advocate communication difficulties and witness communication difficulties.

7.1 Introduction

7.1.1 Communication, ID and court

Giving evidence in court can undoubtedly be a challenging and stressful experience for any witness. Communication plays a key role in the giving of evidence and in cross-examination. The witness needs to be able to give verbal information explaining their version of events, to fully understand and respond to questions, and to withstand the complexities of communication within cross-examination. Research suggests that the current process of cross-examination within an adversarial system can negatively impact on eyewitness testimony (Kebbell and Johnson, 2000; Valentine and Maras, 2011; Wheatcroft et al., 2004).

During a cross-examination exchange, verbal communication is usually between two people, an advocate and a witness. This two-way form of communication is often referred to as interpersonal communication (Berger, 2014), which requires some form of mutual interaction between the persons involved (Burlison, 2010; Griffiths & Smith, 2017). The

process of an effective communication exchange can be complex and is impacted by the communication skills of each communication partner involved, such as: cognitive (Cogher, 2010; Wyer & Gruenfeld, 1995); language (Chomsky, 2011); social (Burleson, 2010); and pragmatic skills to understand the more subtle meanings conveyed in a message (Abbeduto and Hesketh, 1997; Hronis et al., 2017). Bar training in the UK would suggest that advocates are being trained to question witnesses in a style that can be easily understood and processed by the witness. In a section under useful tips, guidance from City University London's Bar Manual on Advocacy is for advocates to avoid long, complicated sentences and tag questions. Rather, when cross-examining, they are told to *"Formulate your questions so that they contain one fact at a time. Use short questions. Do not recite facts at length and then ask the witness 'Is that right?' Be clear and concise."*(McPeake, 2018,p.173). Bar training in NI also teaches advocates to use simple language, a slow pace of questioning and emphasises the importance of listeners being able to 'decode' the information given (IPLS Queens University, 2019).

Adults with ID can experience a vast range of communication difficulties relating to their ability to focus and attend during a communicative exchange as well as with their receptive (inputting and processing information) and expressive language (Belva et al., 2012; Cogher, 2010; Hronis et al., 2017; Kelly, 2000). In addition, they can face challenges with the social skills required for effective communication exchanges and understanding the underlying meaning of language used (pragmatic skills) (Abbeduto and Hesketh, 1997; Martin et al., 2017). Research on adults with ID within the UK criminal justice system is limited, particularly within the court setting. This is perhaps because of an historical attitude that those with ID give inaccurate testimonies and are therefore not viable witnesses (Bowden et al., 2014; Harris and Grace, 1999). Research, however, has demonstrated that this is not true, rather people with ID are able to give accurate evidence under certain conditions (Bettenay et al., 2015; Ericson et al., 1994;

Gudjonsson et al., 2000; Henry and Gudjonsson, 1999; Michel et al., 2000). However, the presence of an ID can result in significant communication challenges for a witness when giving evidence in court that can impact on their testimony (Bowles and Sharman, 2014; Gudjonsson and Joyce, 2011). The systematic review in Chapter six informs of six key communication challenges for witnesses with ID:

1. More limited information is provided in free recall.
2. Witnesses may be suggestible to changing their mind in response to leading questions and potentially to negative feedback from the questioner.
3. Witnesses may be prone to acquiescence.
4. Statements, tag questions and questions requiring a yes/no answer are more likely to lead to inaccuracies.
5. Witnesses can find it difficult to understand court language.
6. Memory limitations, suggestibility and the likelihood of acquiescence are linked to lower IQ

However, as the systematic review highlights, much of the existing research on communication challenges for people with ID, when giving evidence in court, has been mainly lab-based research using methods from experimental psychology focusing on specific areas of communication challenges such as suggestibility (Cardone and Dent, 1996; Gudjonsson and Henry, 2003; Henry and Gudjonsson, 2003; Milne et al., 2002; White and Willner, 2005), acquiescence and confabulation (Clare and Gudjonsson, 1993; Gudjonsson and Clare, 1995) as well as the cognitive impairments of individuals, such as in memory (Collins and Henry, 2016; Perlman et al., 1994) and IQ level (Bettenay et al., 2014; Brown et al., 2012; Gudjonsson and Clare, 1995). There is less research involving actual witnesses or court cases (Ericson and Perlman, 2001; Gudjonsson et al., 2000; Kebbell et al., 2004). We therefore do not know of the impact on

communication of the court process itself and other potential impacting factors such as: social factors; non-verbal behaviours of the questioner; non-linguistic aspects such as the pace of questioning and tone of voice. In addition, the court environment and delays on the day of court may impact. Witnesses with ID are considered 'vulnerable' by the criminal justice system in England, Wales and Northern Ireland (Youth Justice and Criminal Evidence Act 1999, Criminal Evidence (NI) Order 1999). The introduction of a range of special measures in 1999⁶² for vulnerable witnesses (including the provision of Registered Intermediaries) has resulted, amongst other changes, in recordings of the police interviews for complainants and witnesses being used as evidence-in-chief. This means that complainants and witnesses do not have to give an account of their version of events in open court and their participation in the hearing is for cross-examination and re-examination. Vulnerable defendants, however, still have to give their account in person in court, prior to cross-examination.

Research from Scotland, examining 56 trial transcripts of child complainants aged 5–17 years old (2009–2011), found that defence advocates asked more complex questions of child witnesses than prosecutors (Andrews and Lamb, 2017). Indeed, there have been a number of cases in the English Court of Appeal that have challenged how advocates question vulnerable child witnesses. Doak & Jackson (2019) state that five clear principles of changes in cross-examination have occurred in recent years:

1. Age appropriate language should be used.
2. Questions should be untagged and avoid use of suggestion.

⁶² See ss 23–30 of the Youth Justice and Criminal Evidence Act 1999 for a list of these.

3. Advocates should exercise extreme caution when attempting to challenge testimony.
4. There is a need for 'reasonable adjustments' to be made.
5. There is not a right to 'put one's case'.

For adults, on the other hand, Kebbell et al.'s (2004) research, comparing court transcripts of trials for witnesses with and without ID, found questioning of the witnesses to be almost identical, though their research was carried out on cases from 1994–1999, prior to the introduction of special measures. Researchers in New Zealand compared 21 court transcripts of sexual assault hearings from the 1950s with 21 more recent cases (1996–2011). Findings showed that overall advocates asked more questions in the recent cases but the format of cross-examination had remained the same, with the emphasis still on leading questions (Westera et al., 2017). Similar more recent research could not be found for England, Wales or NI.

7.1.2 Registered intermediary service

In NI, when a case is going to trial in the magistrates or crown courts, the services of RIs are requested by the Public Prosecution Service (PPS) for vulnerable witnesses and complainants, and by solicitors for vulnerable defendants. The contents of the RI court report is then addressed during a Ground Rules Hearing when the Judge decides on what recommendations should be accepted and implemented during the case hearing (see Cooper et al., 2015).

In order to address the general lack of research into communication challenges for actual witnesses this study has examined court reports written for adult witnesses by RIs in Northern Ireland. RIs conduct these assessments in order to try to predict the communication difficulties in examination/cross-examination. These reports are based

on information gained from the individuals and relevant others, during a communication assessment.

As research already shows that children in general can be subject to communication challenges during cross-examination (Zajac & Hayne, 2003, 2006), this current study focuses on challenges identified for adults with ID, to ascertain the specific communication challenges relating to the presence of an ID. Thus the aim of this qualitative study is to identify the communication challenges identified by RIs in Northern Ireland for adult witnesses with ID in court.

7.2 Material and methods

This study was made possible through the permission and support of the Department of Justice Complainants and Witnesses branch, which manages the registered intermediary (RI) service in Northern Ireland, known as the Intermediaries Services Secretariat (ISS). The last 25 relevant RI court reports received by the ISS up to May 2018 were requested (this date cut-off was used because following May 2018 reports were sent directly by the RI to the end user). In total 19 reports were received for complainants, witnesses and defendants.⁶³ The reports were from 12 different authors, four of whom provided two reports and one author provided four. Table 7.1 shows the breakdown of age and type of witness. Co-occurring conditions were recorded for some participants: mental health difficulties (7), Attention Deficit Hyperactivity Disorder (ADHD) (3), autism (3), epilepsy (1), dyspraxia (1), and hearing loss (1). This paper uses the

⁶³ Twenty reports were initially received but report 9 was discarded as presence of a learning difficulty was not clear.

generic term of ‘witnesses’ as an inclusive term for complainants, witnesses and defendants.

All reports were anonymised prior to the researchers receiving them. Ethics approval was granted by the Tizard Centre ethics committee.

Table 7.1. Witness details

	Complainants	Witnesses	Defendants	Total
Male	2	2	9	13
Female	3	3	0	6
Total	5	5	9	19
Age range	19-52 years	18-30	18-50	18-52
Av. age	29 years	27.8	26.8	27.6

7.21 Process of analysis

Communication theories and existing literature on communication difficulties for adults with ID provided a structure for analysing information, which is based around attention and focus, receptive language and expressive language. A similar structure is also used within the RI court reports and provided a suitable framework for this research. Consequently, Framework Analysis (Matthews et al., 2019) was chosen for this study as it uses a structure of predefined ideas or themes through which to analyse research while still allowing new and unexpected material to emerge.

All information was charted onto a framework matrix Excel spreadsheet. Each communication challenge recorded in the reports was given a code and the exact wording that related to a code was recorded on the spreadsheet. Each code was then written on a separate sticky note and arranged into sections of potential themes that could be seen from a visual analysis. Each code was taken separately and the phrases from each report, as recorded in the framework matrix, summarised and listed under each code. Key points from these phrases were also written. Spider diagrams were drawn of the codes and the key points extracted from the phrases in the charting stage. These were visually examined for potential themes.

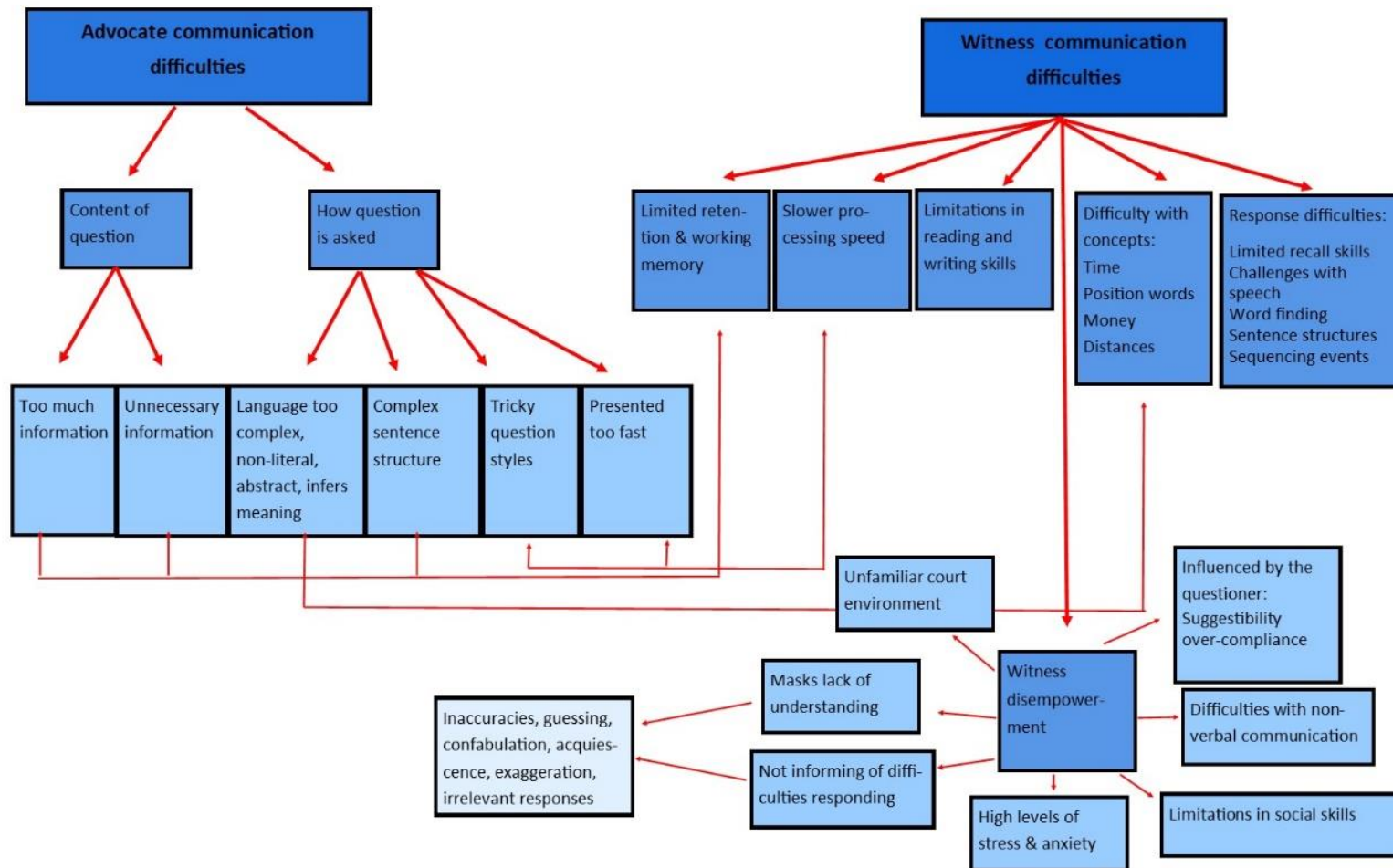
7.3 Results

Two main themes emerged: communication difficulties relating to the witness/complainant/defendant and communication difficulties relating to the presentation of information through their communication partner. As the reports are written with the assumption that the communication partner in any examination/cross-examination communicative exchange will be an advocate, these themes are recorded as:

1. Advocate communication difficulties
2. Witness communication difficulties.

The two main themes and eight sub-themes are recorded and presented in Figure 7.1. For some sub-themes further detailed points are also recorded in Figure 7.1 and highlighted in bold below

Figure 7.1. Main themes and sub-themes of communication challenges.



7.3.1 Theme 1: Advocate communication difficulties

These are difficulties highlighted within the court reports that relate to the way in which the advocate communicates with the witness. There were two subthemes:

1. Content of question
2. How a question is asked.

7.3.1.1 Subtheme 1: content of question

Too much information given in the question from the advocate to the witness and **unnecessary information** can be difficult for the witness to retain, particularly if presented in long sentences or paragraph form.

She is unable to fully process complex, lengthy spoken questions or short paragraphs accurately. (R20)

There is a risk that the witness will not understand the question, they may only 'hear' part of the question, can be 'overloaded' with information, and will not be able to fully process the information. This could then lead to inaccurate and/or incomplete responses.

...he would quickly get lost, unable to retain what had been said and confused as to how he should respond. (R18)

7.3.1.2 Sub theme 2: How the question is asked

The court reports identified challenges with:

- the language used by the advocate

- sentence structure
- style of questions
- pace of questioning.

Language used by advocates may be too complex, non-literal, abstract and infer meaning. These language types can result in confusion, limited or no understanding of the question asked.

A complex question could result in a 'jumbled' response. (R3)

Complex language is referred to as language that is too difficult to understand; legalistic language such as the word 'allegation'; and vocabulary that the witness is unfamiliar with.

Some reports give examples of non-literal language which are idioms, such as 'being tied up' (R20) and common everyday expressions such as 'We'll not be too long' (R18).

Abstract language uses words that relate to ideas, qualities or emotions rather than physical things. Examples of difficulties with abstract language are not generally given in the reports; however, one report refers to concepts around time, feelings, emotions and use of money as being abstract ideas such as: how much time has passed; how one felt in the past about a particular event; or how much an item would cost (R14).

Other types of language that can cause difficulties are highlighted as: sayings; sarcasm; humour; figures of speech; and absurdities.

Challenges understanding inferred meaning are also commented on and this relates to: knowing people's motives; to draw conclusions from what is said; to make predictions; to problem solve; to assume the role of another; to make generalisations; to imagine a scenario; or to 'read the words and behaviours of the people around him.' (R18)

The court reports informed that advocates asking questions using a **complex sentence structure** cause challenges for communication. Examples of complex sentence structures are given as: paragraphs; instructions in several parts; multi-element questions; sentences with embedded clauses such as 'the girl chases the dog that is jumping.' (R1); and questions that contain more than one or two key points.

Has much more difficulty processing questions containing multiple parts. (R10)

Questions asked, or information presented in a complex sentence structure can make it more difficult for the witness to retain the information that is being presented, to process the information and to respond fully and accurately. In simple terms, a complex sentence structure causes confusion.

...he would quickly get lost; unable to retain what had been said and confused as to how he should respond. (R17)

It is found to be so problematic that most of the RIs recommended to only ask questions that contain one key point.

A variety of **tricky question styles** are mentioned in the reports as causing difficulties for communication with each style in only a small number of reports, indicating the individualistic nature of communication difficulties. These are:

- statements used as questions;
- negatives, e.g., 'Don't you know what she said?';
- tag questions, e.g., 'Sure you know you saw that, don't you';
- questions asking 'why' and 'how';
- repeated questions.

Some of these question styles can cause the witness to not recognise the phrase used as being a question, impair ability to understand the meaning, lead to processing difficulties, and result in limited and inaccurate responses.

He will be unsure whether he agrees or disagrees with this type of question (negative) and will simply pick a response. (R4)

...may be at risk of confabulation and providing inaccurate evidence if the same or similar questions are put to him over and over. (R15)

Some reports commented that the witness was more likely to follow and understand questions when they were asked at a slower than usual pace. If information is **presented too fast**, this can lead to an inability to follow the questions, difficulties processing the information, confusion and difficulties responding to the questions.

X indicated that he could not follow questions if they were too quick...and struggled if questions were asked at a fast pace. (R13)

Asking questions at a slow pace to allow the witness time to process information was the most common recommendation made by the RIs, included in 16 of the reports. Some reports gave specific instructions to help advocates, such as counting to six after asking each question.

7.3.1.3 Summary of theme

The way in which the advocate asks questions can impact on the ability of the witness with ID to understand and respond to questions. Too much information and unnecessary information; complex, non-literal and abstract language; complex sentence structures; and a fast pace of questioning can negatively impact on the witnesses' ability to follow

questioning, understand, retain and process the information given, leading to confusion and inaccurate responses. Specific question styles can also negatively impact understanding and responses given: statements, negatives, tags, repeated, 'why' and 'how' questions.

7.3.2 Theme 2: Witness communication difficulties

These are factors highlighted in the reports that related to difficulties the witnesses had in receiving and responding to questions from the communication partner. There were six sub-themes:

1. Limited retention and working memory
2. Slower processing speed
3. Limitations in reading and writing skills
4. Witness disempowerment
5. Difficulties with specific concepts
6. Response difficulties.

7.3.2.1 Sub-theme 1: Limited retention of information and working memory.

The witnesses in the reports had difficulty with storing and retaining information provided in questions. Low working memory was recorded as difficulties with repeating words and sentences.

When asked to repeat sentences of increasing length, she could not repeat more than five words at a time highlighting a difficulty with her retention of information. (R2)

Difficulties retaining information and working memory are further impacted by how the information is presented in questions, with a number of key influencing factors

mentioned: long sentences; a large amount of information given; and the length of time questioning continues for.

As the test progressed, it became evident that her retention of the question became increasingly diminished.(R6).

Tiredness and difficulties focusing on the questions can limit the ability to retrieve the information required and accurately respond to the questions. A wide variety of descriptions were used to express difficulties with attention ranging from mild inattention to struggling to focus, such as: not keeping to topic; disengaged; distracted; poor listener; difficulty sustaining attention; agitation; confused; zoning out; and getting lost.

...at times disengaged from the task at hand. (R6)

Frequently I could see that Mr X was losing concentration, getting agitated and was not fully listening. (R17)

7.3.2.2 Sub-theme 2: Slower processing skills

Slower processing skills indicated that more time was required to listen to verbal information, read written information, gather meaning from what was heard or read, and to respond. Processing skills of the witnesses were described as: slightly reduced; slow; in low average range; or very weak.

Auditory processing time appeared to be slightly reduced.....appeared to process a little slower than anticipated. (R2)

He has very weak processing skills. There is a delay in his response time. (R4)

Time is also a factor in that the reports highlighted the need for more time in order for the witnesses to process information in questions.

Questions asked at a rapid pace, one after another without sufficient time for the witness with ID to process the information within the questions could impact on how much of the information the witness understands and therefore negatively impact the amount of information in the response, and the accuracy of the response.

7.3.2.3 Sub-theme 3: Limitations in reading and writing skills

Limited abilities in reading and writing are factored in the majority of the reports. This ranges from general difficulties with reading and writing to more specific information given: slow to read; unable to read or write; significant difficulty; limited ability.

He needs to read material several times to make sure he has understood it correctly. He also has difficulties tracking his place in text when he is reading. (R15)

She was unable to write the date (today) or her date of birth. (R8)

A number of papers stressed that although the witness demonstrated the ability to read a small amount of information, the challenge was in them being able to process and understand what they had read.

He was slow to read a short, single sentence, he could not retain the written sentence and found it difficult to find the answers in a basic newspaper article. (R5)

...whilst (she) successfully read the abstract aloud, during reading tasks, she displayed difficulties interpreting what she had read and drawing inferences from read text. (R20)

7.3.2.4 Sub-theme 4: Witness disempowerment

A number of specific communication challenges recorded in the reports collectively result in a sub-theme of witness disempowerment when participating in proceedings of examination and cross-examination:

- Influenced by the questioner;
- Non-verbal communication difficulties;
- Limitations in social skills;
- High levels of stress and anxiety;
- Not informing of response difficulties;
- Masking lack of understanding;
- Court environment difficulties.

When attempting to respond to questions the witnesses could be **influenced by the questioner**. The most common influence recorded in the reports was a suggestion of the answer sought being placed into the question; a leading question. This is more likely if the witness is confused with what is being asked, is not focusing well on the questioning, feels pressurised to give a response, or if specific question styles are used; with tag style questions and statements highlighted as being problematic. One report also recorded the use of an affirmative tone in questioning as increasing the risk of suggestibility.

Will readily agree with incorrect information when an affirmative tone or tag is used. (R10)

Some reports highlighted the risk of witnesses giving a response because they are eager to please the questioner, resulting in over-compliance.

...particularly if these questions are asked in a suggestible manner. He may also be at risk of being more suggestible to leading questions following negative feedback from the questioner.....and he may feel pressurised to give an answer. (R15)

...and appeared eager to please throughout. He often looked to the RI for reassurance and asked 'Is that right' (R12)

This may also result in the witness not correcting the questioner when the questioner has misunderstood or is in error.

An over-compliant individual....reluctant to correct inaccuracies. If asked to repeat his answer he will think the first answer was incorrect and try another one, in an attempt to please. (R4)

Some witnesses in the RI assessments demonstrated difficulties with **non-verbal communication**. Fidgeting, moving about in the chair, easily distracted and 'drifting off' were physical signs mentioned in the reports that indicated the witness was struggling to focus. Some physical manifestations of inner anxiety and stress were also highlighted: reduced eye contact; panic attacks; impulsive and agitated behaviour; and being physically sick. Challenges were also recorded in that the witnesses had difficulty being able to use non-verbal behaviour accurately, so that their body language is not an accurate indicator of what they actually want to say. This was recorded as their response to questions such as nodding in agreement or a fixed smile, and not indicating or saying when they did not understand the question.

X was showing all the non-verbal signs of following what the RI was saying, nodding in agreement and no signs of confusion. (R4)

His constant 'fixed' smile can be deceptive, suggesting he remains fully engaged. In reality, by this stage, he has little idea of what is going on around him. (R18)

Difficulties maintaining eye contact was also commonly mentioned in the reports. It is reported that the witnesses frequently avoided or 'dropped' eye contact. Eye contact is further reduced when the witness loses focus or feels stressed.

X's eye contact is limited and this will decrease when he becomes stressed. (R15)

It is noted that using eye contact is not a natural skill, but one that can be learned; however, the witness with ID still struggled to maintain when stressed or losing focus.

He has learnt the rules, but still tends to drop his head when (he) becomes more anxious. (R4)

X has good eye contact when he is reminded and encouraged but when he was losing interest, his eyes were focused elsewhere. (R13)

The witnesses also had difficulty being able to follow and understand the non-verbal behaviour of others. A number of reports highlighted their difficulties in understanding inferences. Although this mainly refers to inferences within language it may also be true for non-verbal language used by the advocates as one report emphasises the '*...challenge of trying to "read" the words and behaviours of the people around him.....he does not accurately read the many non-verbal cues which adults frequently use*' (R18).

Limitations in social skills were highlighted in the reports; self-reported by the witnesses and observed by the RIs in assessment. A number of reports highlighted new situations and new people as being challenging for the witnesses and reducing their communication skills.

Can withdraw when around unfamiliar adults and waits to be spoken to. (R2)

Finds it more difficult communicating with strangers and doesn't like being 'put on the spot'. (R3)

The RI comments in the reports showed that social skills required in situations that are different or unfamiliar to the adults with ID can be confusing, hard to understand and follow, impacting on self- confidence and the ability to speak out.

X seemed self-conscious and embarrassed at times during the assessment. He made comments like 'Now I look stupid', 'Now I look like a dork'. (R7)

High levels of stress and anxiety were common factors in the reports. Some witnesses reported high levels of anxiety, experienced on a day to day basis, for which medication is required.

...affected over the years by...anxiety levels...It may be the case that his high levels of anxiety are directly affecting his cognitive function. (R5)

The reports recorded that high levels of anxiety could have negative impacts on the witnesses' abilities to focus, concentrate and respond effectively to questions asked.

Can become agitated and impulsive if anxiety levels are heightened. (R3)

When I pointed out to him that I noticed him tapping his feet and looking away from me when he wasn't properly listening he said he always did this when he became agitated and at such times he simply wanted to go off and do something less stressful. (R17)

When asked open questions X provided answers around how he was feeling, his anxiety and the impact of what is happening in his life, and he struggled to provide the factual information that the question required. (R16)

Two reports commented on the witnesses' difficulty in processing emotions and stress and the subsequent potential consequences.

...he seemed entirely dissociated from any feelings or emotions....these build up within him to a point when they 'explode' in an outburst of confused feelings.. (R18)

His mother tells me he is not good at talking about how he is feeling and therefore on occasions when she does not act quickly he can express his frustration and anxiety in a verbal outburst. (R19)

Others commented on feelings of anxiety around the court process.

...poor sleep and stress which she attributes to events surrounding the imminent trial. (R20)

Some key points can be drawn from the reports to show the witnesses with ID **may not inform (the court) of difficulties responding to a question.** It is explained that the witness may have struggled to respond to a question because: they simply don't know the answer and cannot remember the details; they have not understood the question but do not want to say so; they did not hear fully; or they need the question repeated but do not ask.

X is at risk of giving an answer even when he has not fully understood the question. This was also raised by Y in his report. (R1)

Some witnesses masked a lack of understanding.

The defendant may come across that he has understood, but in fact, if probed, it becomes evident that the person has not understood what has been put to them. (R5)

A few reasons are suggested as to why the witnesses did not inform the questioner and simply masked their confusion. Firstly, they may not recognise their lack of understanding.

X has limited insight into his own communication difficulties and does not always recognise that he has misunderstood what has been said to him. (R12)

Secondly, they may be embarrassed about highlighting limitations.

His natural instinct is not to say 'I don't understand' due to embarrassment. (R3)

Thirdly, they may experience difficulties with expressing emotions and feelings.

He will not verbalise this confusion. Instead he will internalise. (R4)

A lack of informing the court of any difficulties may lead the witness to provide an inaccurate answer by guessing or confabulating answers, acquiescence, exaggeration, or providing information irrelevant to the question.

At times he tended to guess the answer. (R5)

He therefore confabulated what he thought was likely to have been what happened, rather than what he actually remembered in the story...may be at risk of confabulation

and providing inaccurate evidence if the same or similar questions are put to him over and over. (R15)

He said 'I know all about the engines', then when asked to name one part of an engine he said 'I don't know parts'. (R7)

The **court environment** was another component of witness disempowerment. Many of the reports recorded anxiety from the witnesses around the court proceedings. The reports explained this may be due to the change of daily routine required in order to attend court, fears of not being able to understand and answer properly, and a general feeling of being under pressure.

Concerned he will 'freeze' when asked questions. (R3)

In the courtroom setting anxiety will be heightened and she may feel under pressure when giving evidence. This will have a negative impact on her ability to communicate in a clear and coherent manner. (R6)

Noise and distractors within the environment may impact on the witness' ability to focus and the anxiety levels of the witness may be exacerbated by the court process. Other court factors highlighted included: delays on the day; fear of seeing the defendant; fear of the questioning process; and a previous negative experience impacting stress levels.

X is sensitive to noise and if there is a lot of background noise, his mind will focus on this instead. (R15)

Fear of the trial process and of defendant. Worries about being put on the spot and not being able to answer questions. (R2)

He has a tendency to disengage, especially if other conversations or distractions are taking place around him. (R18)

It is recommended that the witness is given time to adjust to the environment and that there is no delay when evidence giving takes place.

7.3.2.5 Sub-theme 5: Difficulties understanding specific concepts

Understanding and giving concepts of time were recorded as challenging. This was related to being able to state 'when' an event happened, i.e. the time of day, day of the week, month of year and seasons, or being able to recall 'how long' an event lasted for.

Was unable to accurately recall how long he had attended college or worked as a... (R1)

When asked during assessment 'Are there 10 h in a day?' he responded 'yes'. (R15)

X demonstrated some confusion regarding times of the day. (R7)

Some reports also highlight that the witness has difficulty giving an accurate estimate of distance, understanding concepts of money, accuracy for position words, such as between, under and beside.

7.3.2.6 Sub-theme 6: Response difficulties.

Difficulties in responding to questions included difficulties with:

- recall;
- speech;
- word finding;
- sentence structures;

- sequencing events.

Two main points emerge regarding the witnesses' **limited recall skills** in response to questions: the amount of information is limited and questioning is required in order to elicit further and more detailed information. In the reports, responses were described as: basic; incomplete; short; lacking in detail; lacking in context; and never expanding an answer.

Her description of objects and events lack detail and salient facts. (R11)

May require follow up questions during cross-examination as on her first attempt she may only provide minimal detail. Once she was probed she could express more detail. She required probing questions to elicit additional and finer details. (R2)

Challenges with speech were commonly highlighted in the reports. These was recorded as: soft speech of low volume; lack of clarity; mumbling; a stammer; little expression; muffled speech; slurring; rapid speech; and pronunciation difficulties. The severity of the speech difficulties ranged from a mild stammer to being largely unintelligible.

She converses fluently at conversational level although at times her speech intelligibility is reduced. Speech was at times unclear and not fully intelligible at conversational level. She adopted a fast speech rate which at times reduced the clarity of her speech. (R20)

Difficulty with **word finding** – locating the right words to use and putting these words into a sentence format are also recorded as specific communication difficulties for the witnesses. One witness was able to describe the word but could not find and use the actual word sought for. Another witness displayed an overuse of non-specific terms such

as 'it' and 'that' and used words that sounded like the original one he could not retrieve. Pressure of time is also highlighted as a factor that reduces word finding ability.

Some word finding difficulties. Some difficulty accessing target words. He was able to either describe the word he couldn't retrieve or change it to another word. When under time pressure X's ability to recall words significantly deteriorated. (R10)

In addition to finding words, structuring them into sentences was a further challenge. **Sentence structure** difficulties recorded ranged from one or two words at a time being used to short, blunt sentences and developmentally immature sentence structure and grammar. A few reports also stated that a more limited vocabulary was available to the witnesses such as simple words of high frequency. Having fewer words available to choose from, undoubtedly further challenges the possibility of finding the right word to use.

He mostly gave one to two words at a time rather than speaking in sentences, and he began to answer with difficulty. (R5)

Many of the witnesses displayed difficulties in **sequencing events**. For some, they demonstrated the ability to sequence a basic event only, others had difficulties with losing 'train of thought'; disjointed narrative; and a more generalist rather than specific sequencing given.

Could sequence a basic event in a simple and correct order, however this required effort (R6)

She was unable to order 2 or 3 part picture based stories. Her narrative can be disorganised/disjointed at times...she may talk about something that happened, then later talk about the same event but in a different order. (R8)

One report commented that difficulties with sequencing are apparent even if the event was recent.

He also struggled to explain the sequence of events, such as what he had done the previous day. (R17)

An interesting matter is highlighted around the assessing of sequencing in one of the reports when the witness was asked to sequence his daily routine and needed regular 'What next?' prompts, he explained that he did not have any structure to his day, which made sequencing more difficult. It is unsurprising therefore that asking questions in chronological order and signposting topics when questioning are recommendations made in many of the reports.

7.3.2.7 Summary of theme

The adult witnesses with ID exhibited a number of difficulties that impacted on communication. These were: limited retention and working memory; slower processing of information; difficulties with reading and writing; difficulties with time and other concepts; and response difficulties. A range of factors are highlighted that result in overall disempowerment of the witness: being over- compliant and suggestible; not informing of response difficulties; inaccurate use and understanding of non-verbal communication; high levels of stress and anxiety; limited social skills and pressure of the court environment.

7.4 Discussion

The purpose of this study was to research communication challenges as assessed by registered intermediaries (RIs) for adults with ID when questioned in court. Nineteen court reports written by RIs in Northern Ireland were examined. Findings of this research are in line with current literature which highlights communication difficulties for adults with ID including: difficulties in receiving, processing and retaining information; limitations in recall and expressive language skills; limitations in being able to focus during communicative exchanges; and challenges with social and pragmatic skills for effective communication (Abbeduto & Hesketh, 1997; Bartlett & Bunning, 1997; Belva et al., 2012; Blackwell et al., 1989; Cascella, 2004; Cogher, 2010; Henry & MacLean, 2002; Hronis et al., 2017; Kelly, 2000). Findings of this research also complement existing research regarding difficulties with witness suggestibility to leading questions (Bettenay et al., 2014; Cardone and Dent, 1996; Clare and Gudjonsson, 1993; Gudjonsson and Henry, 2003; Milne et al., 2002; White and Willner, 2005), limited recall skills (Bettenay et al., 2014; Brown et al., 2012; Henry and Gudjonsson, 2003) and difficulties understanding court-related language (Ericson and Perlman, 2001). However, the information provided in this study differs from existing research in the points of focus. Research presented in the systematic review in Chapter six on communication challenges for adult and child witnesses with ID focused mainly on experimental methodologies to ascertain the presence of specific communication challenges: mainly suggestibility, acquiescence, confabulation, recall ability and accuracy. This current study records general findings of communication difficulties for individual adult witnesses with ID, resulting in a much wider range of communication challenges recorded.

A key point of difference in focus is that existing literature often records IQ levels of the participants and uses IQ as a point of comparison, whereas the level of IQ of the

witnesses was not mentioned in any of the RI court reports. The findings are also perhaps influenced by the role of the RI which is to assess the more functional abilities of the witnesses to: indicate whether the witness has the ability to communicate to give evidence; whether the use of the intermediary is likely to improve communication; advise the advocates; and make recommendations to the court to enable best communication. The role is not to give any opinion on the accuracy of the witness' testimony of events (as stated in section two of the reports).

As well as highlighting communication challenges relating to the ID of the witness, the court reports also allowed for significant emphasis on the communication challenges within the court setting to be placed on the communication partner: the advocate. This echoes research evidencing that difficulties with communication should not be solely placed with the individual with ID, but can be outcomes from the interactional process itself and the failure of the communication partner to bring balance to the communicative equation by responding appropriately to the language and skills of the individual with ID (Bunning, 2018; Light, 1989).

Within the court reports, the RIs' main recommendations were to ask short, one-subject questions, in chronological order using simple language and at a slow pace. Also, to avoid tags, statements, negative questions and non-literal language. Due to limited research carried out in UK courts it is not known if adult witnesses with ID are being questioned in a manner contrary to RI recommendations. Bar training would suggest that advocates are being trained to question witnesses in a style that can be easily understood and processed by the witness (IPLS Queens University, 2019; McPeake, 2018); however, these reports do suggest a mismatch of communication between the advocate and the witness. The question arises therefore as to why RIs feel the need to assess and make these very specific recommendations in their reports. Training of

advocates in the UK continues to follow the Hampel method of roleplaying and assessment by the trainer, an experienced advocate.⁶⁴ Perhaps the voice of long-standing advocates during training and subsequent pupillage of trainee barristers has the strongest influence in the language and question styles used in cross-examinations. Recent research involving observations of 339 hearings suggests that the court language, concepts and structures result in the silencing of witnesses and rather than being the focus they are moved into the periphery of proceedings (Jacobson, 2020). The Advocacy and Vulnerability training provided by Inns of Court College of Advocacy (ICCA) claims that over 3000 advocates have undergone the training, which emphasises 20 key principles of questioning.⁶⁵ Included in these principles are some of the challenges highlighted in this research, to avoid tag and statement question styles, as well as repetitive and leading questions, and consider avoiding 'why' and 'how' questions (Inns of Court College of Advocacy, 2019). However, until research is carried out within the UK courts, we will not know the extent to which this training is put into practice nor the extent of mismatch of communication between advocates and adult witnesses with ID. Research is currently being carried out by Nottingham Trent University and the Nuffield Foundation⁶⁶, which should hopefully provide some insight into the current format of cross-examination for adult witnesses with ID.

⁶⁴ www.icca.ac.uk/working-party-on-the-method-of-teaching-advocacy/ (accessed 7 July 2021).

⁶⁵ <https://www.icca.ac.uk/advocacy-the-vulnerable-crime/> (accessed 12 November 2020).

⁶⁶ www.ntu.ac.uk/research/groups-and-centres/projects/mapping-the-changing-face-of-cross-examination

7.5 Implications for practice

The findings of this research into court reports written by registered intermediaries for adult witnesses with ID raise a number of points relevant for practice.

Firstly, the range of communication challenges identified in the 19 court reports highlights the complexity and individualistic nature of communication with adults with ID. It reinforces the need for the specialist service of RIs to advise and support effective communication with witnesses with ID at an individual level for all witnesses, including defendants. However, there are a number of recommendations that are commonly made by the RIs for questioning the witnesses that could potentially become part of general practice. These are mainly using short, one-topic questions, with simple language, at a slow pace, in chronological order and allowing for regular breaks in questioning. These recommendations could become part of an accepted format within the courts for examination and cross-examination of adult witnesses with ID. This would then allow the RIs to have even more time during assessment for communication challenges specific to the witness. They could also become part of any existing advocacy training and be encouraged into the culture of cross-examination. There is also an argument that these recommendations would be advantageous to promote effective communication with any witness, regardless of level of vulnerability. The stress and anxiety of being cross-examined in court has potential to reduce the communication skills of many witnesses (Fielding, 2013).

Secondly, this research has also highlighted the existence of other difficulties beyond those related to cognitive impairment of an ID. High levels of anxiety and stress, tiredness and difficulties maintaining focus are common factors that need to be taken into consideration by the courts. Evidence shows a higher rate of poor mental health among adults with ID (Cooper et al., 2007; Hughes-McCormack, et al., 2017), which

would only be exacerbated by a looming court case. Some of the communication difficulties experienced by the witnesses may be impacted by their mental health difficulties and/or trauma experienced resulting in a 'zoning out', dissociation and difficulties concentrating on questioning (O'Mahony et al., 2018). Complainants potentially not only have to live with the repercussions of the alleged crime but then have to perhaps relive it all over again years later during a court case. Defendants potentially have to deal with years of accusations and the prospect of punishment. The impact of this stress and anxiety could be reduced by cases involving these vulnerable adults being fast tracked into court. Pre-recorded cross-examinations that can be carried out at an earlier date are now available in England and Wales for vulnerable witnesses,⁶⁷ but not defendants, and have not yet been implemented fully in Northern Ireland. Other measures on the day of the hearing could also be put in place, such as recommending that witnesses with ID attend court just prior to when they are due to give evidence rather than first thing in the morning. This would require prioritising the needs of these witnesses and perhaps arranging proceedings around these needs. More recently, in response to Covid-19 restrictions, virtual trials have been considered. Recent pilot studies⁶⁸ suggest that virtual trials can reduce the stress of the court environment, make it easier to pick up on non-verbal communication as faces are more visible, and increase participation as all participants are seen on the same level rather than the defendant being at the margins of the courtroom. However, challenges were found with a high

⁶⁷ Under s. 28 of Youth Justice and Criminal Evidence Act 1999.

⁶⁸ <https://justice.org.uk/our-work/justice-covid-19-response/>

dependency on access and effective use of the technology. In addition, the involvement of vulnerable witnesses or intermediaries were not included in the pilots. Further research involving witnesses with communication difficulties is required. The author is not aware of virtual RI assessments in England and Wales and in Northern Ireland RI assessments continued to be carried out in person during the pandemic⁶⁹.

Thirdly, this research raises questions regarding the needs of defendants with ID and their abilities to be able to focus during the entire proceedings. If a defendant, for example, is likely to struggle to understand complex language, long complex sentence structures and non-literal language verbalised at a fast pace, it is not unreasonable to ask how they could be expected to understand and follow what is being said during the testimonies of the complainant and other witnesses, arguments made by counsel, points raised to the judge and jury, and therefore effectively participate in their own hearing. A defendant's right to effective participation in their own hearing is enshrined in legislation through Article 6 of the European Convention on Human Rights (ECHR). However, the lack of clarity for application of this legislation has been brought into question, highlighting a need for further explanation and definition in court practice (Owusu-Bempah, 2018). Owusu-Bempah describes the European Court's description of effective participation in SC versus UK as 'the most comprehensive statement of effective participation that has been provided by the Courts' (Owusu-Bempah, 2018, p.325). The European Court stated that defendants should *"be able to understand the general 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*

⁶⁹ A small number of virtual RI communication assessments have been carried out in NI, if e.g. the witness is out of the jurisdiction, however face to face continues to be the usual procedure.

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” (Owusu-Bempah, 2018,p.324). According to this statement, it would appear that factors required for effective participation overlap with capabilities required of a vulnerable defendant to be declared fit to plead. The most widely used version of the Pritchard test of fitness to plead requires the defendant to be able to: understand the charge; decide on how to plead; challenge jurors; instruct solicitors; follow proceedings; and give evidence in his or her own defence (Bevan, 2017). Brown (2019) suggests a more modern approach to fitness to plead would be to focus on better supporting decision making and participation at trial. It may be then that for some defendants with ID a different approach to communication, which addresses the communication challenges of the advocate and the defendant, could result in them being fit to plead and effectively participating in their trial.

Finally, this research highlights the importance of the skills of the advocate when questioning an adult with ID. The variety of communication challenges addressed in the reports demonstrates the complexity of this role. Not only does an advocate have to ask questions in the best interests of his/her client’s case by extracting alternative evidence and casting doubt on the witness’s version of events, they have to perhaps change their entire style, manner and medium of questioning for a witness with ID. This raises a number of issues. Is this placing very high expectations onto advocates and putting them into an unfair position and are they then best placed to cross-examine witnesses with ID? Or does the overall style of communication of advocates when questioning witnesses need to be examined for promoting effective communicative exchanges? Or perhaps the issue is with the actual process of cross-examination and the adversarial system itself so that the question needs to be asked if it is the best method of effective communication with witnesses with ID to elicit full and accurate accounts of an alleged event? Since the commencement of the RI service within UK courts no research has

been carried out as to how adult witnesses with ID are being questioned, therefore we do not know how well advocates are managing to follow the communication recommendations made by RIs and how effective the role of the RI actually is in promoting best communication with vulnerable witnesses.

7.6 Limitations of this research

This is a qualitative study of communication challenges for adults with ID as recorded in 19 court reports written by RIs in Northern Ireland to inform the courts as to how best to communicate with the vulnerable witnesses. Due to the small number of reports examined this research can only inform on the challenges for these witnesses and what could potentially be challenges for other witnesses with ID. Information on the impact of the court process and environment on communication is limited as the RI assessments were carried out in a neutral, more relaxed environment than a court room. Moreover, the RIs are experienced in communicating with adults with ID and in building rapport, they cannot fully assess the impact of the stressful and emotional experience of going to court, entering a court room, giving evidence and being cross-examined by an advocate on potentially very personal matters. In addition, this research does not provide any information on the format of the RI assessment and any differences in these between RIs. We do not know if a challenge is not mentioned in a report because it was not present or because it was not assessed.

7.7 Conclusion

Challenges with communication in court during examination, cross-examination and re-examination of a vulnerable adult witness with ID are significant, complex and varied. Research into the 19 RI court reports showed these challenges lie within the individual difficulties for the witnesses and challenges for the advocate, as the communication

partner. For the witness these can be limitations of cognitive skills that lead to limited retention of information, lower working memory, slower processing, limitations in reading and writing and difficulties in responding. They can also include factors that lead to the disempowerment of the witness: over-compliance; suggestibility; difficulties with non-verbal behaviours; limited social skills; high levels of stress and anxiety; being in an unfamiliar environment and factors relating to court proceedings; masking and not informing the communication partner of difficulties understanding and responding. However, witnesses are also impacted by the communication challenges of the advocate: giving too much and unnecessary information; using complex, non-literal and abstract language; using complex sentence structures; tricky question styles; and a fast pace of questioning. This research highlights the need for research within UK courts on how adults with ID are being questioned and the effectiveness of changes being made to the court process to enhance communication. Research is also required into the impact of the court process and environment on the communication skills of adults with ID. In addition, although the RI court reports provide information on question styles that can cause communication challenges for the adult witness with ID, they suggest limited alternative question styles that could be used by advocates. There is also very limited information on alternative question styles in existing research. There is therefore a need for further research to identify alternative questions styles that could be used when questioning adult witnesses with ID in court.

The next two chapters are responses to these deficits. Chapter eight is an empirical study to look at a potential alternative question style to verbal leading questions during cross-examination of vulnerable witnesses with ID. Chapter nine gathers the research findings from the systematic review and this current chapter and examines the communication challenges within the context of the cross-examination process within UK courts.

Chapter 8. Cross-examination of adult witnesses with intellectual disabilities – a comparison of question styles for ‘putting the case’

8.1 Introduction

Adults with intellectual disabilities (ID) are recognised in legislation in England, Wales and Northern Ireland (NI) as ‘vulnerable witnesses’⁷⁰ and can request ‘special measures’⁷¹ to assist with the court process, including recommendations by registered intermediaries (RIs) on question styles used during cross-examination. Adults with ID can experience a range of challenges when communicating with others, impacting on their abilities to focus and attend to conversation, to receive and process information and to express themselves through verbal language (Cogher, 2010; Hronis et al., 2017; Kelly, 2000). The level of severity, range and type of difficulties are unique to each individual.

8.1.1 The court process

In court cases in the UK, the typical process is to begin with examination-in-chief followed by cross-examination. During cross-examination, given the adversarial criminal justice system, an advocate has two main purposes: to extract evidence supporting a client’s case and to cast doubt on the witness’ version of events (Keane et al., 2010). The communication style used by advocates is to ask short leading questions to ‘tell’ the

⁷⁰ Youth Justice and Criminal Evidence Act 1999, Criminal Evidence (NI) Order 1999

⁷¹ See sections 23-30 of the Youth Justice and Criminal Evidence Act 1999 for a list of these

witness how to respond. So amongst Iain Morley's, QC, proposed '10 Totally Tremendous Rules of Cross-examination', were the following two pieces of advice: always ask leading questions; and when putting your case, tell the witness he disagrees with it (Morley, 2015). 'Telling' and 'leading' the witness are the two golden rules advocates are taught at the bar (McPeake, 2018), therefore leading questions are mainly used during a typical cross-examination. A question can be defined as leading when the answer sought by the questioner is implied, included or suggested in the question (Hargie, 2016; McPeake, 2018). It empowers the advocate who is both attempting to gain a 'yes' response from a witness and also attempting to control the information provided to the decision makers (Morley, 2015). Leading questions are preferred over open style questions that *"cause the loss of valuable points in the game"* (Valdespino, 2004, p.88). Advice given to advocates is to keep leading questions short and simply phrased (Bates et al., 2015). In summary, cross-examination is an art of skilful, confident, focused and directed communication. It involves the complexities of learned skills to effectively use methods of directing and controlling the responses of a witness.

Over recent years there have been numerous studies and papers that question the traditional form of cross-examination with witnesses considered to be vulnerable (Doak et al., 2021; Henderson, 2016; Keane, 2012; Powell et al., 2022; Zajac et al., 2012; Zajac & Cannan, 2009). The courts are also questioning the practice used by advocates, and this can have serious consequences, sometimes causing cases to fail. For example, cases involving child witnesses, considered vulnerable due to their young age, have been appealed, with criticism made as to how the children were cross-examined (see *R v W and M* (2010) EWCA Crim 1926 and *R v Barker* (2010) EWCA Crim 4). This may also happen to cases involving people with ID. In one such case, involving a defendant with intellectual disabilities, the appeal highlighted communication challenges and unfairness of questions: *"[The appellant] would appear far more compliant [and]*

suggestible, and ... would have a tendency to acquiesce with questions, particularly in an adversarial situation and when being exposed to aggressive (or robust) cross-examination."⁷²

Similarly, in *R v Rashid* (2017) EWCA Crim 2 the style of questions used by the advocates is highlighted, however, competency by the advocates to question a vulnerable witness is assumed and described as, "*Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions*" (para.80).

The Court of Appeal suggested that an inability to question in a manner appropriate to the communication needs of the vulnerable witness would bring the advocate's duty to the court and their professionalism into question:

"An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks" (para.80).

⁷² *R V Jones* (2018) EWCA Crim 2816 (para. 70)

This undoubtedly emphasised the need for advocates to move away from the more traditional format of cross-examination to adapt their practice and style of questioning for the vulnerable witness.

8.1.2 Guidance for Advocates

Research into communication for adults with ID when giving evidence in court is very limited. The vast majority was carried out in the 1990's/ 2000's and mainly consisted of experimental methodologies on specific communication challenges. The systematic review in Chapter six highlighted six key aspects of their communication difficulties:

1. More limited information provided in free recall
2. Suggestibility to leading questions and potentially to negative feedback from the questioner
3. Acquiescence, that is responding in the affirmative regardless of the content of the question
4. Lack of understanding of court language
5. Memory limitations, suggestibility and likelihood of acquiescence, all linked to lower IQ

6. Specific question styles used by the questioner were more likely to lead to inaccurate responses – statements, tag questions and closed yes/no response questions⁷³ (Morrison et al., 2019)

In recognition of these kinds of issues, registered intermediaries (RIs) were brought in by the Youth Justice and Criminal Evidence Act 1999, in order to support the communication skills of vulnerable witnesses in court. RIs typically receive referrals of such witnesses and meet with them to conduct an assessment of their difficulties, so as to write a report for the court. Research into court reports (see Chapter seven), written by RIs in Northern Ireland, based on communication assessments of 19 adults with ID, reiterated the difficulties with specific question styles - statements and tag questions. In addition the research suggested that negative style questions (e.g. “Is it not true that...” “Did you not say that...”), ‘why’, ‘how’ and repeated questions were also problematic for the adults involved (Morrison et al., 2021).

As understanding of the communication issues for vulnerable witnesses has grown, guidance for advocates on questioning witnesses with ID has become available through The Advocates Gateway⁷⁴, an online resource providing toolkits on best practice when questioning vulnerable witnesses. Toolkit 4⁷⁵ offers clear information on ID, the challenges, and provides guidance and information on potentially problematic questioning styles. These include: statements; tags; questions requiring yes/no

⁷³ E.g. of a statement question “So he closed the door?”; Tag “He closed the door, didn’t he?”; Closed yes/no “Did he close the door?”

⁷⁴ [Home | Advocate's Gateway \(theadvocatesgateway.org\)](https://theadvocatesgateway.org/)

⁷⁵ [Planning to question someone with a learning disability \(theadvocatesgateway.org\)](https://theadvocatesgateway.org/) accessed 29/7/22

responses; forced choice closed questions⁷⁶; and ‘Do you remember’ questions. In England and Wales specialist training is available for advocates wishing to cross-examine vulnerable witnesses. This training is provided by The Inns of Court College of Advocacy (ICCA) and is underpinned by 20 Principles of Questioning which include a list of question styles to avoid including: tag; leading; why questions; how questions; statements; and closed leading questions⁷⁷. The advice is that leading questions are suggestive by nature and even those that are short and simple should be avoided. Research from the systematic review in Chapter six informs that ID does not necessarily reduce the accuracy of recall of a witness with ID, rather it is how the witness is questioned that impacts accuracy. Bowles and Sharman found ‘tag’ style questions to cause the highest rate of incorrect responses to misleading questions and simple closed, or closed specific⁷⁸ the highest rate of correct responses (Bowles & Sharman, 2014).

A required change in cross-examination is reiterated by Morley when he states that his 10 rules “go out the window” when questioning vulnerable witnesses. He replaces these with five new rules:

1. No TAG questions
2. Maintain a neutral tone and body language

⁷⁶ E.g. “When you went to the flat, did John or Bill open the door?”

⁷⁷ [20-Principles-of-Questioning-2022.pdf \(icca.ac.uk\)](https://www.icca.ac.uk/20-Principles-of-Questioning-2022.pdf) accessed 29/7/22

⁷⁸ E.g.s. given: “Eric helped himself to a Pepsi, didn’t he (tag); Did Eric help himself to a Pepsi? (closed); Did Eric help himself to a can of Pepsi from the fridge? (closed specific); Tell me about the Pepsi that Eric helped himself to” (open presumptive)

3. Keep questions really simple
4. Do not inhibit choice
5. Help the witness to feel at ease (Morley, 2015)

In examining research, the ICCA 20 principles, and Toolkit 4 of the Advocates Gateway it would be easy to conclude that they consist of lists of what 'not to do'. Therefore, 'getting it right' when questioning a witness with ID could be overwhelmingly challenging and complex. In summarising, the advice seems to favour short, simple, open style questions. It could be argued that this style of questioning would render a cross-examination similar to a police Achieving Best Evidence (ABE) interview of a vulnerable witness, in which open questions form the crux of the investigative interview. In addition, one could ask how open questions fit within an adversarial system where the purpose of cross-examination is to challenge the evidence given by the witness in their evidence in chief (McPeake, 2018). Usually advocates challenge the evidence by 'putting the case' of their own client to the witness. The English Court of Appeal, however, has made efforts to address this by declaring that advocates do not have a given right to 'put the case' to a vulnerable witness (see *R v E* (2011) EWCA Crim 3028; *R v RK* (2018) EWCA Crim 603).

Research has also reported that adults with ID provide less information overall in response to open style questions (e.g. "Tell me about the man in the story."), compared to more specific style questions (e.g. "Did the story say the man's name or not?") (Cardone & Dent, 1996; Perlman et al., 1994). This might suggest that if only open questions are used during cross-examination then adult witnesses with ID may be denied the opportunity to respond to the alternative version of events put forward by the other party or to explain potential inconsistencies in their own testimony. Toolkit 4 of the

Advocates Gateway and ICCA both recommend breaking up short closed questions with short open questions. In addition, Toolkit 4 provides advice on questions with a choice of answers, suggesting the addition of alternative choices of 'something else' and 'don't know' options (para.6.25). However, recent research comparing response styles of adult groups: unemployed; ADHD⁷⁹; ID; and a control group reported that the ID group were the least likely to give 'don't know' answers and alternative 'direct explanation' as to why they couldn't answer the leading question (Gudjonsson & Young, 2021). Choice option questions with visual aids (i.e. questions which provided a choice of answers, illustrated with pictures) were researched with children and adults with ID by Sigelman et al in 1982. Results suggested that these choice questions provided a greater level of accuracy than closed questions requiring yes/no responses and greater levels of responsiveness than open style questions. When pictures were used with the choice questions, the responsiveness was higher than choice questions with verbal options alone. This led the researchers to conclude that *"verbal and pictorial multiple choice questions proved to be a potentially useful alternative to open-ended questions."* (Sigelman et al., 1982.p.517). This research, however, was not carried out within a criminal justice situation. Visual aids in the form of pictures, photographs, drawings and symbols have been widely accepted as potential communication tools for adults with ID in other settings of course (Boardman et al., 2016; Goldbart & Caton, 2010; Jones, 2004; Kennedy & Brewer, 2016; Light & McNaughton, 2014). In addition, the Advocates Gateway

⁷⁹ Attention Deficit Hyperactivity Disorder

dedicated a complete toolkit to the use of visual communication aids when questioning vulnerable witnesses.⁸⁰

However, we do not know the extent to which communication aids are being used during cross-examination. There is no recent research published into how adults with ID are being questioned in courts in the UK, though some is underway.⁸¹ We do not know the extent to which recommendations made by RIs, ICCA training and guidance from the advocates gateway are being followed or adhered to during cross-examination. There is also very limited research into alternative question styles for advocates to use when cross-examining vulnerable witnesses, the effectiveness and appropriateness of their use within the criminal justice system and whether alternative styles of cross-examination result in improved communication for adults with ID. Yet such information is vital if vulnerable witnesses with ID are to be assisted to give evidence. Therefore, this study, which aimed to mimic the court process, compared two formats of cross-examination for adults with ID where alternative options are 'put' to the witness.

Two research questions were asked:

1. Does a cross-examination using questions which provide a choice of answers with visual aids impact the responses of adult witnesses with ID

⁸⁰ Toolkit 14, Using communication aids in the criminal justice system
www.theadvocatesgateway.org

⁸¹ Research is being carried out through the Nuffield Trust on the nature of cross-examination within UK and Ireland which includes linguistic analysis and observations of cross-examinations of cases involving vulnerable witnesses (including ID)
www.nuffieldfoundation.org/project/changing-face-of-cross-examination-in-criminal-trials
(accessed 2/1/23).

in terms of accuracy and suggestibility compared to a cross-examination using leading questions?

2. Does a cross-examination using questions which provide a choice of answers with visual aids increase the likelihood of the adult witness with ID providing a 'don't know' or alternative (something else) response, compared to a cross-examination using leading questions?

8.2 Materials

In order to answer these questions, two groups of participants were recruited: One group (the control group) was questioned using a typical format of cross-examination – leading questions. The second group (the experimental group) was asked the same questions using an alternative format of questions which gave a choice of answers, with visual aids. For ease of reading these will be referred to as 'choice questions with visuals'. For both groups, the questions used were closed questions, with a short and simple sentence structure.

Thus the design was a between-subject design with a control and experimental group of adult participants with intellectual disabilities. The independent variable was the style of questions used during cross-examination and the dependent variables were: level of suggestibility to incorrect information; accuracy of response; alternative response given; and 'don't know' response given.

8.2.1 Participants

Participants were recruited from various voluntary sector organisations providing support to adults with ID in England and Northern Ireland. The main criteria were that participants needed to be aged 18 or over and have a diagnosis of learning disability/intellectual

disability. Thirty two participants signed up to take part in the research which consisted of two parts – communication assessments and then viewing of a mock crime (brief video), followed by initial interview, and then cross-examination. All 32 participants took part in the communication assessment stage and 30 viewed the mock crime, and completed the initial interview and cross-examination (one participant chose not to continue and the other was not available for the second part).

Each group consisted of 6 males and 10 females, all of whom had ID. In addition, five participants self-identified as autistic, two in the experimental group and three in the control group. The mean age of participants was 37.72 years (range 20-64). There was no significant difference in age distribution between the groups ($t=-1.36$; $p=0.182$).

8.2.2 Communication assessments

As there are no standardised communication assessments designed for adults with ID, two assessment tools for children were used – BPVS3 and TROG-2. The BPVS3 tests verbal comprehension (Dunn et al., 2009) and was standardised in 2009 with 3278 school children for an age range of 3-16 years. It is established as an assessment instrument for education, clinical and research purposes. BPVS3 and earlier versions have been used in research to assess receptive vocabulary of adults with ID (Ferguson & Murphy, 2014; Startin et al., 2019; Zis et al., 2014), as an estimate of general intellectual ability (Glenn & Cunningham, 2005) and for between-group comparisons (Ball et al., 2008; Rowe et al., 2006). However, the manual for BPVS3 recommends caution in making inferences about general intelligence (Dunn et al., 2009). The TROG-2 assesses understanding of grammatical concepts. It is a receptive language test consisting of 80 four-choice items (Bishop, 2004). An adapted TROG has also been found reliable for assessing reading comprehension for adults with ID (Jones et al., 2006).

The GSS 2 (Gudjonsson, 1987) assessment of suggestibility was also used, to measure suggestibility (yielding to leading questions and shifting following negative feedback from the questioner). The GSS 2 requires the participant to listen to a story. They are then immediately asked to recall what they remember about the story (providing a measure of immediate recall). Following another activity they are then asked again what they recall, to provide a measure of delayed recall. There follows 20 questions, 15 are misleading questions (information is suggested that is not in the story) and 5 leading questions (information suggested is in the story). This measures yield 1, suggestibility to leading questions. Participants are then informed that they have not done very well and the interviewer needs to repeat the questions. The questions are repeated and this informs on shift, i.e. changing of response following negative feedback from the questioner. The two scores together (yield plus shift) provide the total suggestibility score. The GSS has been very widely used in research on suggestibility, including with people with ID (Gudjonsson, et al., 2000; Gudjonsson & Henry, 2003; Henry & Gudjonsson, 1999, 2003, 2007; Milne et al., 2002; White & Willner, 2005). It has high inter-rater reliability (Clare et al., 1994).

8.2.3 The Mock Crime, Initial Interview and Cross-examination

A short video recording of a mock crime, lasting 17 seconds, was provided by the Police Service of Northern Ireland (PSNI) Crime Training department. The recording showed a man and a woman sitting at a picnic bench reading books. They were approached by a man who pointed a gun at them, and grabbed the woman's shopping bag. The woman tried to get it back but was held back by her companion. The robber ran off with the bag.

After watching the video an initial interview was conducted (see Procedure below). This interview was created using guidance provided by the PSNI on interviewing of a witness⁸² and consisted of free recall and probing questions.

There were two formats for the 'cross-examination' which followed the initial interview (see Procedure below). For the control group there were 20 leading questions in the 'cross-examination' – see Table 8.1 below. No further prompts or suggestions as to answers were given to the control group. The experimental group were asked the same questions, with an added choice of four possible answers with visual aids. Several examples are included below under Procedure.

⁸² Guidance based on Association of Chief Police Officers (replaced by the National Police Chief's Council) and The PEACE interview model

Table 8.1 The 20 questions from the cross-examination

1. Did the recording show someone stealing a bag?
2. Was the victim a man?
3. Did the victim have short hair?
4. Was the victim standing beside a table?
5. Was the man with the victim wearing a white T-shirt?
6. Were they on their phones at the time?
7. Was the victim's bag a rucksack?
8. Did the suspect (the robber) come in from the right hand side?
9. Was the suspect a man?
10. Was the suspect wearing black boots?
11. Did the suspect have short black hair?
12. Did the suspect walk with a limp?
13. Did the suspect shout at the victim and the man?
14. Did the suspect tell them to sit down?
15. Did the victim say "Go away"?
16. Was there another man nearby?
17. Did another adult take part in the crime?
18. Were there cars nearby?
19. Did the suspect get into a car?
20. Was it raining when this crime happened?

8.3 Procedure

The plan for the study was submitted to and approved by the Tizard Centre ethics committee.

The initial interview and cross-examination process was piloted with an autistic young person with ID and an adult with ID. Recommended changes included: using the term 'suspect' with each relevant question, rather than 'he'; providing clear explanations of relevant terms (i.e. suspect, victim, witness); and slowing the pace of questioning, and these changes were subsequently made before proceeding.

After recruitment of the 32 participants, once information sheets and consent forms, had been completed, all participants were randomly allocated to either test or control group using Sealed Envelope online randomisation service.⁸³

The part 1 assessments and part 2 of the study were carried out online via zoom by the author. The assessments were completed first and the viewing of the mock crime recording, initial interview and cross-examination were completed several hours later or on a different day.

8.3.1 Initial interview

The initial interview used the following format for all participants (all provided in simple language and at a slow pace):

⁸³ www.sealedenvelope.com

1. Information on the process of the research and explanations of the terms witness, mock crime, crime, police interview and cross-examination.
2. Observation of a test video recording and participants asked to confirm they could hear and see the recording properly.
3. Observation of the mock crime recording.
4. Communication rules – tell me if you do not understand a question, tell me if you need me to repeat a question/say it again, just say if you cannot remember or do not know an answer, it's ok to not know.
5. Participants were then asked if they had any questions for the researcher.
6. Understanding of the words witness, victim and suspect were checked with explanations given as required.
7. Following viewing the film, an open, free-recall question was asked – “Tell me what you remember about the mock crime you watched on the computer.”
8. The researcher recapped the information given and asked the participant if it was correct (from the participant's point of view). The researcher then asked if the participant wanted to change anything or add anything else.
9. The initial interview was then conducted. For the initial interview, 17 probing questions were asked, e.g. “What was the victim doing?” “What did the suspect look like?” (see appendix 10). Explanations of the meaning of the words victim and suspect were provided with each

relevant question if the participants had previously demonstrated difficulties with understanding or if they appeared confused.

Following a 15 minute break the 'cross-examination' commenced.

8.3.2 Cross-examination

Control group

The control group cross-examination followed a similar format to the GSS2 suggestibility assessment with 20 short, simple leading questions (see Table 8.1). Five of these questions were 'leading correct' in that the information was correct according to the video of the mock crime (Qs 1, 9, 13, 16, 18). The remaining fifteen questions were 'misleading' in that the information suggested in the question was different from what participants would have witnessed in the video of the mock-crime, or else the information was not available in the video of the mock crime. Just before the 'cross-examination' commenced control group participants were reminded of communication rules - to say if they didn't know or could not remember.

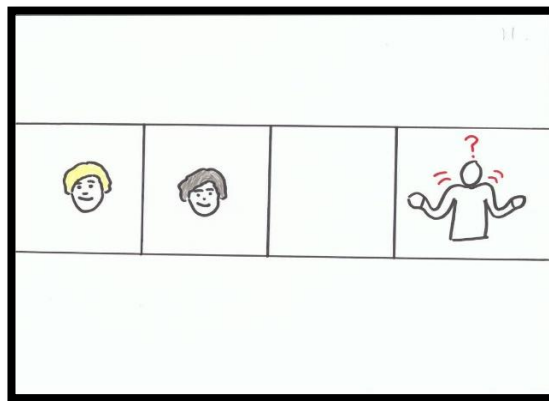
Responses were recorded and scored according to whether the participant agreed with the suggestion, disagreed with the suggestion, gave a 'don't know' or cannot remember response or provided a 'something else' response by offering a different suggestion.

Experimental group

The Experimental group 'cross-examination' sought the same information as in the control group questions however, rather than 'suggest' the answers through a leading question, four possible answers, with visual aids, were provided using four boxes in a row with the options (see appendix 13 for all visuals):

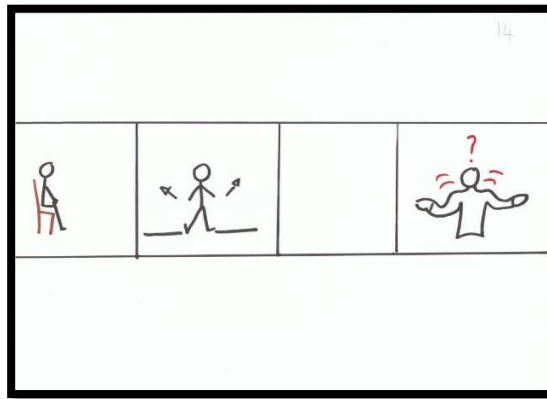
- Visual representation of the correct information
- Visual representation of the incorrect option (same as the misleading questions in control group)⁸⁴
- A blank box representing 'something else'
- Visual representation of 'I don't know'

Three examples follow. For Question 11, regarding the suspect's hair colour the last, 'I don't know' option is correct as the suspect had worn a hood pulled over his head.

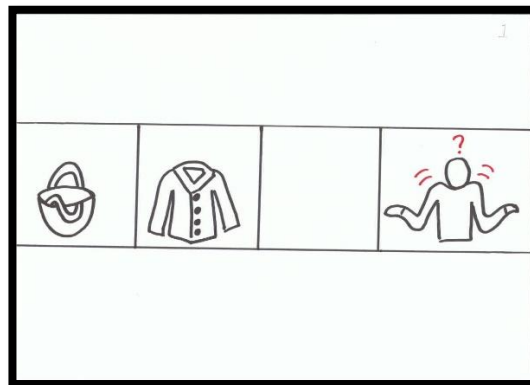


In another, Question 14, the participant was asked “Did the suspect tell them to sit down, stand back, something else, or do you not know?”. The second option is correct

⁸⁴ The correct option was randomly alternated between box 1 and 2.



In a third, Question 1, the first option is correct. “Did the recording show someone stealing a bag, a coat, something else, or do you not know?”



All visual aids were simple line drawings. Colour was used when relevant to the question. Two sample, unscored questions (“Am I wearing a blouse, a T-shirt, something else, or do you not know” and “Is it dark outside, it is not dark outside, something else, or do you not know”) were carried out at the beginning, to ensure the participant could follow the question style. The researcher showed the visual aids for each question and verbally asked the questions and gave (spoke) the options while pointing at the relevant visual aid.

Results were scored following set guidelines. Two sets of reliability checks were done, 50% by the first supervisor, resulting in very specific guidelines set for scoring (see appendix 11), and 30% by an independent reviewer following the guidelines. Reliability with the independent reviewer (percentage agreement) was 94.17%.

8.4 Results

Statistical analysis was completed using the Statistical Package for Social Sciences (SPSS) version 24.0 (IBM Corp. 2016). Preliminary analysis involved means, standard deviations, frequencies and correlations.

8.4.1 Communication assessments and suggestibility

Table 8.2 shows full GSS 2, BPVS 3 and TROG results for all participants. These are assessments of vocabulary, grammar and suggestibility. As the numbers in the groups were small (n less than 20 in each group), non-parametric testing was used for group comparisons. The Mann-Whitney U test was chosen for these data, as it is a reliable test, suitable for between groups analyses of independent samples when there is a difference between two conditions (Coolican, 2018). The Experimental and Control group results can be seen in Table 8.3. The results showed that the two groups were well matched: there were no significant differences between Experimental and Control groups for GSS 2, BPVS 3 and TROG scores.

Table 8.2. Participant communication assessment results

Test (& max possible score)	Groups	N	Mean score	Standard deviation
GSS 2 Immediate recall (max 40)	Experimental	16	4.719	4.9631
	Control	16	5.063	4.1588
	Total	32	4.891	4.5076
GSS 2 Delayed recall (max 40)	Experimental	16	3.656	4.4042
	Control	16	4.000	3.6043
	Total	32	3.828	5.1944
GSS 2 Suggestibility to leading questions (yield) (max 15)	Experimental	16	7.00	4.747
	Control	16	6.13	3.755
	Total	32	6.56	4.242
	Experimental	16	6.63	4.951

Test (& max possible score)	Groups	N	Mean score	Standard deviation
GSS 2 Suggestibility to negative feedback (shift) (max 20)	Control	16	5.06	2.670
	Total	32	5.84	3.993
GSS 2 Total suggestibility (max 35)	Experimental	16	13.63	8.057
	Control	16	11.19	4.778
	Total	32	12.41	6.633
BPVS raw score (max 168)	Experimental	16	104.13	38.903
	Control	16	115.69	30.194
	Total	32	109.91	34.756
TROG (blocks passed) (max 26)	Experimental	16	5.06	4.203
	Control	16	4.19	3.250
	Total	32	4.63	3.722

Table 8.3. Group comparisons for communication and suggestibility assessments

Measures	Mann-Whitney U	p-value
GSS Immediate recall	145	0.520
GSS Delayed recall	120	0.762
GSS Suggestibility to leading questions	113.5	0.583
GSS shift	121	0.790
BPVS	149.5	0.418
TROG	117.5	0.690

8.4.2 Initial interview recall

The initial interview was conducted the same way for both experimental and control groups. The potential total free recall score to the open question “Tell me what happened in the mock crime recording” was 17.

There was a man/and a woman/sitting at a (picnic) table/. They were reading books/. A man came along/ wearing a hoodie/with the hood up over his head/. He grabbed the woman’s bag/. It was a shopping style bag/ with a grey and white pattern/. The man and woman tried to pull it off him/ but he took out a gun./and pointed it at them./ He told them

to stand back./The other man pulled the woman back./ The man ran off/towards the trees on the left.

For all 30 participants the mean score was 6.02 (Range of 0-10) indicating that participants provided on average 35.39% of the total potential information, during free recall. For the subsequent probing questions the total potential was 30. For all 30 participants the mean score was 11.45, indicating that participants provided 38.17% of the potential information requested through probing questions. There was no significant difference between the groups for information provided in either free recall ($p < 0.851$) or responses to probing questions ($p < 0.678$). Mean score results can be seen in Table 8.4.

Table 8.4. Initial interview group scores

	Group allocations	N	Mean	Standard Deviation
Free recall score	Test group	15	6.033	2.408
(max 17)	Control group	15	6.000	2.5425
Probing questions	Test group	15	11.933	5.5897
(max 30)	Control group	15	10.967	5.878

8.4.3 Cross-examination

‘Cross-examination’ of the participants consisted of 20 questions. The Experimental group was asked 20 questions with a choice of 4 answers with visual aids and the Control

group was asked the same questions using verbal short leading questions (and no further prompts as to answers). Two sets of data were recorded for cross-examination results:

1. Whether the answer was correct or incorrect
2. Whether the answer:
 - Agreed with the suggestion provided;
 - Disagreed with the suggestion provided;
 - Other information was provided by the participant – recorded as ‘Something Else’;
 - The participant indicated a ‘didn’t know’ or ‘can’t remember’ response.

Fifteen of the questions were misleading, in that the information suggested in the question was incorrect. Five of the questions were leading correct, in that the information suggested was correct.

8.4.3.1 Accuracy – correct or incorrect

The total group results are shown in Table 8.5. Participants answered just over half of all questions correctly (51.2%), this was slightly lower for the misleading questions (49.3%) than for the leading questions (56.7%).

Table 8.5. Cross-examination accuracy group scores

	Group allocation	N	Mean	Std. Deviation
Total number of correct responses given (max 20)	Experimental	15	10.467	2.9729
	Control	15	10.000	2.7255
	Total	30	10.233	2.8123
Total number of leading questions correct (max 5)	Experimental	15	2.73	0.961
	Control	15	2.93	1.223
	Total	30	2.83	1.085
Total number of misleading questions correct (max 15)	Experimental	15	7.80	2.541
	Control	15	6.97	2.287
	Total	30	7.38	2.413

None of the differences between groups were significant (see table 8.6) Therefore, we can conclude that giving the choice answers with visual aids as a question style for cross-examination did not significantly improve the accuracy rate of the adults with intellectual disabilities participating in this research.

Table 8.6. Cross-examination group comparisons for accuracy

Response	Mann-Whitney U	Asymptotic significant 2 sided (p-value)
Total correct	98	0.545
Total leading questions correct	125.5	0.547
Total misleading questions correct	90	0.347

8.4.3.2 Comparison of Agree, Disagree, Something Else, or Don't know responses

Findings for the misleading questions show that the most common response for participants (n=30) was to disagree with the misleading suggestion (48.2%)⁸⁵ The rest of the responses were made up mainly from agreeing with the suggestion (30.4%) or giving a 'don't know' response (15.1%). A small number (6.2%) provided an alternative 'something else' response. The experimental group did have a slightly lower mean rate of agreement (4) with the misleading suggestion, compared to the control group (5.13) but there were no significant differences between the groups for any of the responses to misleading questions: agreement, disagreement, don't know, something else response. Mann Whitney tests showed there were no significant differences between the groups in these responses (see Table 8.8).

⁸⁵ For Q11 'don't know' was correct answer

Table 8.7. Cross-examination total group

Misleading Questions	Group allocation	N	Mean	Std. Deviation
Agreed with suggestion (max 15)	Experimental	15	4.000	2.7516
	Control	15	5.133	3.2484
	Total	30	4.567	3.0136
Disagreed with suggestion (max 15)	Experimental	15	7.533	2.5317
	Control	15	6.933	2.4918
	Total	30	7.133	2.5560
Don't know response (max 15)	Experimental	15	2.266	2.2338
	Control	15	2.266	3.1952
	Total	30	2.267	2.7908
Something else alternative response (max 15)	Experimental	15	1.200	1.6561
	Control	15	0.666	1.1751
	Total	30	0.933	1.4368
Leading questions				
Agreed with suggestion	Experimental	15	2.733	0.9611

(max 5)	Control	15	3.066	1.3345
	Total	30	2.900	1.1552
Disagreed with suggestion (max 5)	Experimental	15	1.666	0.8165
	Control	15	1.666	1.1127
	Total	30	1.666	0.9589
Don't know response (max 5)	Experimental	15	0.600	0.6324
	Control	15	0.266	0.5936
	Total	30	0.433	0.6260
Something else alternative response (max 5)	Experimental	15	0	0
	Control	15	0	0
	Total	30	0	0

For the five Leading Correct questions, agreement was the most common response (58%) followed by disagreement (33.34%). There were no significant differences between the groups on Mann Whitney tests. Therefore we can conclude that the choice answers with visual aids did not reduce the suggestibility of the adult participants with ID compared to short verbal leading questions. In summary, for both misleading and leading correct questions the findings show no significant difference between the experimental and control groups for any of the test criteria responses – agreement, disagreement, 'don't know' or 'something else'.

Table 8.8. Cross-examination group comparisons

Response	Mann-Whitney U	Asymptotic significant 2 sided (p-value)
ML Agreed	132	0.414
ML Disagreed	95.5	0.477
ML Don't know	94	0.430
ML Something else	89	0.279
LC Agreed	132.5	0.392
LC Disagreed	112	0.982
LC Don't know	77.5	0.087
LC Something Else	112.5 (not chosen)	1.00

8.4.3.3 Recall, accuracy and suggestibility correlations

Correlations were carried out between amount of free recall information (about the mock crime), total score for probing questions about the mock crime in the initial interview, total score correct in cross-examination, and agreement to misleading questions in cross-examination (which of course implies incorrect answers) (See Table 8.9). We can confidently state that the more free recall a participant was able to give about the event, the greater amount of information they provided in response to probing questions ($p < 0.001$). There were also significant correlations between free recall information

provided on the mock crime and total correct questions in cross-examination ($p < 0.020$) and between total probing questions score and total correct in cross-examination ($p < 0.001$). Therefore we can state that the more a participant remembered and recalled about the event the more questions they answered correctly during cross-examination. There was a negative correlation for both total score for free recall and total score for probing questions, with agreement to misleading questions, but neither were significant ($p < 0.060$; $p < 0.187$). There was therefore a trend towards people being more able to resist leading questions when they recalled more about the mock crime and when they had higher scores for the probing questions, but this trend was not significant for this small sample.

Table 8.9 Correlations between the various measures relating to the mock crime

	Free recall info on mock crime	Total score probing questions on mock crime	Total correct in cross-examination	Agreement to misleading questions
Free recall info on mock crime		0.696 (P<0.001)	0.421 (P<0.020)	-0.348 (P<0.060)
Total score probing questions on mock crime			0.657 (P<0.001)	-0.248 (P<0.187)
Total correct in cross-examination				-0.306 (P<0.1)
Agreement to misleading questions				

8.4.4 Additional findings

To reduce the likelihood of confusion from legal jargon language, all participants were asked to provide an explanation of their understanding of terms that would be used throughout the research: victim; suspect; and witness. An explanation was provided of all terms for any participant who demonstrated confusion or uncertainty of understanding. The term 'mock crime' was also explained. During the police interview a reminder of the

terms was given prior to each relevant question if deemed necessary by the interviewer or as required. During cross-examination explanations were also given if obvious that the participant might have been confusing the terms. In spite of the regular explanations, confusion or potential confusion for the terms victim and suspect was noted for 1/3 of all participants (as judged by, for example, referring to the suspect as 'her', when it was a man, or commenting on the man beside 'her' when asked about the suspect, as only the victim had a companion).

8.5 Discussion

8.5.1 Study design

This experimental study of alternative question styles for 'putting the case' during cross-examination included 30 adult participants (32 assessed and 30 completed interviews). All participants were over 18, with a mean age of 37.72 years and a diagnosis of intellectual/learning disabilities. Five participants self-identified as autistic. Participants were randomly divided into two groups. The experimental group were assigned to a 'cross-examination' of 'choice questions with visuals' question style and the control group to a simple leading question style with no visuals. Participants were equally distributed between groups for age, gender, communication assessment scores, initial interview free recall and probing questions scores, as can be seen in Tables 8.2, 8.3 and 8.4.

8.5.2 Communication and suggestibility assessments

The communication assessment tools used gave results that would be expected of adults with a diagnosis of ID. As the BPVS 3 (test of receptive vocabulary) and TROG (test for reception of grammar) assessments are only standardised for children, we cannot comment on their standardisation for the adult participants in this study. However, according to the BPVS 3 manual (Dunn et al., 2009) the age equivalent provided for the

mean raw score of 104 (experimental group) is 7 years 5 months. For the control group (mean raw score of 115) the age equivalent provided is 8 years 6 months. It is not intended to compare adults directly with children but this information provides a measure of the participants' communication skills in terms of a developmental model of language and communication.

Results of the TROG test were 5.06 blocks passed for the experimental group and 4.19 for the control group. This places the participants within <1 percentile, that is less than 1% of the population of over 14 year olds are likely to achieve this result (Bishop, 2004, p.56). Bishop also carried out adult normative samples with 70 adults (no ID). The mean score of blocks passed for adults under 65 was 18.48, that is 3.6-4 times higher than the participant scores (Bishop, 2004).

Findings from the assessment phase, with the GSS, in this research are in line with previous research indicating that adults with ID have more limited recall skills and are more suggestible to leading questions than the general population (Cardone & Dent, 1996; Clare & Gudjonsson, 1993; Milne et al., 2002; Morrison et al., 2019; White & Willner, 2005). The GSS 2 manual provides standardized mean scores for 83 adults in the general population. The mean GSS2 immediate recall score recorded is 19.7 (Gudjonsson, 1997, p.24). This is around four times as much as the adults with ID in this study; whose mean immediate recall scores were 4.7 (experimental) and 5.1 (control). The mean rate of suggestibility to leading questions for participants here was 6.13 (control) and 7.0 (experimental). Although more suggestible than the adults without ID scores in the GSS2 manual (mean 4.5), participants were less suggestible than the standardized scores for 68 adults with ID (9.8) in the GSS2 manual (Table 5.9). Interestingly, however, the participants recalled less than the ID standardized recall score given in the GSS manual (8.1) but had somewhat higher mean shift scores, that is

changing their mind following negative feedback. Participants mean shift scores were 6.63 (Experimental) and 5.06 (Control), compared to 4.8 (GSS manual, ID standardized). Therefore, the participants in this study seem to be somewhat less suggestible than the 68 adults with ID tested in the GSS2 manual, however, they also had more limited recall skills and were somewhat more liable to shift after negative feedback.

Participants in this study also recorded lower suggestibility rates than previous empirical studies. This study indicates this sample of individuals on average were suggestible to misleading questions for 43.7% of the questions on the GSS2 and 30.% of the cross-examination questions, i.e. they gave incorrect answers to this percentage of misleading questions. In Milne et al (2002) the 47 adults with ID recorded a mean suggestibility to misleading questions (yield 1) of 61%, using an adapted version of the GSS. Earlier research with 60 adults with ID (Cardone & Dent, 1996), using the GSS2 questions, indicated mean suggestibility scores of 8.40 to 12.60 (out of 15 questions), depending on the recall style used. This is nearly twice the rate of suggestibility than the 'cross-examination' in this study (4.57). It may be because the material in the GSS story was verbal (not visual) and perhaps harder to understand than the mock crime in this research.

8.5.3 Research findings

This study asked two questions:

1. Does a cross-examination using leading questions with a choice of answers, with visual aids, impact the responses of adult witnesses with ID in terms of increasing accuracy and reducing suggestibility, compared to simple leading questions?

2. Does a cross-examination using leading questions with a choice of answers, with visual aids, increase the likelihood of the adult witness with ID providing a 'don't know' or alternative (something else) response, compared to simple leading questions?

8.5.3.1 Accuracy and suggestibility

Results of this study show that choice questions with visuals did not significantly increase the accuracy of responses to 'cross-examination' questions, nor reduce the rate of suggestibility to misleading questions for adult participants with intellectual disabilities. The more a participant could recall about the mock crime (in free recall), the more accurate their responses were during initial probing questioning, and during cross-examination. Previous research has found suggestibility is linked to memory recall, in that the less remembered of an event the more likely an adult with ID is to be suggestible to leading questions (Kebbell et al., 2004; Milne et al., 2002). However, in this study although there is a non-significant inverse correlation between the amount of information recalled and suggestibility for the misleading questions, i.e. suggestibility is higher when the participant recalls less, the correlation is not significant. This may be due to the small sample size or other factors may be at play.

It is important to consider a number of factors relating to the methodology that may have potentially influenced the lower suggestibility rate in this study and the lack of significant differences between the groups: environment, familiar support person, sentence structure, and communication rules (tell me if you do not understand a question, tell me if you need me to repeat a question/say it again, just say if you cannot remember or do not know an answer, it's ok to not know). It is important to note here that a score in the formal communication assessments and the test conditions of research may not easily translate into functional abilities in everyday settings. In addition, questions asked in the

control and experimental 'cross-examinations' were of short, simple sentence structures, which were more likely to have been understood by the participants and the mock crime was relatively simple (compared to the GSS story).

As the research was carried out online all participants were in an environment they were used to being in. Most were accompanied by a member of staff who assisted with the technology and ensured participants could hear and see properly. The same researcher who carried out the assessments also completed the research, thereby encouraging familiarity. Some participants used the researcher's name and wished to engage in social communication. The researcher is also experienced in direct communication work with vulnerable adults which may have impacted how the questions were asked, e.g. slow pace; tone of voice; pronunciation. The culmination of these factors may have influenced confidence and comfortability of the participants in both groups, to be able to disagree with the leading questions, and therefore reducing the difference between the groups. These factors are also likely to have reduced the stress and anxiety levels of the participants. Research informs that people with ID may also be more prone to mental health difficulties, high levels of everyday stress and anxiety⁸⁶ (American Psychiatric Association, 2013). Stress reduces communication abilities (Derakshan & Eysenck, 2009; Eysenck et al., 2007; Eysenck & Calvo, 1992). Recent research into virtual trials suggest that they can reduce the stress of giving evidence.⁸⁷ Therefore participating in

⁸⁶ [All Party Group on Learning Disability - Priority Issues May 2018.pdf \(mencap.org.uk\)](#) (accessed 3/1/23)

⁸⁷ <https://justice.org.uk/our-work/justice-covid-19-response/>

the research online may have maintained lower stress levels of the participants in this study.

Verbal communication rules were explained to all participants before viewing the mock crime and highlighted again for the control group prior to cross-examination. This was carried out as there were no alternative response options available for the control group, as for the test group. This allowed for the question style to be the only dependent variable. Communication rules give the witness with ID 'permission' to disagree with the questioner. This is an important intervention that should not be ignored for its simplicity of nature. Adults with ID are likely to have been brought up within a protective culture and with the belief that others know best. Their 'habitus' (Thompson, 2011) may be one of disempowerment and lack of opportunities for communication development (Bradshaw, 2001; Bradshaw et al., 2013; McConkey, 2010; McConkey et al., 1999). This will be discussed in more detail in Chapter nine.

8.5.3.2 *Don't know and something else responses*

Findings also indicate that choice questions with visuals did not increase the likelihood of the participants providing a 'don't know' or alternative (something else) response. This may be due to the impact of cognitive limitations of the participants as critical thinking is required for these responses. Research by Gudjonsson explained that giving 'don't know' and 'direct explanation' (further explanation) responses require active behavioural resistance and strategic judgments, whereas yielding to a suggestion is more of a spontaneous reaction (Gudjonsson & Young, 2021). A lack of difference between the group results may be because the participants in the control group felt equally as comfortable and confident in stating when they didn't know or to give an alternative answer, even without the visual and verbal prompts. The reasons for this have already been discussed. The visual aids used may simply not have been effective in promoting

don't know and alternative answers. Seeing the visual aids on screen, rather than in person, may have limited clarity and reduced any effectiveness. Alternatively, the visuals and a choice of answers may also have been less effective at reducing suggestibility than other factors relating to both groups, such as environment, pace of questioning and rapport with the researcher.

An additional unexpected finding from this research was the challenges 1/3 of the participants had with retaining understanding of the terms 'victim' and 'suspect', despite regular explanation given. This is in line with research on adults with ID who could only understand 8 out of 34 legal terms (Ericson & Perlman, 2001) and highlights the importance of not assuming understanding of legalistic language.

8.6 Implications for practice

Providing visual choices was not an effective strategy for improving performance in 'cross-examination' for the 30 participants in this study, when compared to simple leading questions. However, there was considerable variation among the participants with ID in their communication abilities, recall skills, accuracy and suggestibility to leading questions. Although greater amount of information remembered about the event resulted in higher accuracy rates, it did not significantly correlate to a reduction in suggestibility. Caution should therefore be advised, in that even though an adult witness with ID may remember a high level of details about an event, they may still be suggestible when questioned. A lower rate of suggestibility compared to other research for these participants may indicate that other factors influence suggestibility, such as: a familiar environment; being questioned online; the physical presence of another familiar person; 'permission' to disagree through communication rules; ID training and experience of the questioner; and sentence structures used. This implies that suggestibility is not just impacted by the style of questions used with adults with ID and these other factors need

to be taken into consideration by the courts. Further research into these factors is required. In addition, the court should consider minimising the use of legalese language during cross-examination for all witnesses with ID and for defendants with ID during the entire hearing. This research implies that, even though explanations of terms such as 'suspects' were provided, some witnesses with ID may not be able to retain these. This language may cause confusion during cross-examination and limit vulnerable defendants with ID to be able to effectively participate in their trial.

Although choice questions with visuals did not impact accuracy or suggestibility for the participants in this study it should be noted that the sample size is small and there was a wide range of results within the participants for the communication assessments, recall, accuracy and suggestibility. Therefore we cannot conclude that choice questions with visuals may not be more suitable than verbal leading questions for other adults with ID.

8.7 Limitations of research

This research has a number of limitations relating to the small number of participants and lack of a control group of adults without ID. The complexity and diversity of communication abilities and challenges for adults with ID is evident in this research, as there is a wide range within the scores. This highlights the need for individual assessments of vulnerable witnesses prior to cross-examination. A control group of adults without ID would have allowed for a direct comparison of results as to whether the participants with ID in this study were more suggestible than adults without ID. The small number of participants and diversity of communication for people with ID, mean that the results may not be applicable for all adult witnesses with ID. No communication history of participants was taken therefore we do not know what visual aids, if any they may have previously used and if effective. In addition, this research was not a real cross-examination, rather it was a contrived situation and therefore less intimidating than giving

evidence during a real hearing. There was very limited delay between observation of the mock crime and 'cross-examination'. Previous research has indicated that interviewing adults with ID about an event as soon as possible after the event is important in reducing the likelihood of suggestibility (White & Willner, 2005). The lack of delay in this research may therefore have reduced the rate of suggestibility. As the participants were not witnesses or victims of a real crime they experienced less emotional involvement, which may impact communication during a live cross-examination. The participants in this research also indicated a lower level of suggestibility using the GSS2 assessment than those in other studies. Further research is required to ascertain whether the intervention of choice questions with visuals is more effective than verbal leading questions for adults with ID who record high levels of suggestibility.

8.8 Conclusion

This study compared accuracy and suggestibility for two formats of cross-examination: simple, short leading questions; and choice questions with visuals, for 30 adults with intellectual disabilities. All formats of the communication assessments and study were carried out online, via zoom. Participants observed a recording of a short mock crime and were asked an open recall question followed by probing questions. Following a 15 minute break participants were randomly assigned to an experimental or control group for cross-examination. The two groups were evenly matched for communication abilities of participants, age and gender. Findings showed no significant differences in accuracy, suggestibility rates, or likelihood of providing an alternative or don't know response, between both formats of cross-examinations. We therefore conclude that although adults with ID may be more suggestible to leading questions than adults without ID, using choice questions with visuals was not more effective than short leading questions for cross-examination of the adult participants with ID. However, if short leading questions

are used in cross-examination of adult witnesses with ID in order to 'put the alternative case' then focus could be placed on adjusting other factors that potentially reduce the suggestibility of the witness, such as: familiarity of the environment; presence of a familiar person; influencing factors of the questioner; and using communication rules to give the witness 'permission' to disagree with the questioner. Further research is required into the influence of these other factors in potentially reducing suggestibility.

Chapter 9. Communication challenges for adult witnesses with intellectual disabilities within the theoretical framework of communication and adversarial process of cross-examination.

9.1 Introduction

Some academics, practitioners, and perhaps the lay person, may be of the opinion that cross-examination exists as a truth seeking operation within the criminal justice system. *“It is to assist in the administration of justice by revealing the truth to the court.”* (Colman, 1973, p.4). However, an alternative held view is that it is less of a truth seeking exercise and more about winning the case (Doak. et al., 2021; Keane, 2012; Morley, 2015).

In fact, cross-examination is considered a battle or a contest to be won (Morley, 2015) and even by the court⁸⁸ as a battle tool *“a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of its story.”* (Doak. et al., 2021, p.25). In order to win the battle, each advocate needs to ensure that the version of events, as portrayed by their client, is believed by the decision makers – the judge or jury. When cross-examining the aim is to discredit the testimony of the witness; to place doubt in the minds of the decision-makers, or even to discredit the witness (Kepardis, 2002; McPeake, 2018; Roberts, 2022). Communication skills are essential armoury for the battle. Skills of personality, persuasion, and presence (Pratt,

⁸⁸ See *Mechanical and General Inventions Co. and Lehwess v Austin and the Austin Motor Co*: HL [1935] AC 346, 359

2003), purposeful body language, tone of voice and emphasis of words, in conjunction with leading question styles that suggest the desired response, are all skilfully used to control the communication exchange (Clark, 2011; Johnson & Hunter, 2009). This control is to influence the witness' responses and ultimately lead the judge or jury to the desired conclusion (Bates et al., 2015; Clark, 2011; Johnson & Hunter, 2009; Morley, 2015; Pratt, 2003).

If indeed cross-examination is a battle, the witness must therefore be the opponent and it could be assumed that the witness also has an armoury store of communication skills to use in the battle. Otherwise it could not be considered a fair battle. If the witness is vulnerable, due to having an intellectual disability (ID), can cross-examination possibly be a fair communication contest?

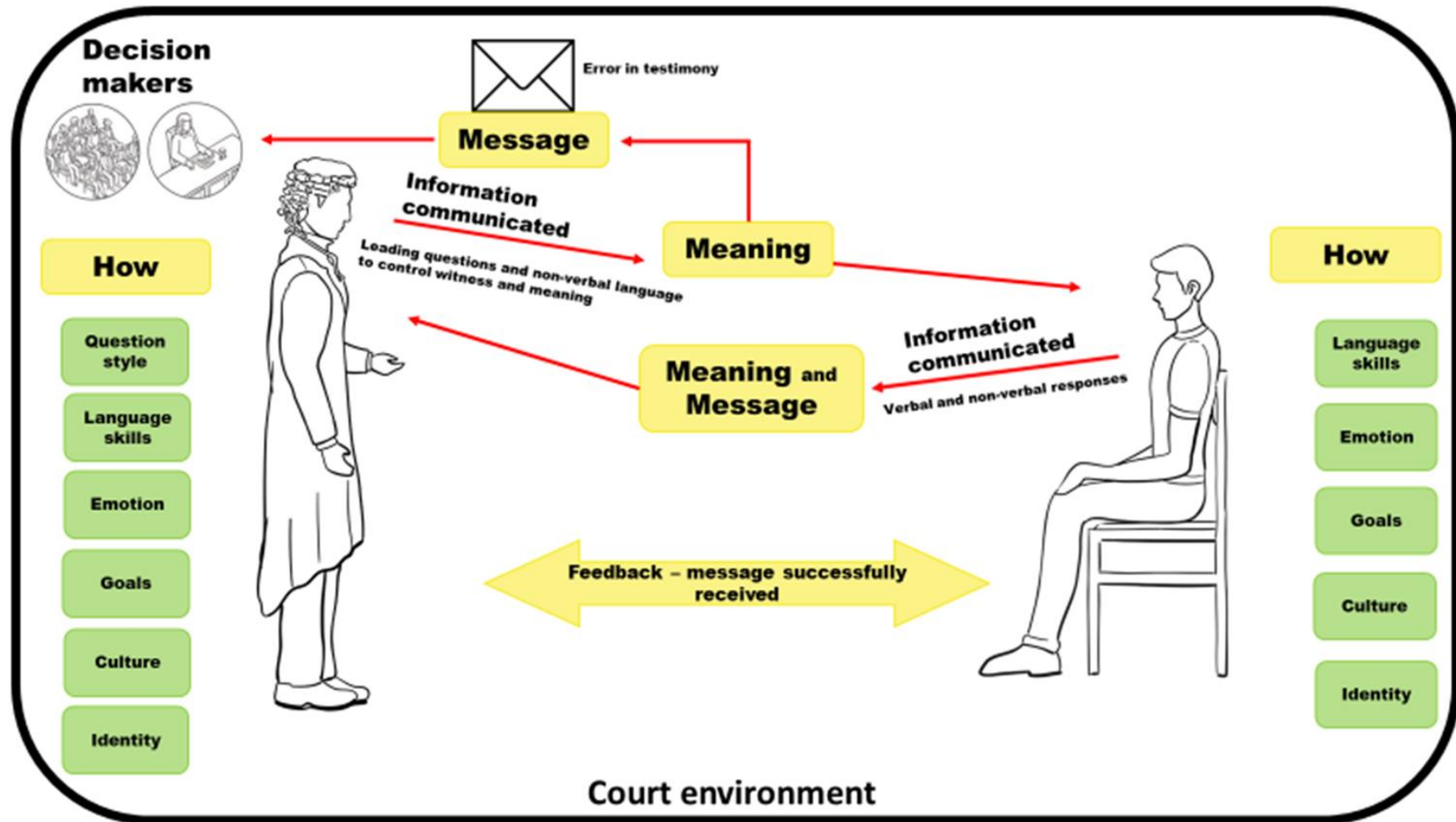
This chapter attempts to answer this question by exploring the communication challenges identified in the systematic review in Chapter six and the empirical study of registered intermediary (RI) court reports in Chapter seven within the theoretical context of communication, as highlighted in Chapter three and the process of cross-examination. A new model of communication will be presented – the Cross-examination Model of Communication.

The empirical study of court reports in Chapter seven highlights a mismatch of communication skills between the advocate and the witness with ID. The communication challenges during cross-examination do not just lie with limitations due to the presence of an intellectual disability, but also with the methods of communication used by the advocates. Chapter three on communication theory explains that a communication exchange is a complex and skilful process, with multiple influencing factors impacting the success of any exchange. The challenge with communication during cross-examination is that it is an untypical and unique form of interpersonal communication.

Although two people are involved in a communicative exchange, advocate and witness, the communication process is more of a one way flow. There are questions from the advocate to the witness, and responses from the witness to the advocate. The witness does not ask questions of the advocate, as in a typical interpersonal communicative exchange⁸⁹. Although only two people are usually involved in the exchange, sometimes a judge may also ask questions, many other people are actually part of the process. Some are mere observers, others have invested interests, and others are the key decision makers. In addition, cross-examination is an unnatural communicative exchange of which the process is very familiar to one partner – the advocate, and usually very unfamiliar to the other partner – the witness. Existing models of communication do not fully explain this unique and complex form of communication. The next section introduces a model of communication (Figure 9.1), that can be used to further analyse the challenges and complexities of communication for adults with ID during cross-examination, and indeed for the advocates, as their communication partners.

⁸⁹ It's interesting to note that a defendant enjoys procedural rights in the trial process that other witnesses do not. For example, the defendant enjoys the right to confrontation through their lawyer, which may involve challenging evidence and questioning of witnesses. (see Owusu-Bempah, 2016)

Figure 9.1 Cross-examination model of
Communication



9.2 Information communicated – what is said

During cross-examination the information communicated is usually the words that the advocate and witness speak, as well as the non-verbal language exhibited. During cross-examination of an adult witness with ID challenges may arise with the language used by the advocate and the language difficulties of the vulnerable witness.

9.2.1 The power of language control

Research presented in Chapters six and seven explains that some language can be problematic for adults witnesses with ID: excessive information, long sentences; unfamiliar language used; and specific questions asked.

They may struggle to understand, retain and process long sentences. If too much information is presented in a question, part of the question can be missed by the witness and lead to inaccuracies in their response. Witnesses with ID may not be familiar with, and can have difficulties understanding, language that is commonly used within the court. Some models of communication state that effective communication exchanges require both communication partners to know and understand a common code (Cobley & Schulz, 2013; Fiske, 1990). Within cross-examination the verbal and non-verbal language used, the manner of presenting language, and the social etiquette expected within the court environment could all be considered to be the 'code'. However, language used in court is not common everyday language, rather it is 'legalese' style language, often presented within long and complex sentence structures (Andrews & Lamb, 2017; Ellison, 2001; Jacobson et al., 2015). Therefore, only one partner, the advocate, fully understands and can use the communication code, thereby disadvantaging the vulnerable witness. The expected social etiquette will be addressed at a later stage.

In addition, specific areas of questioning may cause difficulties and inaccuracies, such as questions of time and distance, 'why' and 'how' questions, particularly questions regarding 'how long' an event lasted for (Morrison et al., 2021). Although the recommendations provided in court reports written by RIs indicate short questions of more simple structures, a lack of research means that we do not know the extent to which these recommendations are being followed by advocates within UK courts.

9.2.2 Language difficulties of the witness

Witnesses with ID may also have difficulties in expressing information. Research in Chapter seven informs of a mismatch in communication between the advocate and the witness with ID. The adult witnesses with ID may have cognitive limitations in the amount of information they can retain and it can take longer to retrieve and recall the information. In formulating responses to questions, some adults may have word finding difficulties and challenges putting the words to use together into full sentences, as well as potentially having speech impediments. Sequencing an event accurately may also cause challenges for the adult witness. These limitations are further negatively impacted if there is too much information given in the question and if difficult question types are used. Advocates, by contrast, have high functioning cognitive skills. In order to be accepted to advocacy Bar training, barristers should have a 2:1 or higher degree in Law (IPLS Queens University, 2019). Advocates are also trained to communicate through emotion and non-verbal language, particularly paralanguage, such as emphasising certain words and using tone of voice (McPeake, 2018; Morley, 2015). The RI reports in Chapter seven highlight challenges with emotions for adult witnesses with ID and how they are expressed, mainly emotions around stress and anxiety. Also witnesses with ID may use limited eye contact due to a lack of social skills, or autism, and not as a result of emotions felt at that time, leading to a potential misinterpretation by the judge and jury. Research indicates that, while the expression of emotions can positively influence the jury, it can

also detract from their credibility when the emotional intensity does not match what jurors consider to be an appropriate display of emotion (Salerno et al., 2018). Is there then potential for a jury to misjudge a display of emotion from a witness with ID if not aware of the impact of stress and anxiety on their emotions and subsequent communication skills? As France comments, *“Communication and speech problems associated with anxiety and other stress related disorders encompass every aspect of speech, language and communication.”* (France, 2001, p. 37). A jury could interpret fidgeting or rocking in a chair as signs that the witness is lying when in reality the witness is experiencing high levels of anxiety. It may be that this anxiety is nothing to do with the facts of the alleged event, but because they saw the defendant when coming into court or perhaps the sensory levels of the defendant witness are heightened, with the unfamiliar surroundings and sounds of the courtroom causing distress.

During cross-examination questions are usually asked of the witness through verbal speech. However, complainants and witnesses who did not have the opportunity of an ABE interview (video recorded police interview used as evidence-in-chief) and defendants, have to rely on reading a written transcript of their police interview. Advocates may also refer the witness to parts of their statement when asking questions. Adults with ID may have limitations in their reading skills⁹⁰ (Morrison et al., 2021) which may cause difficulties in being able to fully and accurately prepare for their cross-examination and follow references made during questioning.

In summary, adult witnesses with ID can be disempowered by the language used by the advocate, the amount of information presented in questions, the type of question asked,

⁹⁰ [ICD-11 for Mortality and Morbidity Statistics \(who.int\)](https://www.who.int/standards/classifications/icd-11)

and the length of questions asked. They may also be disadvantaged by difficulties and differences in their expressive language skills, high levels of stress experienced, and limitations in reading skills. These are in contrast to the advanced cognitive, verbal language, non-verbal language, emotional and reading skills possessed by advocates who are communicating within a familiar environment.

9.3 Meaning and message – what is understood

Once questions are asked, the witness needs to interpret the meaning of the verbal and the non-verbal language used. However, the witness is not the only person in a trial who interprets the meaning of a question asked. The judge and jury, as the decision-makers, also interpret meanings of questions asked and responses given. Moreover, the advocate is skilfully trained to influence the meanings interpreted by the decision-makers.

9.3.1 Control of meaning

The content refers to the interpreted meaning of the verbal and non-verbal language used by the advocate and witness. For the purposes of this cross-examination model, the concept of 'message', adopted from the older transmission model of communication, had been added. Within the cross-examination context the 'message' refers to the intended meaning of the verbal and non-verbal language used by the advocate and also of the response the advocate aims to obtain from the witness. The continuous process model argues that meaning comes from what is perceived during the communicative exchange (Fogel, 1993). Meaning is open to change during the exchange, is individually interpreted and socially constructed (Grove et al., 1999). Advocates are trained to ask leading questions that 'suggest' the response sought and to only ask questions that they already know the answer to (Valdespino, 2004). Therefore, with each question asked,

there is an intended meaning or 'message' that the advocate seeks to deliver to the decision-makers in a trial; the judge or jury. In addition, each question asked by the advocate is not a separate entity, rather each question is merely one 'pawn' used in the striving for checkmate, or one small piece of the jigsaw puzzle. The overall 'message' the advocate seeks to deliver to the decision-makers is that there is error in the witness' testimony and/or that the individual is an unreliable witness. Heath & Bryant (2000) describe the message as a bullet, penetrating the skull to inject ideas into the mind of the intended receiver and building up over time. Advocates, trained and experienced in the process of cross-examination know that their message is directed towards the decision-makers, it is purposely designed to do so. However, it is unlikely that the vulnerable witness with ID would possess the cognitive and pragmatic skills to decipher this complexity of communication or that they would have similar court knowledge and experience as that of the advocate to understand the intricate functioning of the court process. Therefore, the meaning of a simple question from the advocate "Could you see the colour of his hair **clearly** from where you were standing?" combined with a subtle roll of the eyes, a sweeping arm gesture and exasperated facial expression directed towards where the jury is sitting, could easily be interpreted by the adult witness with ID as the advocate simply checking that the witness saw the hair colour, and that a simple 'yes' response is required. However, the message and therefore meaning that the advocate intends the jury members to interpret is that there is doubt as to whether the witness could actually properly see the person's hair colour. It is likely this question, skilfully using verbal language, para-language and non-verbal gestures, would be followed up by further questions, perhaps regarding time of day of the event and distances (such as, "It was dark then, wasn't it?"), and other evidence to further drive through the 'message' that the witness could not possibly have seen the person's hair colour. Therefore, the advocate invites the judge and jury to conclude, that the witness' testimony is unreliable.

In line with the continuous process model, the advocate will continuously 'read' the non-verbal language of the judge and jury and adjust language, as well as the specific questions asked, in accordance with their own interpretation of the meaning the decision-makers are adopting.

It could be argued that the message from the responses given by the witness is also directed towards the judge and jury, however we could question how aware of this the vulnerable witness with ID would be. In addition, the witness with ID is unlikely to have received training in how to control the meaning portrayed with each response delivered. In fact, due to potential limitations and difficulties in expressive language, the meaning interpreted by the advocate, judge and jury of the witness' verbal and non-verbal language may differ significantly from what the witness actually intended to say. Following the publication of a meta-analysis (Vrij & Turgeon, 2018) concluding that jurors should be advised not to consider demeanour when evaluating the honesty of a witness, Denault et al.,(2020) responded that ignoring non-verbal language of a witness is not the solution. Rather the authors suggest that, although not reliable indicators of dishonesty of a witness, *"information, intentions, scripts, or other reactions transmitted by facial expressions and gestures can help you understand witnesses and their verbal testimony better."* (Denault et al., 2020, p.5). However, if a jury is not informed of potential difficulties or differences in the witness' non-verbal language, then the jury members may interpret the witness' language based on their own assumptions, bias, life experiences, culture and understanding of non-verbal language.

9.3.2 Meaning interpreted by the witness

Some witnesses with ID may struggle to understand non-literal content that requires deciphering of the information – 'reading between the lines.' People with ID may have more limited pragmatic skills (Lapadat, 1991; Nydén et al., 2010; Rice et al., 2005;

Stothers & Oram Cardy, 2012), therefore questions that are too abstract in nature and non-literal can be challenging for the vulnerable witness to understand, even if not considered an overly complex sentence structure, e.g. “What did you think John understood was going to happen?” Therefore they are also unlikely not to understand the inferred meaning the advocate is making with a specific question, as well as the overall inference the advocate aims to make. In addition, witnesses with ID may have difficulties in accurately interpreting non-verbal language and para-language that the advocate uses to emphasise or highlight a point made, or to elicit sarcastic undertones. Misinterpretation of the meaning of a question is also likely to result in misinformation of feedback communicated to the advocate and decision-makers, i.e. that the question has been fully understood. This means that the advocate does not accordingly adjust language and sentence structure used and continues in a similar manner, resulting in further confused, incomplete or inaccurate responses from the witness, which may suggest to the judge and jury that the witness is unsure of their facts, whereas they may just be struggling to understand the advocate’s language.

In summary, the advocate skilfully aims to control the meaning the decision-makers attain with each question, as well as the overall meaning of the cross-examination exchange. The message is not directed towards the witness but to the decision makers. The witness with ID is unlikely to have this awareness and is therefore disempowered by this process. In addition, their own verbal and non-verbal language used may be misinterpreted by the advocate and decision-makers.

9.4 How information is communicated

How advocates cross-examine a witness could be considered a highly skilled, complex and effective display of communicative control and power. But is it effective interpersonal communication with a vulnerable witness with ID? Is it effective in testing the veracity,

accuracy and completeness of a vulnerable witness' testimony? Advocates use the tools of question style, emotion, goals, culture and identity in their use of communication.

9.4.1 Using question style

Advocates are trained to ask leading questions during cross-examination in order to control the witness' response and to 'tell' them how to respond (Clark, 2011; McPeake, 2018; Morley, 2015; Pratt, 2003; Valdespino, 2004). These are questions where the answer sought by the advocate is contained within the question. Leading questions are usually presented as tag questions or statements:

- A tag question e.g. "You saw the man, didn't you?"
- A statement e.g. "So you saw the man?"

However, even a simple closed question requiring a yes/no response may be considered to be a leading question, e.g. "Did you see the man?" particularly if the witness is prone to acquiesce and often responds in the affirmative. This question implies that there was a man present, as opposed to a non-leading question "Did you see anyone else?" or "Was there anyone else there?"

Para-language is also used by the advocate to emphasise the response required through tone of voice (Craddock & Thomas, 2017; Johnson & Hunter, 2009), e.g. "You **saw** the man, **didn't** you?"

However, research presented in Chapters six and seven inform that all of these question styles are problematic for witnesses with ID as they may be more suggestible to the leading questions and therefore accept the suggestion given in the question. This can therefore lead to confused and inaccurate responses. In addition, the negative style of

the tag question can cause confusion as to whether the witness responds to the affirmative – you saw him , or the negative – didn't you.

Bar training for advocates would suggest that they are being trained to question witnesses in a way that can be easily understood and processed by the witness. The training seems to parallel some of the recommendations made by RIs in the reports in Chapter seven, that is to ask short, one subject questions in chronological order using simple language at a slow pace. In a section under useful tips, guidance from City University London is for advocates not to use long complicated sentences and tag questions, rather when cross-examining they are told to *“Formulate your questions so that they contain one fact at a time. Use short questions. Do not recite facts at length and then ask the witness ‘Is that right?’ Be clear and concise.”* (McPeake, 2018, p. 173). Bar training in Northern Ireland also teaches advocates to use simple language, a slow pace of questioning and emphasises the importance of listeners being able to ‘decode’ the information given (IPLS Queens University, 2019). However, examples given of effective cross-examination, using a case transcript in the advocacy guidance manual of City University London, whilst including short sentences with a limited amount of information, also include question styles considered by this research to be problematic for adults with ID such as: statements, *“On the early morning of the 1st of February you were left alone in your house with your wife?”*; negative questions with complex language, *“Do you not recollect on that momentous night what time it was you came home?”*; long and complex sentence structure with a tag, *“It would be most important for your defence in this case on the charge of murder if any person could be found who saw your wife alive after the Martinettis saw her alive; you realise that?”*(McPeake, 2018). It must be noted, however, that the witness in the case example is not recorded to have any form of disability, only that these examples are highlighted as good cross-examination.

If not part of advocacy training, it could then be assumed that a complex style of questioning is not commonly used for questioning any witness, regardless of their communication skills. Therefore, the question arises, if advocates are not trained to use long, complex structured tag questions with complex language, then why are these difficulties assessed and recommended by RIs to be avoided? In addition, why is there specific further training recommended in England and Wales for questioning vulnerable witnesses? The Advocacy and Vulnerability training provided by ICCA emphasises 20 key principles of questioning. Included in these principles is to avoid tag and statement question styles, as well as repetitive and leading questions, and consider avoiding 'why' and 'how' questions (Inns of Court College of Advocacy, 2019).

In summary, questioning used during cross-examination empowers the skilled advocate but disempowers the vulnerable witness with ID if typical question styles and leading questions are used by the advocate.

9.4.2 Using language

Cradduck and Thomas coin the term 'mooting' to describe the special form of skilled physical performance the advocate can adopt using vocals, facial expressions and subtle physical gestures to engage the audience (Cradduck & Thomas, 2017). In 1972, Pearce and Brommel claimed that the persuasion skills of an advocate are not just dependent on their cognitive skills of making a legal argument (Pearce & Brommel, 1972), rather, as Cradduck and Thomas explain, it includes *"harnessing body and voice to create credibility"* (Cradduck & Thomas, 2017, p.322). Advocates are trained in the art of presenting themselves at court through regular practical reflective practice, *"Advocacy in itself is a real art, especially witness handling. They become very self-aware of how they are presenting themselves, coming across to the judge, witnesses, members of the public."* (IPLS Queens University, 2019). This behaviour is likely to further disempower

the witness with ID, who is unlikely to have the training, social skills, experience, or cognitive knowledge to capture the audience in this manner. In addition, research from the RI court reports in Chapter seven suggests that witnesses with ID have difficulty accurately interpreting the body language of others and to using it appropriately themselves. There is a risk that this may be misinterpreted by the judge and jury, *“Where a statement is made verbally, which is contradicted by the accompanying body language, it is generally the body language which is given credence”*. (Thompson, 2003, p.100). In addition, the witness with ID may experience behaviours that challenge in their everyday life (Matson et al., 2011) that are more likely to be triggered and by the emotion inducing questions and environment of the court and displayed during questioning.

Therefore, while advocates are trained to use non-verbal language to engage the court audience, witnesses with ID are disempowered by difficulties reading and accurately interpreting the advocate’s non-verbal language and in using non-verbal language in a way that may be deemed typical or appropriate.

9.4.3 Using emotion

Emotion, expressed verbally and non-verbally, is very much intertwined with communication. *“Emotion is now seen as a pervasive phenomenon that is a legitimate concern to communication scholars.”* (Berger, 2014,p.275). Advocates are taught to exercise control over their emotions but also to use emotion, when required. For example there is a belief that expressing indignation and anger might be beneficial for an advocate as it infers competency, particularly during the closing statement (Salerno, Phalen, Reyes, & Schweitzer, 2018). *“Control of his feelings there must be, in particular of his temper. If he cannot, he will not keep control of his tongue and will not keep control of the case. Forensically simulated emotion should be one of the armaments of the advocate”* (McPeake, 2018,p.11). This gives the impression that the use of emotion is a

skill rather than a natural and spontaneous expression of internal feelings. This is not to say that advocates operate in an emotionless, robotic type state. Rather, they are also taught to have an understanding and love of language and humanity. The City Law School training guide for advocates suggests that this understanding and love are not actually skills that can be taught, they are either possessed by the advocate or not. However, advocates are taught that they should demonstrate that they value these qualities and guidance is given as to how to use words to their advantage, but how to value humanity is not specifically addressed (McPeake, 2018). Professor Diane Nixon, Senior Lecturer for IPLS⁹¹ in Belfast stresses that barristers are not paid liars or mouth pieces, rather they act on instructions while exercising their ethical judgement (IPLS Queens University, 2019).

Emotion expressed by a witness is likely to be generated from the internal feelings that relate to their personal situation and having to be questioned about this in the court setting. Therefore emotion is less of a skill and more of a natural expression for the witness. Although that is not to say that some witnesses, in possession of the relevant the cognitive skills, have the potential to skilfully use emotions to give the impression of vulnerability or remorse. However, the relationship between emotions and communication is rather complex. Dillard (1998) identified three ways in which emotions can be involved in the communication process: emotion motivated, emotion manifesting, and emotion inducing. Both the advocate and witness can express emotion in all three manners. For example, sighs of exasperation on behalf of the advocate or annoyance expressed by the witness through a raised voice can be motivated by the underlying emotion. Non-verbal behaviour such as reduced eye contact can manifest the emotions

⁹¹ Institute of Professional Legal Studies

experienced by the witness at a point of time (according to how the listeners may interpret this non-verbal behaviour). Specific questions of an intimate nature, asked by the advocate about an event can induce strong emotions in the witness. However, unlike the advocate, it is unlikely that the adult witness with ID has undergone training in how to respond to emotion motivated, manifesting and inducing information. In addition, what a witness may wish to communicate through their emotions and what they are actually feeling may not be one and the same.

Another factor impacting the display of emotional skills, relevant for witnesses with and without ID, is that of trauma. High levels of emotion linked to early childhood trauma or trauma from a specific event can result in dysregulation of emotions through a fight/flight/freeze response⁹² for the witness and reduce, negatively impact or totally block their communication skills (Ellison et al., 2017; Risan et al., 2020). Therefore trauma related communication difficulties could cause additional disadvantage for the vulnerable witness with ID when cross-examined.

In summary, advocates are taught and encouraged to both control their emotions and to use emotion as a communication tool. The vulnerable witness with ID may not display emotion in a manner deemed typical by the jury. High levels of anxiety and the nature of the questioning may induce further emotions. A high state of emotion in the witness can reduce communication skills and effectiveness.

⁹² Developmental Trauma Training for Professionals, 2020 www.beaconhouse.org.uk

9.4.4 Goals

The purpose of cross-examination is for the truth of the alleged event to be discovered (Colman, 1973; Keane, 2012b). However, this is not necessarily the goal of the advocate. Academics and practitioners argue that in practice cross-examination is not a truth seeking exercise, rather it is to ‘win the case’ (Doak. et al., 2021; Keane, 2012b; Morley, 2015). The advocate has two main goals for cross-examination: to advance their own case and to undermine the opponent’s case (Henderson, 2016a; IPLS Queens University, 2019; McPeake, 2018). They are taught to gain and maintain control at all times (Morley, 2015). In order to advance their case, the advocate is advised to “*elicit favourable testimony*” and develop their case. To undermine their opponent’s case, they can limit the testimony of the witness by highlighting gaps and limitations or discredit the testimony of the witness (McPeake, 2018,p.169). In essence, the goal of the advocate is to suggest or show that the evidence of the witness is not as they have stated in their evidence-in-chief, either because the witness is not telling the truth, they are mistaken or because their interpretation of the facts is different. This is done through leading questions that direct and tell the witness how to respond.

If the goal of the advocate is to show that there are errors in the witness’ testimony, one could surmise that the communication goal of the witness during cross-examination is to defend their testimony, to say that they are correct in their version of events. There is no information provided in the RI court reports in Chapter seven as to the goals of the witnesses but as a number of the reports record difficulties with understanding inferences, there is evidence to suggest that they may have difficulty understanding the goals of the advocate. They may not understand the purpose of leading questions, the motives of the advocate or be able to predict the purpose and focus of a particular line of questioning the advocate is taking in order to ‘tell the story’. Advocates are trained to ‘tell’ the witness, to control the evidence, rather than ‘ask’ (IPLS Queens University,

2019; McPeake, 2018), yet the witnesses with ID might not realise they are being 'told' through leading questions and therefore may not be able to respond appropriately to counteract the information.

9.4.5 Culture and identity

The ability to use communication as a tool could be argued as a method for advocates to operate within a culture of 'power'. They are trained to take control of the witness and to be the voice of their client (McPeake, 2018). They use their voice as a tool and are accustomed to being listened to in court (Johnson & Hunter, 2009). Their verbal and non-verbal communication are used to portray they are in control and know what they are doing. Being in a courtroom setting has become part of their 'cultural norm', it is their place of work, a familiar environment. The courtroom is a formal, ceremonial institution and an unfamiliar environment to most lay persons. Advocates are well educated and therefore have this as a cultural resource to draw from. Thompson, referring to French theorist Pierre Bourdieu who coined the term 'cultural capital', describes this as *"Someone who, through their education and upbringing, has developed greater knowledge and understanding of a range of social circumstances will be in a stronger position to operate within these circumstances to influence people and to communicate with them."* (Thompson, 2011,p.25). Someone with a less cultural capital will be in a much weaker position. Witnesses with ID could be described as having less cultural capital.

Historically, the language used to describe people with ID: unworthy of normal lives; takers from society; unfit; incapable of making any positive contribution (Bouras, 2016; Hansen et al., 2008); idiots; lunatics (Gone et al., 2012); feeble-minded; imbecile; morally defective; moron (McClimens & Richardson, 2010), has all had negative connotations. In definition, there has been a move away from the emphasis of focusing

on IQ and a realisation that other factors such as: adaptive functioning; managing emotions, behaviour and interpersonal relationships; and communication difficulties, need to be taken into account (Bertelli et al., 2016). In more recent years we have seen some transition from institutionalised care, where individuals have had little say in their everyday lives, to more person-centred support in the local community (Emerson & Hatton, 2005; Gone et al., 2012). However, culture takes time to change and for those communicating with witnesses with ID, judges and jury members, their perceptions of the witness may still be influenced by the historical culture of people with ID, which was as people giving inaccurate testimonies and not being viable witnesses (Bowden et al., 2014; Gudjonsson et al., 2000; Harris & Grace, 1999).

Bourdieu also refers to the term 'habitus' as being developed through practice, functionally operating below the level of consciousness and language, but forming a powerful backdrop for our actions and interactions (Bourdieu & Nice, 2010). Thompson refers to this as being like a backdrop of wallpaper, in that it is there but can go unnoticed (Thompson, 2011). It could be said that the 'habitus' for advocates is that of empowerment and for adults with ID it is disempowerment. The culture they have been brought up in has focused on their difficulties and disabilities, what they cannot do, people needing to be taken care of. The labels they have received of their diagnosis and intellectual impairments have perhaps been developed from their school days. It is recorded in the RI court reports in Chapter seven that some witnesses went to special schools or struggled academically in school. This is a contrast to the high level of education achieved by advocates. A diagnosis of ID or learning difficulties can impact all aspects of an individual's lives and opportunities available to them. McClimens and Richardson explain that medics who have the power to provide a diagnosis of ID can also *"exert power over access to education, through employment law and through the courts, significantly influencing the lives of many people with ID"* (McClimens &

Richardson, 2010,p.19). Communication and language are integral parts of the creation and development of identity (Thompson, 2011). People with ID are usually segregated from society through the education system, training and employment systems. They have fewer life opportunities than those without ID to develop social skills (Bradshaw, 2001; Bradshaw et al., 2013; McConkey, 2010; McConkey et al., 1999). It is possible that the risk of suggestibility to leading questions, as highlighted in some of the reports, is not only influenced by the style and complexity of questions and cognitive impairments within the individuals, but also because of their cultural influences. A lifetime of being labelled as having ID or learning difficulties along with other conditions such as ADHD, autism and anxiety disorder, may also have resulted in an attitude of, 'others know best'. If the questioner says that, then it must be true.

Allegations continue to emerge of regular long term abuse in institutions within the UK, in places such as Winterbourne View, National Autistic Society care home in Somerset and more recently Muckamore Abbey in NI.⁹³ Abuse is more likely to develop in situations of power imbalance between individuals and institutionalised cultures (Jackman-Galvin & Partridge, 2022). Living in such cultures would undoubtedly impact on how individuals with ID communicate with persons in positions of power within the court environment, perhaps making them less likely to correct a questioner or say when

⁹³ [Transforming care: A national response to Winterbourne View Hospital \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

[Seven years on from Winterbourne View, why has nothing changed? | Saba Salman | The Guardian](#)

Muckamore Abbey Hospital Inquiry (mahinquiry.org.uk)

they do not understand. The RI reports in Chapter seven highlight a reluctance of the witnesses to say when they do not fully understand the question or need it repeated and being overly compliant, resulting in them guessing the answer, giving irrelevant responses, acquiescing or confabulating. Some witnesses explain this reluctance as embarrassment or fear of appearing stupid.

It is perhaps this fear that also drives some witnesses to mask their lack of understanding and using body language or gestures to 'say' that they do understand. This fear or masking lack of understanding will limit the likelihood of the witness accurately feeding back to the advocate when they do not understand a question.

In summary, advocates are familiar with communicating from a position of power. Witnesses with ID are more likely to have been brought up with and live in a position of disempowerment and bring this identity to the courtroom. The formidable and formal culture of the courtroom further empowers the communication skills of the advocate while further disempowering the communication skills of the vulnerable witness with ID.

9.4.6 Court environment

Even if not intentionally or consciously done so by the advocate, the court environment can be used to empower the communication skills of the advocate and further disempower the skills of the witness with ID. The environment in which a communication exchange takes place has impact on the effectiveness of the exchange (Moss, 2015; Van Der Gaag, 1989). It has already been suggested that the witness is in a weaker position of 'cultural capital' as they are not as experienced or knowledgeable about the culture of the court. They are also not as familiar with the environment of the court; the formality, routines, language used; and order of events, which is likely to raise levels of stress and anxiety. It is recorded in the RI court reports in Chapter seven that the

witnesses with ID already experience high levels of anxiety in their everyday lives. Individuals with trait anxiety are more impacted by communication challenges when faced with situations inducing state anxiety (Edwards et al., 2015; Eysenck et al., 2007). Attending court is inarguably one of these situations for any witness. The witnesses in the RI court reports informed being anxious about the trial process. High levels of anxiety reduce the witness with ID's receptive and expressive language skills (Bettenay et al., 2015). Anxiety has also been associated with reducing ability to accurately interpret non-verbal behaviours of others (Hall & Knapp, 2013). Delays on the day of court, the questioning process, fear of seeing the defendant and previous court experiences are all factors highlighted that can further exacerbate stress and anxiety for the vulnerable witness with ID.

The model in Figure 9.1 shows, that although the witness may be at eye level with the advocate (on a raised witness box or on video screen) they are seated while the advocate stands. Advocates can use this advantageous position, along with their body language and paralanguage to reinforce their position of power. It is interesting to note however that, following the Gillen Report in NI (Gillen, 2019) a recommendation made in the updated case management protocol for vulnerable witnesses in the crown courts, calls for trials to be held in courtrooms where all participants are on the same level (Lord Chief Justice's Office, 2019). The author is not aware of any research indicating that these changes have been implemented, nor has she witnessed this in her own court experiences in Northern Ireland.

The courtroom, by nature, requires more formal behaviour than in everyday life. Advocates are taught etiquette of how to dress and behave when in court. The wearing

of a wig and gown is written into the NI bar code of conduct⁹⁴ with further guidance on colour of suit, shoes and addition of a neck collar and the exact positioning of the wig, *“The wig should be straight and not worn at an angle”* (p.44). The attire of the advocate indicates a high level of formality, which is followed through into the guidance on behaviour: stand when the judge enters; sit down if opponent rises to object; and specific forms of addressing the judge, depending on the court – ‘your honour’, ‘your worship’ ‘my Lord/Lady’ (McPeake, 2018). This formality forms part of the advocate’s daily working life and is likely to become ‘second nature’. The overall impression given by this formal behaviour is one of respectful power.

In contrast, the witness is unlikely to be very familiar and well versed on the court rules of behaviour. Impressions of disrespect and lack of credibility may therefore be made by the advocate, judge and jury, based on the witness’ non-verbal behaviour. In their paper on witness credibility, Porter and Ten Brinke (2009) claim that judges rely heavily on the witness’ demeanour and their appearance, *“Evaluations of trustworthiness appear to be influenced by a reliance on faulty information derived from the face during the inferential process”* (Porter & ten Brinke, 2009,p.127)

Therefore, the court environment, familiar and empowering for the advocate, further disempowers the witness with ID with its formality, rituals and unfamiliarity.

⁹⁴ <http://www.barofni.com/page/code-of-conduct>

9.5 Conclusion

In concluding, the usual, traditional format of cross-examination within an adversarial trial is an unfair battle of communication for the vulnerable witness with ID. The process is an unnatural and untypical form of interpersonal communication that is very familiar to one communication partner and likely to be very unfamiliar to the other. It is therefore a process that further empowers the already advanced communication skills of the advocate while disempowering the already more limited communication skills of the adult witness with ID. There is a mismatch of communication skills between the communication partners with regards to: verbal and non-verbal language used and understood; intended meaning and understood meaning of language used for each question asked as well as overall meaning intended by the advocate; and the use of language by the advocate. Various factors of the cross-examination process can be skilfully used by the advocate to enhance communication while the same factors are likely to further disempower and de-skill the witness with ID. These factors include: question styles used; mooting skills of non-verbal language; complex and legalise verbal language typically used within courts; emotion; goals; culture and identity; and the court environment.

Chapter 10. Conclusion

Communication is a complex and vast area of study. Interpersonal communication is defined as interaction between two or more people (Berger, 2014). Communication theories indicate that interpersonal communication requires a two way flow of communication using verbal and non-verbal language. Communication during cross-examination in a court could be described as interpersonal communication, in that it usually involves communicative exchange between two people – the advocate and a witness. However, as this thesis presents, cross-examination does not adopt the format of a typical communicative exchange, rather it is unique and complex. Although cross-examination mainly involves two communication partners, it does not permit a typical two way flow of communication, rather it demands a one way flow of verbal questions put from the advocate to the witness. However, this communicative exchange does not follow the transmission model of communication, as in a simple flow of information from sender to receiver, it is much more intricate and complex than that. For example, the questions the advocate puts and the answers received are really intended for those outside the two-person communication exchanges, i.e., for the judge and jury. The continuous process model of communication may be applied, to a certain extent, in that both the advocate and the witness co-regulate their communication in response to the verbal and non-verbal information provided by their communication partner. However, this model is also limited in explaining cross-examination, in that the witness is not permitted to ask questions in response, rather only to respond to the questions asked. In addition, when one of the partners has an intellectual disability (ID) there is a mismatch of communication skills that impact the vulnerable witness' ability to co-regulate their communication and to communicate effectively in order to provide their best evidence.

This thesis aimed to address three research questions regarding communication and cross-examination:

1. What are the main communication challenges for witnesses with ID when giving evidence in court?
2. Is there a better question style for advocates to cross-examine vulnerable witness with ID?
3. What is communication within the context of cross-examination and how does this communication impact witnesses with ID?

10.1 Communication challenges for witnesses with ID when giving evidence in court

The main communication challenges for witnesses with ID when giving evidence in court are discussed in Chapters six and seven. Chapter six is a systematic review and identified six key challenges:

1. More limited information provided in free recall
2. Suggestibility to leading questions and potentially to negative feedback from the questioner
3. Acquiescence, that is responding in the affirmative regardless of the content of the question
4. Lack of understanding of court language
5. Memory limitations, suggestibility and likelihood of acquiescence, all linked to lower IQ

6. Specific question styles used by the questioner were more likely to lead to inaccurate responses – statements, tag questions and closed yes/no response questions.

Chapter seven examined court reports written by registered intermediaries in Northern Ireland for 19 adult witnesses with ID. Results demonstrated a wide range of challenges, linked to the communication skills of both the witness with ID and the advocate, concluding that communication difficulties with a vulnerable witness in court cannot be fully attributed to cognitive and adaptive functioning limitations of the witness. Rather they are also dependent on the verbal and non-verbal communication skills of the advocate to be able to effectively present information and ask questions of the vulnerable witness.

While there are some key themes to communication difficulties for adults with ID, there is also a wide variety and range of difficulties. This suggests the need for a person centred approach when considering the communication difficulties, needs and adjustments required to effectively question a vulnerable witness with ID. This also highlights the importance of the RI role in assessing and advising the court on each individual vulnerable witness.

10.2 Is there a better question style for advocates to cross-examine vulnerable witness with ID?

The style of questions used during cross-examination is a factor influencing communication effectiveness. Question styles are highlighted in the systematic review and the study of RI court reports, as well as in the guidance of the Advocates Gateway

online toolkits⁹⁵ and the 20 key principles used as a basis for vulnerable witness training for advocates in England and Wales.⁹⁶ A number of question styles are highlighted as being problematic for witnesses with ID, including: statements; tags; forced choice; closed questions requiring yes/no responses; why, how, negative and repeated questions. Questions that are leading in nature are also highlighted in research as being problematic for adults with ID, as they are more likely to be suggestible and agree with the response suggested in the question. The ICCA 20 principles advises that leading questions should be avoided, even those that are of short and simple construction. Toolkit four of the Advocates Gateway resource suggests providing vulnerable witnesses with 'don't know' and an alternative 'something else' responses when questioning. Chapter eight, therefore, is an empirical study examining whether questions with choice answers and visual aids reduce the likelihood of suggestibility, compared to short and simple leading questions, for adult witnesses with ID. The research concluded that there were no significant differences between groups for accuracy, suggestibility or likelihood of the 30 participants in the study responding with a 'don't know' or 'something else' alternative answer. In fact, the most common response for both groups was to disagree with the leading question. However, the findings did highlight potential difficulties for adult witnesses with ID being able to understand court legalese language (such as, witness, victim, suspect) even if explanations are provided. This raises potential difficulties, particularly for defendants with ID, in being able to understand and follow proceedings and therefore fully participate in their trial. It highlights the need for courts

⁹⁵ See www.theadvocatesgateway.org

⁹⁶ [20-Principles-of-Questioning-2022.pdf \(icca.ac.uk\)](#) accessed 29/7/22

to change the formal and legalese language used throughout the trial of a vulnerable defendant with ID and not just when the defendant is giving evidence.

This thesis has not been able to identify a specific question style that is recommended to use in cross-examination of an adult witness with ID. Results from the small number of participants in Chapter eight suggest that these witnesses may be able to withstand the suggestions within short, simple leading questions if other factors are considered and adjusted; communication rules giving permission to disagree with the questioner, a familiar environment, presence of a familiar person, and experience of the questioner in communicating with people with ID. Communication rules are an easy adjustment to make and can be given verbally or with a relevant visual aid, depending on needs of the individual. As regards environments, the courts in England, Wales and NI have already moved towards less intimidating environments with special measures of screens and live link rooms and giving of evidence from a different building. However, it could be argued that these locations would still not be considered a familiar place by the witness even with a familiarisation visit. Likewise, a registered intermediary (RI) may also be considered to provide a familiar presence for the vulnerable witness. However, this may be dependent on the number of times they have met with the RI beforehand, and the RI would certainly not be considered as familiar as perhaps a family member or support worker. The experience of the questioner is another factor highlighted by the research in Chapter eight as potentially reducing the participants' suggestibility to leading questions. This researcher has many years of experience communicating with children and adults with ID, perhaps resulting in an easier and more natural building of rapport with the participants and in the use of a different pace, tone, volume of voice, and co-regulating of non-verbal expressions than an advocate would use in court. Her communication skills have not been taught in a training programme, rather they have been learned from people with ID through ongoing direct communication. The courts in

England, Wales and NI are currently expecting advocates to adapt and change their skills, despite the likelihood of them having had limited direct experience of communicating with people with ID. Advocates have been trained to use their voice and non-verbal communication, to elicit particular answers, and have perhaps many years of practicing communication using methods that are deemed suitable and relevant for the skills required within the court environment, but are contrary to enabling effective communication with people with ID. These are specific skills for the purpose of: challenging evidence; rooting out unreliable witnesses; rooting out witnesses who are lying; and undermining the opponent's case. Leading questions are the crux of cross-examination within an adversarial system and the recommended question style advocates are trained to use. When there is a court case with the special measures of a RI for a vulnerable witness the advocate, who is more experienced in court communication, is now required to totally adapt their communication style and skills and ask questions in a way that is deemed suitable by the RI (as approved by the Judge). The Court of Appeal in England has stated that advocates are assumed and expected to be able to question a vulnerable witness in a way that is effective and can be understood by the witness:

"Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer.....An advocate would in this court's view be in serious dereliction of duty to the

court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks” (para.80).⁹⁷

In NI, advocates have therefore been expected to do this since the implementation of the RI scheme in 2013, yet they have not received any training to learn a new communication skillset required for vulnerable witnesses. It is suggested here that the courts have underestimated the communication skills required for effective communication with vulnerable witness and it is proposed that following RI recommendations is actually very complex and challenging to do effectively. Findings from this thesis would disagree with the court in *R v Rashid*, i.e., that it is not simply a matter of using open questions of short, simple sentences, easy to understand language and grammatically simple sentences structures in a neutral tone of voice. If the witness has ID then open questions may result in limited responses, questions of short and simple grammatical construction can still be considered to be leading, as 30% of questions asked in the research in Chapter eight were agreed with by the participants. What constitutes easy to understand language is very subjective and depends on each individual. What is considered a neutral tone of voice can vary and be impacted by accents and cultural factors. In addition, external factors such as delays and the court environment are likely to be outside of the advocate’s power to control, yet may have acute impact on the effectiveness of the communication exchange during cross-examination. In 2019, the Lord Chief Justice of NI recognised the profound change that is required to the process of cross-examination for each vulnerable witness, when he wrote:

⁹⁷ *R v Rashid* (2017) EWCA Crim 2

“All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. This may mean departing radically from traditional questioning techniques in the cross-examination of a vulnerable witness. The form and extent of the cross-examination will vary from case to case.” (Lord Chief Justice’s Office, 2019, p.20)

This researcher’s recent experience of being involved in advocate and RI training in NI would confirm the challenges of adapting to this change. A mock cross-examination, as part of the first vulnerable witness training in NI⁹⁸ resulted in most advocate participants claiming to find it very challenging to adapt communication in order to cross-examine a vulnerable witness in line with the RI court report recommendations. This is even when having time to prepare the questions beforehand. Likewise, as part of a self-directed learning workshop in Northern Ireland⁹⁹ RIs were given a list of questions created by advocates for cases and were tasked with rewording the questions to be suitable for the specific needs of a vulnerable witness. They were also asked to consider how the advocate could ‘put the alternative case’ to the witness. The overwhelming feedback from the RIs was the level of complexity and challenge involved in rewording the questions and the requirement for more context to each question. This emphasises the need for joint training for RIs and advocates and for both professionals to work together in preparing questions for the cross-examination of a vulnerable witness.

⁹⁸ Through Institute of Professional Legal Studies, Queens University, Belfast, 2022.

⁹⁹ RI CPD training 22nd March 2023

10.3 Communication within the context of cross-examination and the impact on witnesses with ID.

Chapter eight alludes to external factors that may impact the effectiveness of a communicative exchange between the advocate and vulnerable witness. The chapter concludes that it was possible that a familiar environment, the presence of a person known to the witness, and communication rules giving permission to disagree with the questioner, may reduce the risk of suggestibility to leading questions for adult witnesses with ID, thereby increasing the effectiveness of a communication exchange. This hypothesis needs further testing to be certain of its veracity, but it may be that the unfamiliar and formal setting of a courtroom is overwhelming and intimidating for the witness with ID, even if visual aids are used, thereby reducing the effectiveness of communication. Although vulnerable complainants and witnesses are likely to give evidence via a live link room, they usually still have to enter a court building and are not in their everyday environment. Vulnerable defendants still usually give their evidence and are cross-examined in the courtroom. In addition, vulnerable witnesses do not have the presence of someone very familiar to them, as was the case for participants in the empirical study in Chapter eight.

Chapter nine addresses the theoretical framework of communication within the adversarial process of cross-examination and introduces a new model of communication for discussing the key communication challenges. It highlights a range of factors that impact communication, linked to each partners' communication skills, emotions, culture, identity, and goals. In addition, it highlights factors related to the court environment and the cross-examination process, within an adversarial system, that can impact the effectiveness of the communication exchange between an advocate and witness during cross-examination. This chapter concludes that the format of cross-examination within

an adversarial trial is an unfair battle of communication as it further empowers the already advanced skills of the advocate while disempowering the already more limited skills of the vulnerable witness with ID.

This thesis has also highlighted the need for research on cross-examination of witnesses with ID within the UK courts. There needs to be access to live cases for research observations and transcripts/recordings of cases. This vital research would provide information on what is actually happening in practice and answer questions such as: how are vulnerable witnesses being questioned; what challenges are they encountering; to what extent are advocates following RI recommendations for best communication; what challenges are advocates encountering; what challenges do these recommendations raise for the functioning of the courts and purpose of cross-examination? In addition, further research could potentially identify other areas within court proceedings where communication issues arise and potential changes are required. Furthermore, more research is required to investigate the extent to which vulnerable defendants with intellectual disabilities are able to follow and participate in all sections of proceedings of their trial.

10.4 Implications of research for practice and future action required

The following recommendations of changes to policy and practice are informed by a combination of research and practice. Some are subject to further research requirements.

10.4.1 Cross-examination policy and practice

Current policy on cross-examination of vulnerable witnesses in UK courts is defined by legislation set out within the YJCEA¹⁰⁰ and the Criminal Evidence (NI) Order 1998. The legislation includes eight special measures that vulnerable and intimidated witnesses can request of the court:

1. Screen around the witness box
2. Evidence given by live link from outside the court
3. Evidence given in private (members of the public and press excluded)
4. Removal of Judge and Barristers' wigs and gowns in crown courts
5. Video recorded police interview used as evidence in chief (ABE)
6. Cross-examination may be recorded in advance of the trial
7. The use of an intermediary
8. Aids to communication¹⁰¹

In practice, the Court of Appeal has concluded that competence of an advocate to cross-examine a vulnerable witness includes the ability to ask questions without 'tags, short and simple sentence structure, easy to understand language and grammar, and use of open style questions (see *R v Rashid* 2017, EWCA Crim 2, para.80). However, while research and guidance from the Advocates Gateway and vulnerable witness training, based on ICCA 20 principles, informs of what 'not to do', there is very little practical guidance for advocates on question

¹⁰⁰ Youth Justice and Criminal Evidence 1999 Act

¹⁰¹ Sections 23-30 of YJCEA 1999; Criminal Evidence (NI) Order 1998, as amended by the Justice Act (NI) 2011

styles to use to carry out cross-examination of vulnerable witnesses that ensures effective communication takes place. While communication needs of vulnerable witnesses is very individualistic, for adults with ID, this thesis provides six specific recommendations that could be applied to all cross-examinations of these vulnerable witnesses. In addition, these recommendation should be applied for the cross-examination of all witnesses in hearings where the defendant has ID. These recommendations include:

1. Short questions on one topic
2. Simple (non-legalese) language
3. Chronological order of questioning
4. Slow pace of questioning
5. Regular breaks provided
6. Rules of communication provided – permission to ‘not know’ and to disagree with the questioner

If these recommendations were adopted as standard practice for all relevant hearings then the intermediary would be able to focus communication assessments on other factors and make recommendations on factors more person specific to the vulnerable witness’ needs. Chapter eight also highlighted potential impact of a familiar person with the vulnerable witness when cross-examined. This is an area that requires further research and potential development.

10.4.2 Legal practice for advocates and intermediaries

Chapter seven highlighted a mis-match of communication between an advocate and witness with ID. When the cross-examination model of communication is applied to witnesses with ID it is clear that the process empowers the communication skills of the

advocate and disempowers those of the witness with ID. Chapter eight highlighted factors, not relating to question style, that may empower and upskill the witness with ID to be able to withstand the suggestibility of leading questions. One of these potential factors was the questioner. We now need to ask if the current process of cross-examination creates a mis-match of communication and disempowers the vulnerable witness. If so, can changes within the questioner help bring some balance to the communication exchange? Two options are proposed:

1. The advocate asks questions that are pre-prepared with communication input from the RI
2. The RI asks the witness the questions that are pre-prepared by the advocate with communication input from the RI.

Option one maintains the placement of priority on legal and advocacy skills for effective communication in cross-examination. Although pre-preparing of questions may be emerging and current practice in the UK, it is proposed that the level of input from the RI increases and the RI receives legal training to be able to have greater understanding of the cross-examination process and to be able assist the advocate with wording of the questions. The RI would not have input into what questions are asked only in how they are worded and presented. The benefit of this option is that it is more likely to be accepted by advocates as it is simply further development of current practice. In addition, it allow for the focus and emphasis to remain on skills of legal advocacy required for an adversarial cross-examination. However, the greatest responsibility for effective communication still rests with the advocate. There is still the expectation for the advocate to possess the knowledge, skills and willingness to change perhaps a lifetime of practice and question a vulnerable witness in a very different way and using a different communication skillset. A professional with potentially years of expert practice honing

cross-examination skills that use specific language, questions styles and non-verbal skills to put an alternative case and discredit the testimony of the witness.

Option two adopts the approach that the professional skillset of communicating with vulnerable people is of greater importance in empowering the communication skillset of the vulnerable witness and is therefore more likely to bring balance to the communication equation. As with option one, the advocate still has control over what questions are asked, the RI has no input into the subject matter of the questions, however, they deliver the questions to the witness. There is an argument, which already exists regarding written preparation of questions, in that advocates need the flexibility to ask questions in response to answers given by the witness. The counter argument would claim that this is still possible, particularly with effective joined up working between the advocate and RI. Positioning of both within the courtroom in a way that promotes this working is also important to consider. However, other protestations could also be made in that this approach requires a more radical change to practice and culture and the high level of involvement by the RI may be considered as contrary to their neutral role in the court proceedings. Both option one and two require further consideration and research.

10.4.3 Training

Both of the above mentioned options require specific and directed training. Training suggestions include:

1. Advocate training in questioning vulnerable witnesses with ID, including mock cross-examinations with actors with ID
2. RI training in the process of cross-examination and 'putting the case'
3. Joint advocate and RI training in preparing cross-examination questions and mock cross-examination with actors with ID

4. Combined judge, advocate and RI training to include key communication challenges for vulnerable witnesses when giving evidence and discussion of changes to make to practice. This would include preparation of questions and mock cross examination with actors with ID.
5. Training for judges and advocates on intellectual disability and communication challenges when giving evidence in court.

10.4.4 Potential future action

In order to achieve the proposed recommendations from this thesis a specific plan is required. Whilst any such plan demands flexibility and is subject to funding it is possible to create an outline plan of action:

1. Publications of chapter eight empirical research and the cross-examination model of communication.
2. Contact to be made with the Recorders of Belfast and Londonderry offering training and research presentations to local judges. The presentations could include:
 - Communication challenges for adult witnesses with ID when giving evidence in court
 - Elements within the court setting that may impact the communication skills of vulnerable witnesses with ID

Training to be offered to judges could include:

- Judge only training on rewording typical cross-examination questions
- Joint judge/advocate/RI training on rewording typical cross-examination questions

- Joint judge/advocate/RI mock cross-examination with actors with ID
3. Contact could be made with the NI Bar library and Professor Nixon of Institute of Professional Legal studies, to offer training to advocates on:
- Communication challenges for adult witnesses with ID when giving evidence in court
 - Elements within the court setting that may impact the communication skills of vulnerable witnesses with ID
 - Training and practical communication guidance on preparing to consult with a witness with ID
 - Joint judge/advocate/RI training on rewording typical cross-examination questions
 - Joint judge/advocate/RI mock cross-examination with actors with ID
4. Further research subjects include:
- Cross-examinations of adults with ID – what is happening in practice?
 - Observations of advocate and vulnerable witness non-verbal language during cross-examination
 - Development of a new suggestibility test using a visual mock crime
 - Research on vulnerable witness experience of cross-examination in court
 - Comparison of RI and advocate as the cross-examination questioner of vulnerable witness with ID

Appendix 1



Tizard Ethics Feedback Form

Student Name:	Joanne Morrison
Supervisor:	Jill Bradshaw & Glynis Murphy
Title:	<i>What communication challenges for witnesses and defendants with intellectual and developmental disabilities are being made by Registered Intermediaries in courts in Northern Ireland?</i>
The Chair has considered the amendments and confirms that the proposal now has ethical approval. Signed: J.Ruffels Date: 28.11.18 On behalf of Tizard Ethics Committee	

Alterations approved by Supervisor	 20.11.18 Signature Date
Final approval On behalf of Tizard Ethics Committee	 Michelle McCarthy Signature Date 28.11.18

Appendix 2

Tizard Centre, University of Kent
Canterbury, Kent, CT2 7LZ

Researcher: Joanne Morrison

Email: sim87@kent.ac.uk

Telephone: 07738682331

Tizard Ethics Committee

Secretary: Jo Ruffels

Email: J.Ruffels@kent.ac.uk

Telephone: 01227 827955



Consent Form (Registered Intermediary)

Identifying the main communication challenges for witnesses with an Intellectual/Learning Disability.

Thank you for considering taking part in this research. If you have any questions please ask a member of the research team before you decide whether to take part by contacting Joanne Morrison (sim87@kent.ac.uk), or the supervisors of the study:

Dr Jill Bradshaw, Tizard Centre, University of Kent. Tel: 07710088477 or email: j.bradshaw@kent.ac.uk

Professor Glynis Murphy, Tizard Centre, University of Kent. Tel: 01227(82)3960 or email (g.h.murphy@kent.ac.uk).

Tizard Centre ethics can be contacted through Jo Ruffels, email: j.ruffels@kent.ac.uk. You will be given a copy of this Consent Form to keep and refer to at any time.

Please tick

I confirm that I have read and understood the information sheet dated 24/9/18 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.	
I understand that my participation is voluntary and that I am free to refuse without my employment or legal rights being affected.	
I understand that if I withdraw from the study, prior to final collation and publishing, the data collected up to that point will be destroyed.	
I agree that the court report(s) I have written that have been identified by the ISS office as suitable for this study can be anonymised and forwarded to Joanne Morrison to be used in this study.	

Name of Participant (please print) _____

Signed _____ Date _____

Name of Researcher (please print) _____

Signed _____ Date _____

Appendix 3

Tizard Centre, University of Kent

Canterbury, Kent, CT2 7LZ

Researcher: Joanne Morrison

Email: sjm87@kent.ac.uk



Registered Intermediary Information Sheet

Title: Communication challenges in court for witnesses with intellectual/learning disabilities.

Dear

A court report written by you in your capacity as a Registered Intermediary has been identified as being suitable by the Intermediaries Services Secretariat (ISS) for my PhD research study and you are being invited to take part by providing permission for your report to be included in this study

Your participation in this study is entirely voluntary. Before you decide whether you want to continue to participate it is important for you to understand why the research is being conducted and what it will involve. It has been approved by the Tizard Centre, University of Kent ethics committee.

What is the purpose of the study?

The purpose of this study is to highlight the key challenges being identified by Registered Intermediaries in Northern Ireland for victims, witnesses and defendants with learning disabilities when participating in a court trial. I will be examining 25 court reports to ascertain the key challenges RI's are highlighting and to compare these with research gained from published experimental studies. I will not be examining the content of the report as to how it is written or presented.

Do I have to take part?

Your participation in this study will be entirely voluntary. It is up to you to decide whether or not to take part. If you do not wish for your report to be included, please inform the ISS office. This information will not be shared with me. If you decide to take part you are still free to withdraw however, this might not be possible once the reports have been anonymised, information extracted and findings published.

How will confidentiality be ensured?

Material gathered during this research will be treated as confidential and securely stored. The ISS office will anonymise the court reports and remove any identifiable material prior to forwarding to me. In addition, I will not be made aware by the office of the names of RI's who are participating or choosing not to participate in this study. In addition to the information in the report, the only information I require is brief information regarding the nature of the crime, such as: physical assault or sexual assault and the type of witness, i.e. victim, defendant.

What will happen to the results of the research study?

The information you provide us with will hopefully be published in a legal journal to further inform advocates and the courts of the communication needs of vulnerable witnesses. Specific individuals will not be identifiable from the results as no names will be used. At the end of the study I will send you a summary of the results and present findings at a RI quarterly meeting. Again, the RI's who chose to take part in this study will not be identifiable.

Who is organising and funding this research?

This research is being organised by PhD student Joanne Morrison and funded through the University's Vice Chancellor award.

Contact

Please do not hesitate to contact Joanne Morrison or her supervisors, Jill Bradshaw and Glynis Murphy, of the study if you have any queries (e-mail: sjm87@kent.ac.uk; j.bradshaw@kent.ac.uk; g.h.murphy@kent.ac.uk. Tizard Ethics committee can be contacted through the Secretary Jo Ruffels, email: j.ruffels@kent.ac.uk. If you wish to take part, please complete the consent form attached to this information and email back to the ISS office.

Appendix 4

Tizard Centre, University of Kent
Canterbury, Kent, CT2 7LZ

Researcher: Joanne Morrison

Email: sjm87@kent.ac.uk

Telephone: 07738682331

Tizard Ethics Committee

Secretary: Jo Ruffels

Email: J.Ruffels@kent.ac.uk

Telephone: 01227 827955



Complaints Procedure: October 2018

Identifying the main communication challenges for witnesses with an Intellectual/Learning Disability.

Thank you for agreeing for your court report(s) to be used in this research

I welcome feedback about your experience.

If you have any questions, concerns or complaints regarding this research please do not hesitate to get in contact.

You can contact:

Joanne Morrison at Tizard Centre (sjm87@kent.ac.uk Tel: 07738682331)

If Joanne is not able to help resolve your question, concern or complaint, please contact her supervisors:

Dr Jill Bradshaw, Tizard Centre, Tel: 07710088477 or email: j.bradshaw@kent.ac.uk

Professor Glynis Murphy, Tizard Centre, Tel: 01227(82)3960 or email:

g.h.murphy@kent.ac.uk.

or

Jo Ruffels, Secretary of Tizard Ethics Committee

Email: J.Ruffels@kent.ac.uk

Telephone: 01227 827955

Appendix 5

Would you like to help with research?



My Name is Joanne Morrison. I am a
PhD student at the Tizard Centre,
University of Kent.

**I am looking for adults with learning disabilities to take part
in research.**

I am looking at different types of questions that could be used
when adults with learning disabilities give evidence in court. You
will watch a video of a mock crime and then I will ask you
questions about it. The research will take place online.

For more information open the document attached.

**To take part please contact Joanne Morrison on
07738682331 or email sjm87@kent.ac.uk**

Information Sheet



Cross-Examination in court for adults with learning disabilities.

Is there a better way to ask questions?



My name is Joanne Morrison.

I am a PhD student with the Tizard Centre, University of Kent.

Dr Jill Bradshaw and Professor Glynis Murphy are senior staff at the Tizard Centre and they are helping me to do research (study).



We are looking at communication for adults with learning disability when they are in court.

We want to find a better way for adults with a learning disability to be cross-examined (to be asked and respond to questions) in a court of law.



Cross-examination is when a lawyer asks a witness questions about a crime that happened.

If you see a crime you become a 'witness' and can tell the police everything that you saw.



In court, the lawyer asks the witness questions about what they told the police.

Sometimes these questions can be confusing.

We want to see if there is a better way that questions can be asked.



What will happen before the research?

Joanne or another researcher will meet with you online on a zoom call to do a communication assessment.



There will be 3 different assessments in the one meeting.

This meeting will last about 45 minutes



What will happen on the day of the research?

On a different day you will meet with Joanne online on a zoom call to watch a recording of a crime taking place.

This will not be a real crime but a 'mock crime' with actors.



No one will be hurt and it will not be frightening to watch.

After this you will be interviewed by Joanne.

She will ask you simple questions about what you saw.



You will have a break of 15 minutes.



You will be 'cross-examined' by Joanne.

This means she will ask you questions about what

you said about the mock crime.



After this the research will finish.

This meeting should last about 30 minutes.



We will not tell people what you say in your interview unless you tell us something that suggests you or someone else might be at risk of harm.

This is called confidentiality.



You will get a £10 gift voucher to thank you for your help



The information we collect may be published in a professional journal – a magazine for staff who work with people with learning disabilities.

We will not say your name.



You can say no to taking part in this project.

Or you can decide to stop at any point.

This will not affect your services.

If you want to be involved or have any questions about the research, please get in touch with Joanne:



07738682331



sjm87@kent.ac.uk

If you have any questions about the ethics of this research, you can contact:



Tizard Centre,
University of Kent
Canterbury,
Kent, CT2 7LZ



Ethics Committee:

lssjethics@kent.ac.uk

Privacy notice



Researchers will remove all information which can identify people at an early stage – this means names, addresses, contact details and any other information that could identify you.

If you would like to know more about this please follow the link below:

<https://research.kent.ac.uk/researchservices/wp-content/uploads/sites/51/2018/05/GDPR-Privacy-Notice-Research.pdf> or ask a member of the research team.

Appendix 7 Participant consent form

Tizard Centre, University of Kent
Canterbury, Kent, CT2 7LZ
Researcher: Joanne Morrison
Email: sjm87@kent.ac.uk
Telephone: 07738682331

Tizard Ethics Committee
Issjethics@kent.ac.uk



Research on cross-examination in court for adults with learning disabilities. Is there a better way to ask questions?

Please tick the boxes and sign your name at the bottom of the sheet if you consent to the research.

I have seen the information sheet about the study and had help to understand it (if needed). ☐

I understand that I will see a mock crime (one that is not real). ☐

I understand that I will be interviewed about what I saw. ☐

I understand that I will be cross-examined (asked questions) about what I said in the interview. ☐

I understand that my interview will be video recorded. ☐

Only the researchers will look at the recording. ☐

I understand that I am free to refuse to take part in the research and stop at any point. ☐

I would like to take part in the study. ☐

Your name

Date

Signature

Researcher's name

Date

Signature

Tizard Ethics Feedback Form

Name:	J Morrison
Ethics application number:	0559
Title:	Research on cross-examination in court for adults with learning disabilities. Is there a better way to ask questions?
The Tizard Ethics Committee has considered the request for amendments for the above proposal. The decision of the committee is: Changes are recommended on presentational issues. After applying the recommended changes, please send copies of the amended paperwork to the Ethics Committee. No further action is needed. Feedback <u>Presentational issues</u> Revised Participant Info Sheet:	

- Refers to Joanne or one of her friends – I would change this. Not sure if the student is referring to her supervisors here? If data will be collected only by Joanne this should be removed.
- This information is not all easy to understand- please consider removing parts that are not necessary

There will be 3 different assessments. We need this information to be able to have a range of people with different communication abilities in each group. There will be 2 groups using different ways to ask questions in the cross-examination. This meeting will last about 45 minutes

- Please correct the statement:

We will not tell people what you say in your interview unless you tell us something that may cause you or someone else harm". The last part should read: "unless you tell us something that suggests you or someone else might be at risk of harm"

- Ethics committee secretary info is out of date.

Signed: Tizard Ethics Committee Secretary

Date: 27/12/2021

On behalf of Tizard Ethics Committee

Final approval

Dr Paraskevi Triantafyllou

On behalf of

Tizard Ethics

Committee

Signature

Date: 27.12.2021

Appendix 9

Initial interview research data collection guidelines

Free Recall:

There was a man/and a woman/sitting at a (picnic) table/. They were reading books/. A man came along/ wearing a hoodie/with the hood up over his head/. He grabbed the woman's bag/. It was a shopping style bag/ with a grey and white pattern/. The man and woman tried to pull it off him/ but he took out a gun/ pointed it at them./He told them to stand back./The other man pulled the woman back./The man ran off/ towards the trees on the left.

	Free recall	Alternatives accepted as correct	Not accepted as correct
1	There was a man	Man/boy/lad/fella/guy or any other relevant colloquial term used or 2 people mentioned	Child/2 men
2	And a woman	Girl/lady or any other colloquial term used or 2 people mentioned	Man/2 women
3	Sitting at a picnic table	Sitting together/at a table/bench/wooden seating	Any other form of seating or activity
4	They were reading books	Reading/looking at books	On their phones or any other activity
5	A man came along	Boy/lad/fella/guy/person/arrived/turned up/appeared/ran over	Woman
6	Wearing a hoodie	Sweatshirt/heavy jumper	Other type of upper clothing
7	With the hood pulled up on his head	Hoodie up/head covered	Wearing a hat

8	He grabbed the woman's bag	Stole/took/nicked/pulled/tried to get	Other activity
9	It was a shopping style bag	Big/large bag/bag/handbag	Small bag/rucksack
10	With a grey and white pattern	Patterned/checked	Any other colours
11	The man and woman tried to pull it off him	The man or the woman/ grabbed/fought to get the bag back	Any other unrelated activity
12	But he took out a gun	Looked like a gun/weapon	Knife or other specific weapon mentioned
13	And pointed it at them	Put towards them/ looked like he was going to shoot them	Any other unrelated activity
14	He told them to stand back	"Get back"	Any other commands given
15	The other man pulled the woman back	Tried to help the woman/protected the woman	Any other unrelated activity
16	The man ran off	Left running/ran away	Walked/got into a car/any other activity
17	towards the trees on the left	Towards trees/bushes/towards the left hand side	Any other direction

Probing questions:

	Probe	Alternatives accepted as correct	score	Not accepted as correct
1	Time of day	Don't know/morning/afternoon/during the day	1	Specific time given/evening/night time/specific day given
2	Weather	Sunny/bright/sunshine/clear/dry1	1	Any other type of weather
3	People around	3 people/another person in background/2 people (at table)	1	A different number of people/ no people
4	What was the victim doing?	Sitting at (picnic) table/sitting/reading book/with friend/trying to get her bag back/	1	Any other activity
5	Description of victim	Female/woman long hair/black hair/brown hair/ wearing jeans/blouse/shirt/dark T-shirt underneath/glasses/slim build	6	Male/man/blond hair/short hair/other types of clothing/a hat/a mask
6	Suspect approach	Walked over/on foot/just appeared/just saw him grab the bag/ moved quickly/roughly	1	Ran over/other descriptions
7	Anyone with the suspect	No/couldn't see anyone/don't think so	1	Yes/another man/woman
8	Items	Gun/weapon	1	Other items

9	Description of suspect	male Black/grey hoodie Hood up over head/face Dark/black jeans/trousers Brown boots Couldn't see face Tall/medium height Slim/medium build	7	Female Details of face Details of hair Other clothing Small height
10	Suspect speak	Stand back/get back	1	No didn't speak/ any other words
11	Manner of suspect	Aggressive/rough/demanding/language meaning negative manner	1	Calm/pleasant/polite
12	What did victim do	Stood up/tried to get/pull/grab bag	2	Any other activity
13	What did friend do?	Pulled woman back/tried to help/protected	1	Any other activity
14	Description of bag	Shopping bag/handbag/black and white/grey/large	3	Small bag/rucksack/other colour given
15	Direction suspect left	Left side/towards the back	1	Right side/the way he arrived/any other direction
16	How did he leave	He ran off/walked quickly	1	Any other way

Tota I			30	
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Appendix 10

Recording form for initial interview

Participant code:

Group: Test/Control

Date:

Brief (Before interview starts)

You are here today to take part in research. I am going to show you a mock crime. This research is looking at how people with learning disabilities are asked questions during cross-examinations in court. (Check out understanding of the word 'crime'). When people see a crime happening they are known as a 'witness' to that crime. They can tell the police what they saw. This is called a police interview. Afterwards, they can go to court and be asked questions about what they told the police. This is called cross-examination.

You are here today because you are going to take part in a police interview and cross-examination. . A 'mock' crime is a crime that is not real and the people are actors.

You will now do the police interview, have a break and then the cross-examination.

The interview will be recorded for the research.

Police Interview Questions

Show recording of mock crime

TURN ON ZOOM CAMERA

Account Phase (with camera)

(Name) we are here to talk about a mock crime you have watched on the computer. There are some communication rules.

Tell me if you don't understand a question. Tell me if you need me to repeat a question. If you cannot remember or don't know the answer to a question, just say that. It is ok to not know. Have you any questions before we begin the interview?

What is your understanding of the word 'witness'? (if not understanding explain – "A witness is someone who can tell the police what happened in a crime. You are now a witness to the mock crime you watched.")

What is your understanding of the word 'victim'? (if not understanding explain – "A person is a victim if something bad and against the law has been done to them by someone else")

What is your understanding of the word 'suspect'? (if not understanding explain – "A suspect is someone the police think did a crime or broke the law")

First, I want you to tell me everything that you remember about this crime. Then I will ask you some questions. Is that ok?

Tell me about what you remember about the 'mock' crime you watched on the computer.

RECALL given (record)

CHECKING OUT

"So what you told me is....." – interviewer recaps what the witness had said, using the timeline as a guide.

"Is that correct, or is there anything you would like to change?"

"Is there anything else you want to add?"

PROBING

“Now I want to ask you some questions”

Number/scene	Question	Info already given	Response given	Completed
Setting the scene 1	What time of day was it?			
2	What was the weather like?			
3	Where there any people around?			
Victim 4	What was the victim doing?			

Number/scene	Question	Info already given	Response given	Completed
5	What did the victim look like? Prompting questions if needed: Age, build, clothes, hair			
Suspect arrival 6	How did the suspect approach the victim? Prompting questions: speed, body language			
7	Did the suspect have anyone with them?			

Number/scene	Question	Info already given	Response given	Completed
8	Did the suspect have any items with them?			
Suspect appearance 9	What did the suspect look like? Age, build, clothes, hair			
Suspect actions 10	Did the suspect say anything? Prompting questions: Accent, tone of voice, volume			
11	How was their manner? If not understanding ask:			

Number/scene	Question	Info already given	Response given	Completed
	Were they calm, aggressive or do you not know?			
Victim 12	What did the victim do?			
13	If the other person was mentioned ask: What did the victim's friend do?			
14	If they said the suspect stole the bag as them to describe the bag			

Number/scene	Question	Info already given	Response given	Completed
Suspect leaving the scene 15	What direction did the suspect leave?			
16	How did he leave?			
17	Is there anything else you want to tell me about the mock crime?			

TURN OFF ZOOM CAMERA

15 MINUTE BREAK

TURN ON ZOOM CAMERA FOR CROSS-EXAMINATION

Appendix 11

Guidance for scoring cross-examination

The results need scored for correct/incorrect and level of suggestibility of response. For correct/incorrect each question is scored either 0 or 1 according to the tables 1 and 2 below. All responses that are accepted as correct can be seen in table 3.

In addition, each response is scored for the level of suggestibility according to the following scale:

Agrees with suggestion (A)

Disagrees with suggestion (DA)

Don't know (DK)

Something else (SE)

Therefore, for Q2 "Was the victim a man?" if the response is yes or man (option chosen on test) then the score would be 0A. 0 as the response is incorrect and A because the response agrees with the suggestion. If the response was no, the victim was a woman, then the score would be 1DA, as the participant disagrees with the suggestion in the question and answers correctly.

Correct or incorrect

Table 1

Misleading questions (except Q 11)

Score	Score 1	Score 0
Responses	No	Yes

Accepted	• Implying no and disagreement with suggestion e.g. "I didn't see that" • Not mentioned • Not shown • Don't think so • Correct response given • Alternative correct response given, e.g. "woman"	Agreeing with suggestion implied Probably/possibly Must have been Could have Think so Quite likely I don't know Can't remember Didn't notice Alternative incorrect response given Any irrelevant response that does not answer the question
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For misleading questions, if two responses are given, one correct and one incorrect, the incorrect response takes precedence and the response is scored 0.

Table 2

Leading correct questions

Score	Score 1	Score 0
Responses accepted	Yes Implying agreement with suggestion Think so Probably/possibly	No I don't know Didn't see

	Quite likely	
--	--------------	--

For correct leading questions, if two responses are given, one correct and one incorrect, the incorrect response takes precedence and the response is scored 0.

Exceptions:

Q7 A handbag response is also accepted as correct as this was accepted in police style interview and is subject to interpretation.

Q11 A 'don't know' response is correct and gains 1 score.

Response scale:

Agrees with suggestion

Disagrees with suggestion

Don't know

Something else

Where there is response which implies Disagree or Agree and Something Else, then the first thing that the participant says takes precedence.

Table 3**Correct responses**

	Leading correct/ misleading		Correct Response	Test group options
1	LC	Did the recording show someone stealing a bag?	Yes/bag	1. Bag 2. Coat
2	ML	Was the victim a man?	Woman (female gender response only)	1. Woman 2. Man
3	ML	Did the victim have short hair?	Long hair (only long/longish accepted)	1. Short hair 2. Long hair
4	ML	Was the victim standing beside a table?	Sitting beside/at a picnic table/sitting down	1. Sitting at table

	Leading correct/ misleading		Correct Response	Test group options
				2. Standin g beside a table
5	ML	Was the man with the victim wearing a white T-shirt?	Blue T-shirt (no other colour option accepted)	1. White Tshirt 2. Blue Tshirt
6	ML	Were they on their phones at the time?	Reading books (no other activity accepted)	1. On their phones 2. Reading books
7	ML	Was the victim's bag a rucksack?	Shopping style bag/large handbag	1. Rucksac k 2. Shoppin g bag
8	ML	Did the suspect (the robber) come in from the right hand side?	Left From the side of the trees/bushes accepted	2.Left hand side 1.Right hand side
9	LC	Was the suspect a man?	Yes (male gender response only)	2.Woman 1.Man
10	ML	Was the suspect wearing black boots?	Brown boots (no other colour accepted)	2.Brown boots 1.Black boots
11	ML	Did the suspect have short black hair?	I don't know/ hoodie up so couldn't see/hair hidden/hard to know	2.Short blond hair

	Leading correct/ misleading		Correct Response	Test group options
				1.Short black hair
12	ML	Did the suspect walk with a limp?	No	1.Walk with a limp 2.Didn't walk with a limp
13	LC	Did the suspect shout at the victim and the man?	Yes/ Raised voice	1.Shout at the victim 2.Speak to the victim
14	ML	Did the suspect tell them to sit down?	Stand back/ Get back	1.Sit down 2.Stand back
15	ML	Did the victim say "Go away"?	The victim didn't speak/No	1.The victim said go away 2.The victim didn't speak
16	LC	Was there another man nearby ?	Yes a man in the background/anything that states there was another man there	1.There was another man nearby 2.There was no one else nearby
17	ML	Did another adult take part in the crime?	No/ only the adults that were there, i.e. the people already mentioned	1.There was another suspect nearby 2.There was no other suspect nearby

	Leading correct/ misleading		Correct Response	Test group options
18	LC	Were there cars nearby?	yes	1. There were cars nearby 2. There were no cars nearby
19	ML	Did the suspect get into a car?	He ran away/ He left/ No	1. Get into a car 2. Run away
20	ML	Was it raining when this crime happened?	No/It was sunny/it was dry	1. It was raining 2. It was not raining

Appendix 12

Cross-examination questions scoring

Test group

Participant number:

TURN ON CAMERA

Visuals are line drawings without colours unless colour is part of the question.

2 test questions are used at beginning

e.g. Am I wearing:

a T-shirt, a blouse, something else, Or do you not know

Is it dark outside, it is not dark outside, something else, or do you not know.

	Leading correct/misleading	Visual options (shown on one page and questioner points to each when asking)	Response	score
1	LC	Did the recording show someone stealing:		
		A bag		
		A coat		
		Something else		
		Or do you not know?		
2	ML	Was the victim:		
		A woman		

		A man		
		Something else		
		Or do you not know?		
3	ML	Did the victim have:		
		Short hair		
		Long hair		
		Something else		
		Or do you not know?		
4	ML	Was the victim:		
		Sitting at a table		
		Standing beside a table		
		Something else		
		Or don't you know?		
5	ML	Was the man with the victim wearing a		
		White T-shirt		
		Blue T-shirt		
		Something else		
		Or don't you know		
6	ML	Were they:		
		On their phones		

		Reading books		
		Something else		
		Or don't you know		
7	ML	Was the victim's bag a		
		Rucksack		
		Shopping bag		
		Something else		
		Or don't you know		
8	ML	Did the suspect come in from:		
		The left hand side		
		The right hand side		
		Some other way		
		Or don't you know		
9	LC	Was the suspect:		
		A woman		
		A man		
		Something else		
		Or don't you know		

10	ML	Was the suspect wearing:		
		Brown boots		
		Black boots		
		Something else		
		Or don't you know		
11	ML	Did the suspect have:		
		Short blond hair		
		Short black hair		
		Something else		
		Or do you not know		
12	ML	Did the suspect:		
		Walk with a limp		
		Didn't walk with a limp		
		Something else		
		Or do you don't know		
13	LC	Did the suspect:		
		Shout at the victim		
		Speak to the victim		
		Something else		
		Or do you not know		
14	ML	Did the suspect tell them to:		

		Sit down		
		Stand back		
		Something else		
		Or do you not know		
15	ML	Did the victim say "Go away"		
		The victim didn't speak		
		Something else		
		Or do you not know		
16	LC	Was there another man nearby?		
		There was another man nearby		
		There was no one else nearby		
		Someone else		
		Or do you not know		
17	ML	Was there another suspect nearby?		
		There was another suspect nearby		
		There was no other suspect near by		
		Something else		
		Or do you not know		
18	LC	Were there cars nearby?		

		There were cars nearby		
		There were no cars nearby		
		Something else nearby		
		Or do you not know		
19	ML	Did the suspect:		
		Get into a car		
		Run away		
		Did he do something else		
		Or do you not know		
20	ML	Was it raining when this crime happened		
		It was not raining		
		Something else		
		Or do you not know		

Cross examination questions

Control group

Participant number:

Turn on camera

	Leading correct/misleading		Response	Score

1	LC	Did the recording show someone stealing a bag?		
2	ML	Was the victim a man?		
3	ML	Did the victim have short hair?		
4	ML	Was the victim standing beside a table?		
5	ML	Was the man with the victim wearing a white T-shirt?		
6	ML	Were they on their phones at the time?		
7	ML	Was the victim's bag a rucksack?		
8	ML	Did the suspect (the robber) come in from the right hand side?		
9	LC	Was the suspect a man?		
10	ML	Was the suspect wearing black boots?		
11	ML	Did the suspect have short black hair?		
12	ML	Did the suspect walk with a limp?		
13	LC	Did the suspect shout at the victim and the man?		
14	ML	Did the suspect tell them to sit down?		
15	ML	Did the victim say "Go away"?		

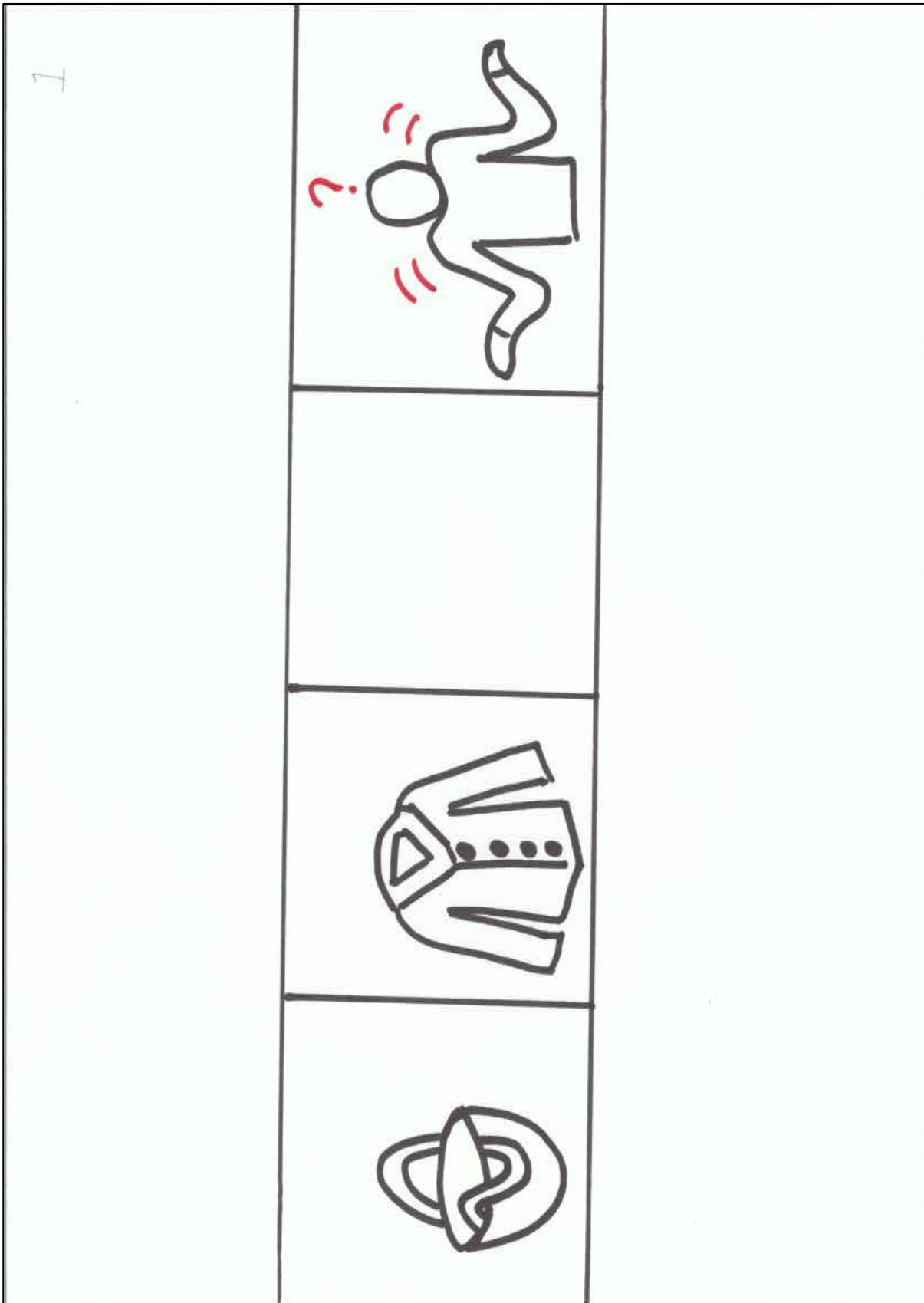
16	LC	Was there another man nearby?		
17	ML	Did another adult take part in the crime?		
18	LC	Were there cars nearby?		
19	ML	Did the suspect get into a car?		
20	ML	Was it raining when this crime happened?		

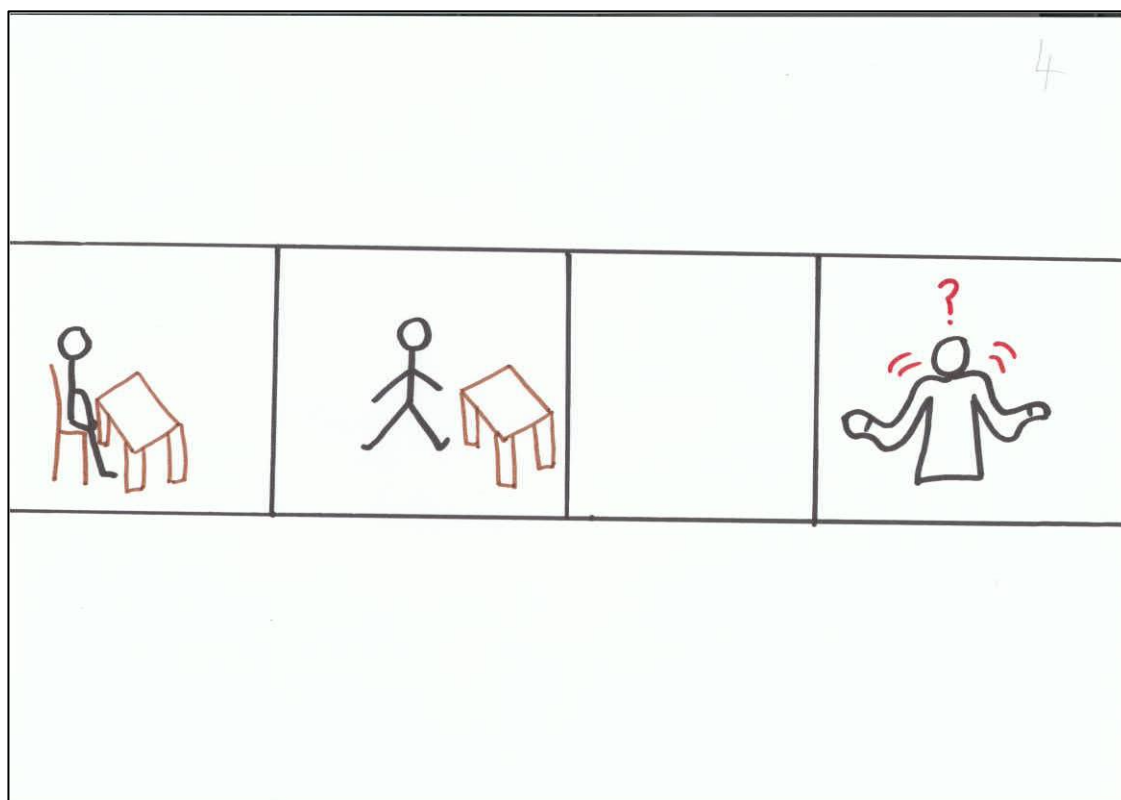
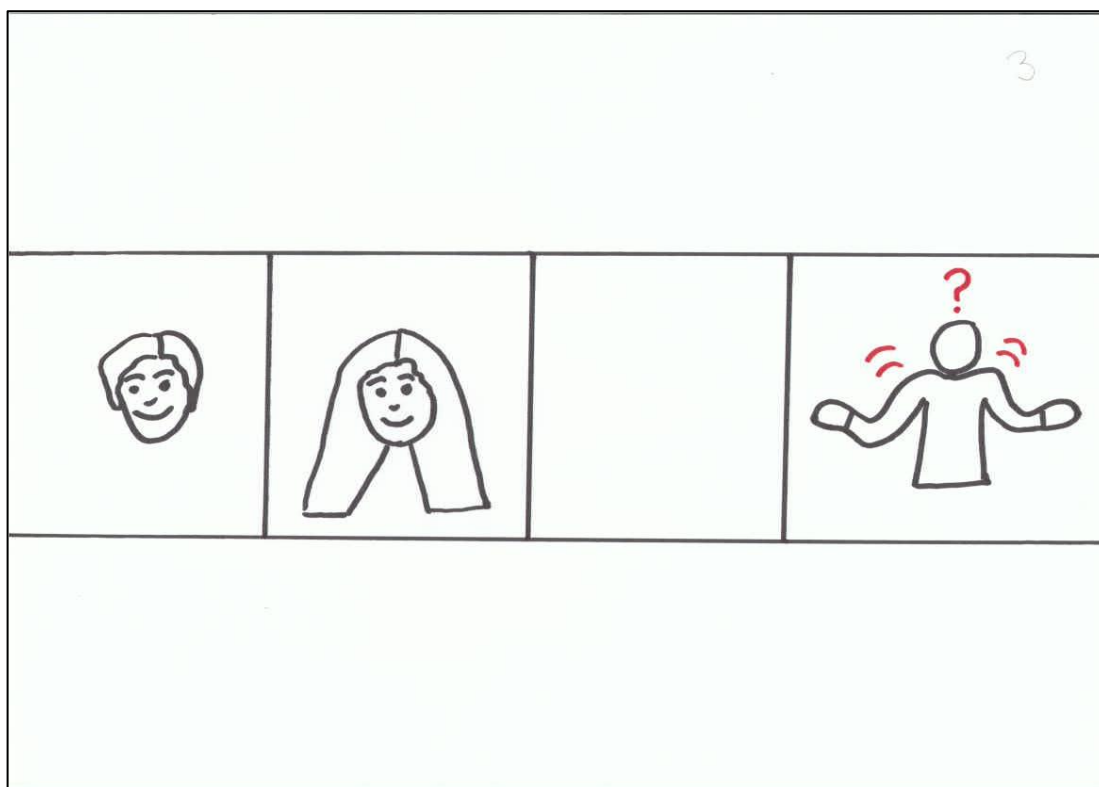
Appendix 13 Visuals for choice questions

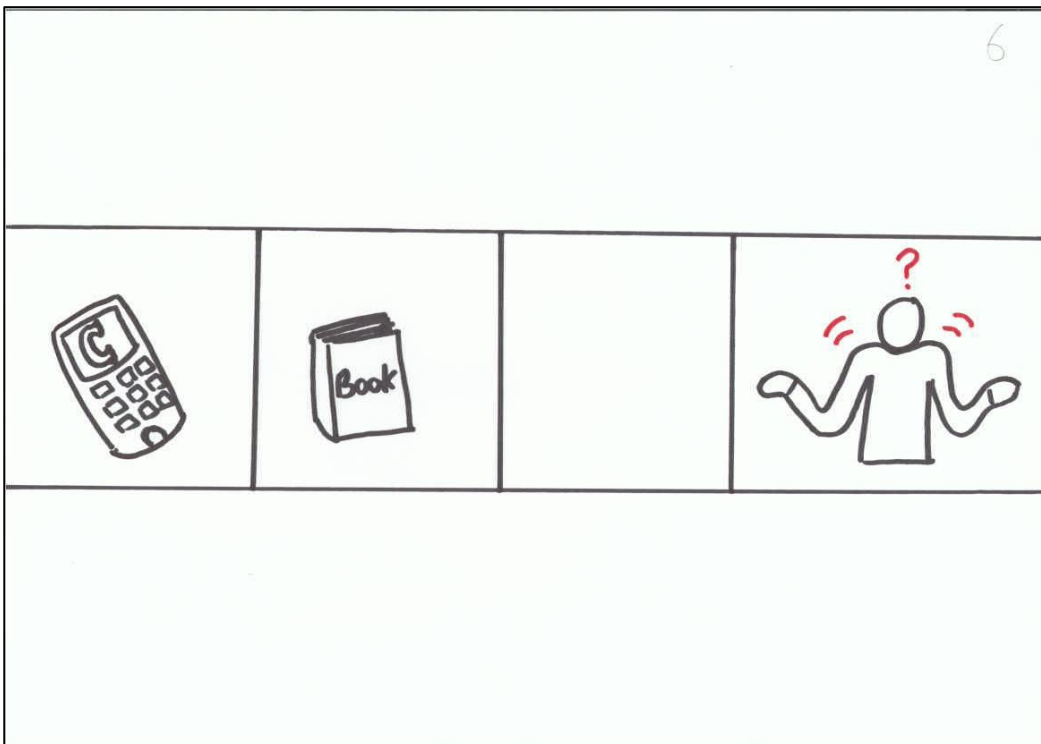
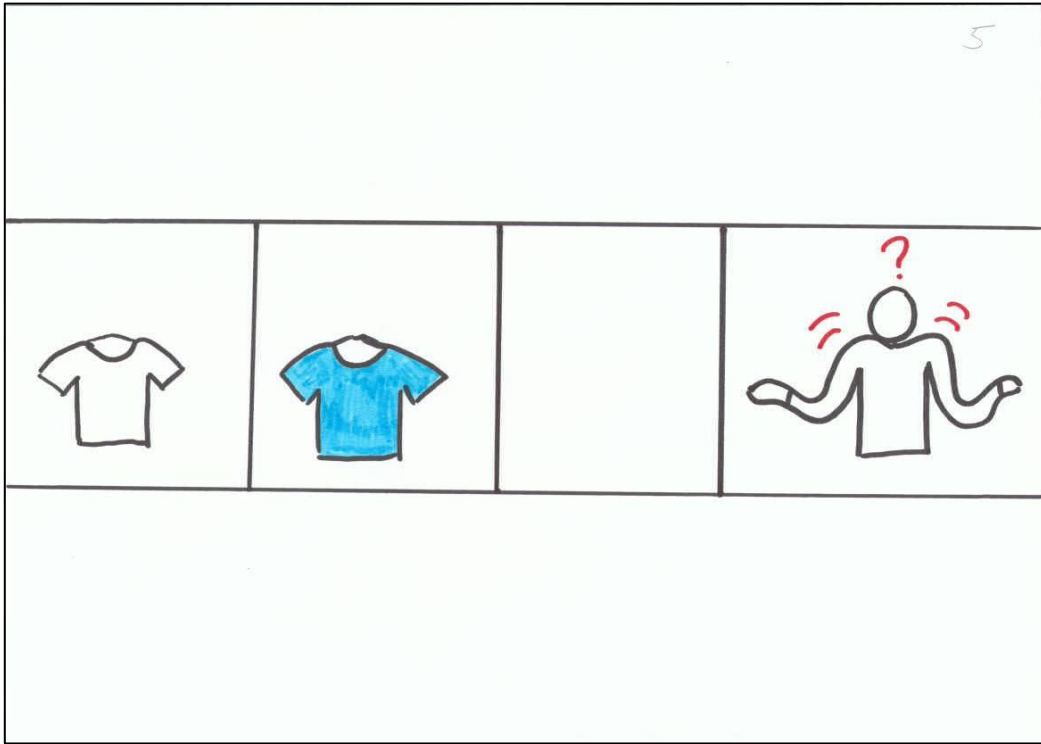
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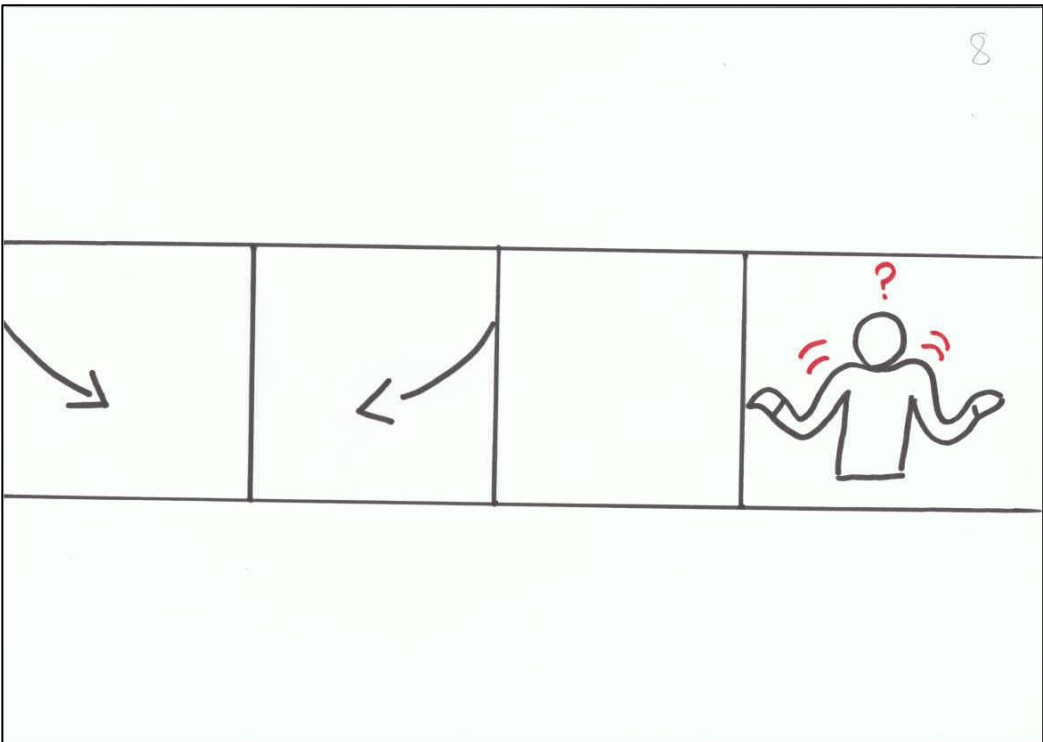
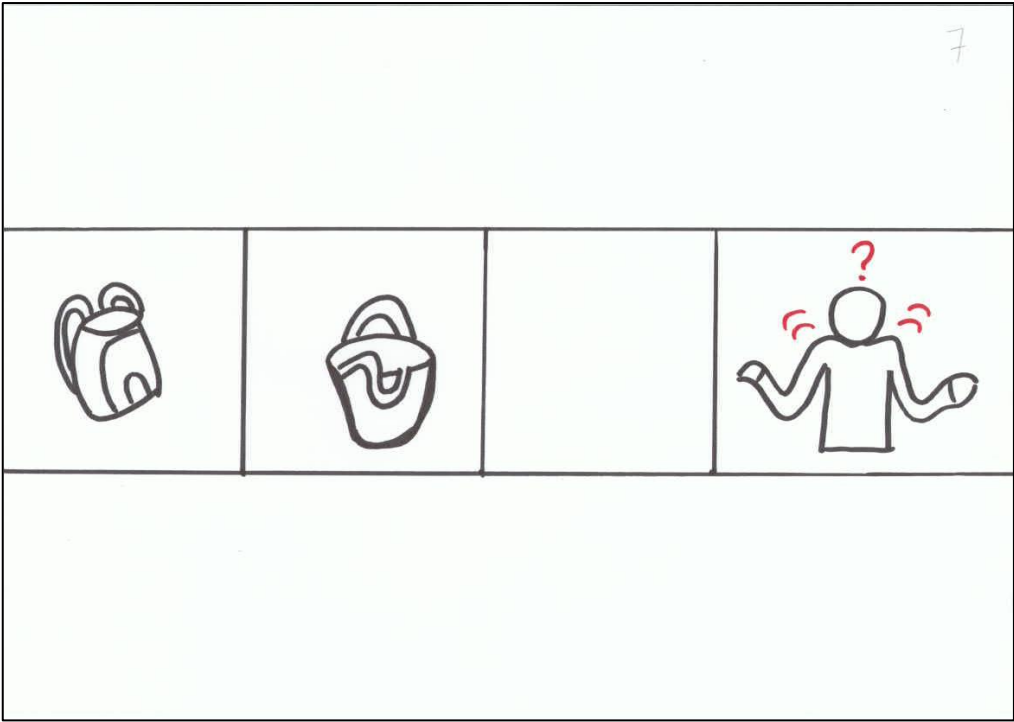
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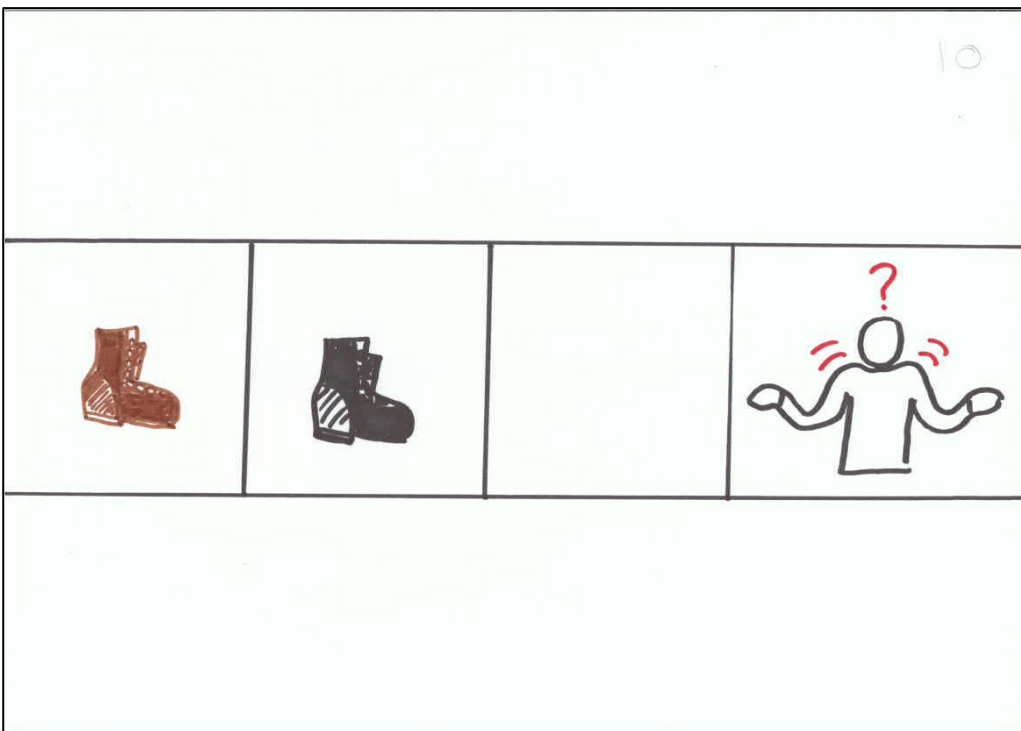
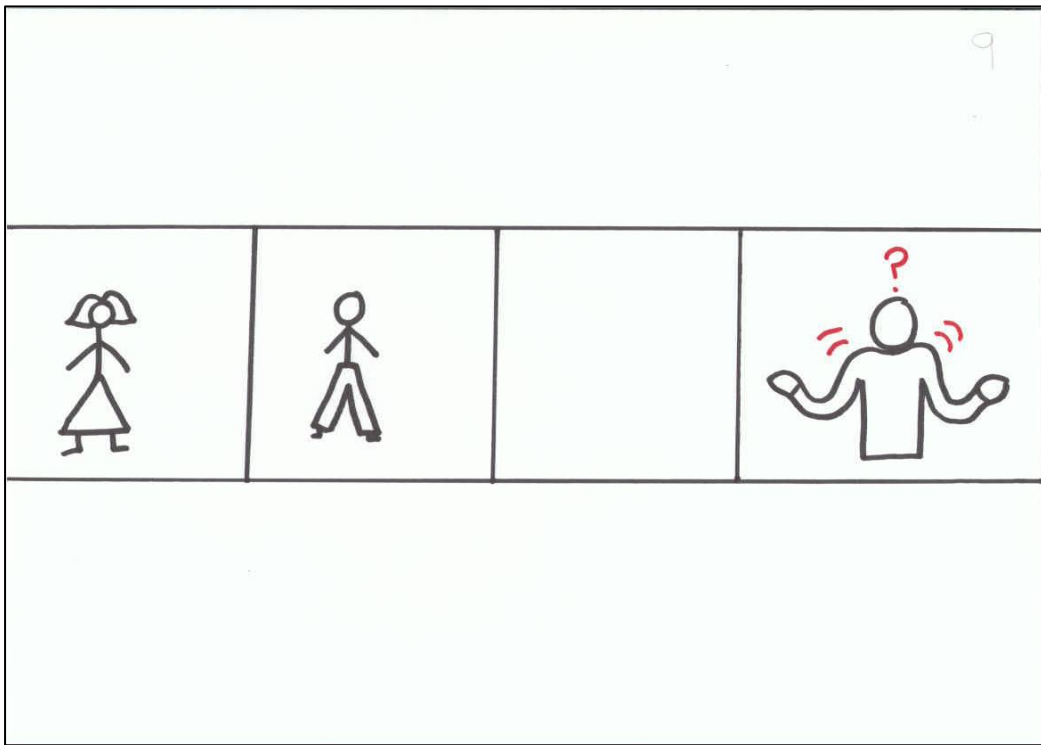
Size as used for research





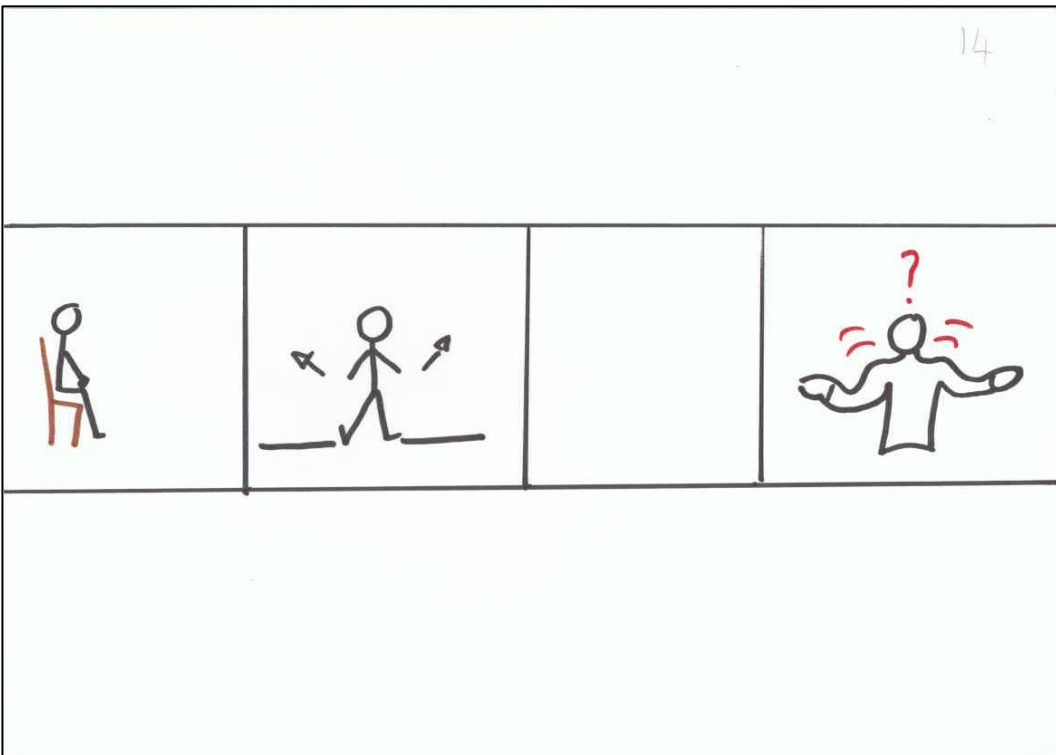
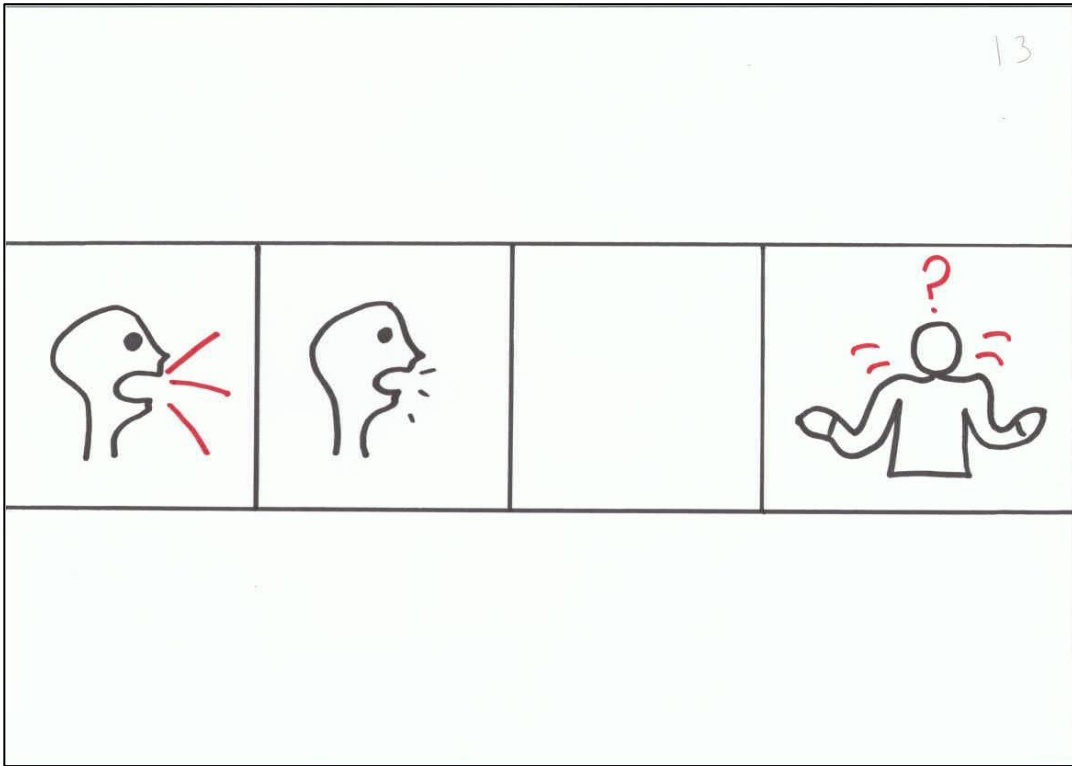


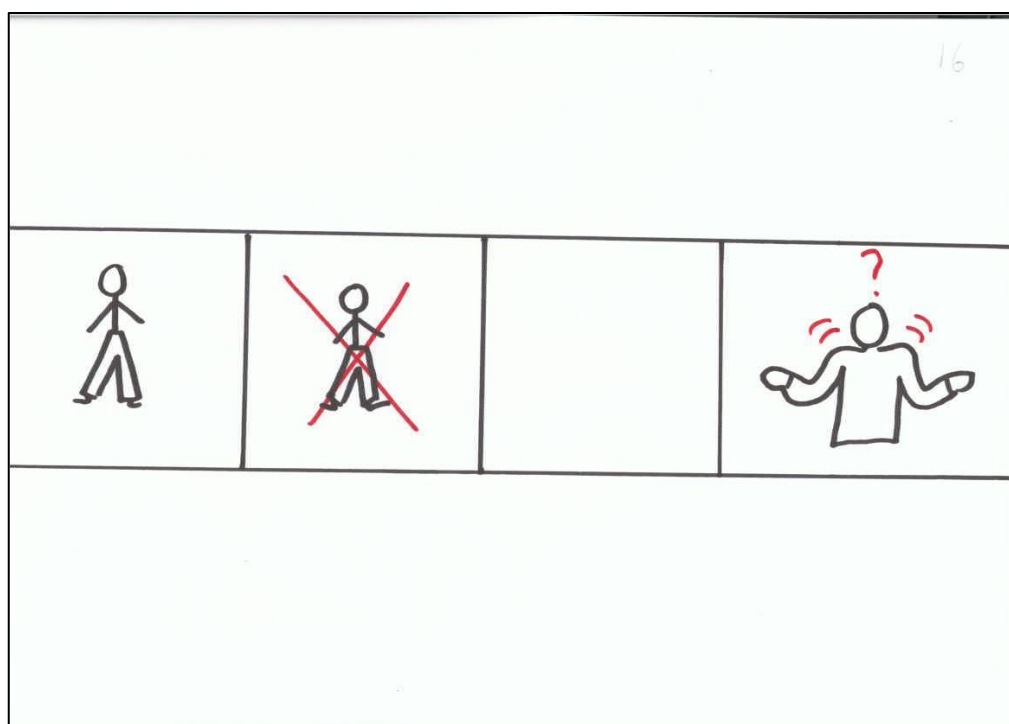
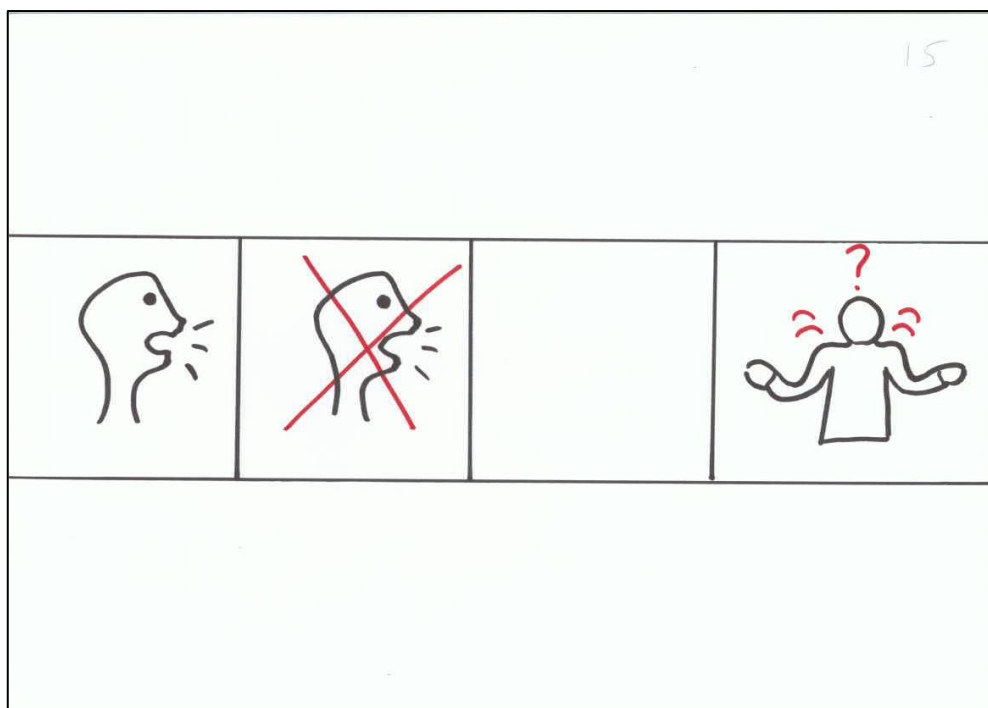








19

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