



Benchmark
best practice - best evidence with vulnerable people

Communication Assistance Guideline

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1. Introduction

Disclaimer: The material provided in this guideline is not legal advice and should not be treated as such. The information is intended as a guide only and should not be relied upon as the definitive authority on communication assistance in the New Zealand courts. No liability is accepted for any adverse consequences of reliance upon it. Further disclaimer information is provided here [[link](#)].

1.1 This guideline contains information about Court-appointed Communication Assistants (hereinafter referred to as CA) in criminal and youth justice cases and is primarily intended for use by lawyers, judges, police, and Ministry of Justice personnel.

1.2 The model of CA described here originated in the English Registered Intermediary Scheme. It was adopted in the NZ adult criminal court in

2012¹ and has since gone on to be used in the Youth Court and, less often, in the Family and civil courts.

1.3 The procedure described here is for the criminal and civil courts. Youth Court processes are significantly different and the Youth Court is developing its own specific guidelines.

1.6 This guideline is comprised of two parts: the first half consists of general information about CAs and from section 9 onwards the practicalities and recommended procedures around the use of CAs are discussed.

2. What is a CA?

2.1 CAs are court-appointed specialists who advise and assist lawyers, police and judges with defendants, witnesses and civil litigants² who have communication difficulties so that they can give "best evidence"³ and participate effectively in the justice system.⁴

2.2 CAs are appointed under s 80 of the Evidence Act 2006, which entitles defendants in criminal proceedings and witnesses in civil or criminal proceedings to "communication assistance", broadly defined in s 4 of the same Act as "oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication" with a person with a communication impairment.

2.3 CAs can provide assistance during pre-trial client and witness/suspect interviews, during trial and beyond.

2.4 The help they give can include direct assistance with/monitoring of questioning, the provision of visual aids and stress-management techniques during questioning, and formal recommendations as to directions for adapting courtroom processes.

3. Who is a CA?

3.1 CAs come from a range of professional backgrounds, but all should have specialist skills in assessment and intervention for communication disabilities.⁵ Most are Speech Language Therapists, but others such as psychologists, social workers and specialist teachers may also qualify. See "Finding a CA" at section 6 below.

3.2 CAs are neutral, independent officers of the Court appointed under the same section (s 80 Evidence Act 2006) as interpreters, although their role is far wider.

3.3 CAs are sworn in as officers of the Court, answerable only to the Court, and are liable to prosecution for perjury for deliberately false or misleading statements.⁶ Like lawyers, they have a right of address⁷ to the court in order to carry out their role.

3.3 CAs are NOT:

(a) Expert witnesses;

- They do not give evidence;
- They do not appear for either side;
- They cannot give an opinion on witness accuracy, reliability or competence.

(b) Support Persons;

(c) Interpreters;

(d) Victim Advisors;

(e) Lay Advocates.

4. Identifying the need for a CA

How do I know if a CA is required?

4.1 Except in the most obvious cases, it can be difficult for a lawyer to decide if a person needs a CA. Communication impairments are often subtle and well-hidden.

4.2 Even where an impairment is obvious, experienced lawyers often underestimate the severity of its impact (e.g.: children's language; see the [Questioning Children Guideline](#)). Some rules of thumb are set out below.

4.3 Do not be put off applying because the person has some communication ability. The aim of a CA is to enable people to participate fully and to give best evidence, not basic evidence.⁸

When in doubt, get an assessment

4.4 Assessments: If it is suspected that the person may need a CA, it can be confirmed only by a specialist assessment and report, which can then be used as the basis of the CA application (see below "Application process" at 8.7).

4.5 Assessments and reports could be sought from a psychologist or psychiatrist (including a Mode of Evidence Report or a Fitness to Plead Report) or specialist teacher or social worker with expertise in the area. These professionals can flag issues of concern (i.e.: low IQ, for instance, or low processing speed), although they may not be sufficiently specialist in the mechanics of communication impairments or how to overcome problems to the extent necessary to act as a CA.

4.6 If communication impairment is found, a communication specialist will be appointed as CA and undertake a full Communication Assistant Assessment and deliver a court report with recommendations (see below), which will form the basis of any formal directions. CA Assessment Reports are useful even if ultimately a CA's attendance at court is not required, due to the practical advice as to how to improve communication.

Rules of thumb: When to consider a CA

4.7 Research and clinical experience suggests applying for a CA in the following situations:

Always apply for a CA for:

- Children 12 years and under;
- Anyone for whom there are recent or historical concerns about:
 - Developmental delay/disorders, learning difficulties/disorder (including dyslexia), Traumatic Brain Injury (TBI), Intellectual Disability (ID), Autistic Spectrum Disorder (ASD), Foetal Alcohol Spectrum Disorder (FASD), mental health diagnosis, etc.;
 - Anxiety or stress affecting communication (e.g.: a person who usually has no issues but who has had incidents of deterioration/not being able to communicate when stressed);
 - A hearing impairment or someone who is Deaf, or;
- Anyone with a recent psychiatrists' or psychologists' report, including a Fitness to Plead Report or a Mode of Evidence Report, indicating communication difficulties, low IQ, poor processing speed, high suggestibility or high stress.

Consider applying for a CA for:

4.8 Disabilities can be difficult to identify if there is no prior diagnosis, obvious markers or history. If you feel someone is having difficulties communicating, consider a communication assessment to confirm whether a CA application is needed.

4.9 Possible signs of need include a person who:

- Finds it hard to interact with you or to give you detailed responses to your questions;
- Cannot maintain a coherent narrative, or forgets or contradicts their previous accounts;
- Gives vague or non-specific responses;
- Takes a long time to respond, is hesitant or frequently reformulates their sentences;
- Does not appear to understand much of what you say;
- Is unable to repeat your advice back to you in his or her own words;
- Agrees with you constantly or is reluctant to correct you (nodding, repeatedly saying “all good”);
- Says they do not remember or “dunno” a lot or repeatedly changes the subject;
- Shows inappropriate or unusual emotional responses such as smiling or laughing inappropriately, inappropriate humour or inappropriate confidence or cockiness;
- Is easily distracted or restless when listening;
- Talks tangentially or is off the topic;
- Talks too much or not enough. Sentences may be very short and lacking in complexity or might be rambling and difficult to follow.

Screening techniques for lawyers

4.10 The following may help to identify whether a specialist assessment is needed:

- Observing person’s response to initial greeting and conversational questioning;
- Observing person’s emotional state and how they respond to the environment and others;
- Getting the person to recall a sequence of events for example, asking them how they got to the meeting with you; and how long that had taken;
- Asking the person to explain what you have just told them to ensure you have explained it properly;
- Ask the person to write down the date, their date of birth;
- Ask some questions about time, such as how long it will be until a particular event or how long it has been since they last saw you;
- Ask questions using different forms (*who/what/where/why/how many/how far?*);
- Ask some questions that require reasoning and explaining (e.g. *How do you know....? What makes you think that....?*) or that require the person to explain their own or another person’s state of mind (e.g. *What do you think she was worried about when....*);
- State back incorrect information to the person to see if they can correct you;

- Ask the person to tell you what legal terms and more sophisticated words mean (e.g., *evidence; allegation; victim*).

4.11 Listen for the quality of the information the person provides – is it coherent, detailed, specific and relevant?

4.12 Refer to the specific disability guidelines for more detailed information on identification screening.

4.13 Background inquiries: It is also helpful to make inquiries (or if you are prosecuting counsel, have the OC make inquiries) of the person's whānau and any caregivers and any professionals already involved (including schools). Consent will be required from an adult defendant or witness or a child's guardian in order to collect this information.

5. What do CAs do?⁹

Overview:

5.1 CAs have three basic functions during legal proceedings:

(a) Assessment: CAs first conduct an assessment of the person with a known or suspected communication impairment (see below). The assessment is an integral and essential part of the CA role.

(b) Report: After assessment, CAs produce a written report (see below) with a detailed description of the person's communicative difficulties/disabilities and competencies, with recommendations (if any) on how to facilitate that person's testimony and participation to the best of their ability. The recommendations may then inform any formal directions necessary for trial.

(c) Assist: Depending on the person's needs and when CAs are appointed, they can then assist throughout the process from initial interviews through to trial/hearing, sentencing and post-trial processes.

- Although not often done in NZ, CAs may assess people for and assist with Police interviews, including EVI/video recorded interview,¹⁰
- Prior to trial, CAs can assist lawyers to explain charges, Summaries of Fact and evidence to enable vulnerable defendants to give instructions. CAs can also assist all lawyers to prepare examination questions.
- At trial, CAs monitor questioning and intervene to prevent miscommunication. If requested, they may assist counsel with questioning.

- After trial, CAs may assist at counsel’s meetings with witnesses/defendant, at probation interviews, with Victim Impact Statements, and Restorative Justice Hui.

See process flow diagrams on [CA resource page](#).

Assistance Examples from Case Law

5.2 Following assessment, the CA may assist in a range of situations including:

- (a) Advising and/or assisting at witness interviews and Evidential Video Interviews;¹¹
- (b) Advising and/or assisting at police suspect interviews;
- (c) Advising and/or assisting at lawyer’s interviews with suspects and/or clients;¹²
- (d) Assisting with Court Education visits;
- (e) Assisting at Family Group Conferences (FGC’s);
- (f) Advising the Court at pre-trial hearings on directions for adapting trial processes;
- (g) Advising on lawyer’s preparation for direct and cross-examination;
- (h) Monitoring and assisting defendant’s or civil parties’ participation in and understanding of the trial/hearing process;
- (j) Assisting police/counsel to explain outcomes to witnesses;
- (k) Assisting defence counsel to explain outcomes and sentences to offenders;
- (l) Advising/assisting police/prosecutors with preparation and presentation of Victim Impact Statements;
- (m) Assisting probation officers in offender interviews for pre-sentence reports;
- (n) Assisting at Restorative Justice Hui.

Recommendation Examples from Case Law

5.3 Recommendations for trial adaptations courts have accepted include:

- (a) Restrictions on the time of day the witness is called;
- (b) Breaks: including frequency and duration of breaks and restrictions on total length of examination per day;¹³
- (c) Use of an alternate venue for giving evidence;
- (d) Alternate methods of testifying, such as the witness writing or typing answers or using yes/no/unsure cards to answer;
- (e) Communication Aids (Language/comprehension supports) such as:
 - (Low tech) picture symbol coreboards, witness-specific sign language for court contexts¹⁴ or
 - Other visual aids¹⁵ such as “yes/no/don’t know” signs, vocabulary charts,¹⁶ pictures of people/places (see table below, or
- (f) the CA aiding a witness or defendant to follow proceedings by providing running translation/account of questions/procedure verbally or in writing,¹⁷ or
- (g) Helping a witness or defendant to read documents,¹⁸ including preparation of “Easy read” versions of documents;
- (h) Permission for CAs to attend meetings with the vulnerable defendant or witness during trial adjournments to assist police or counsel to explain proceedings;¹⁹
- (i) Task-orientated supports such as visual “rules of court” reminders and cards to indicate stress levels or need for a break;
- (j) Stress management techniques, such as a support dog, displacement activities (drawing or fidget toys, retreat space/tent in CCTV room), permission for the witness/defendant to wear a particular costume or a hat, hold a comfort object, to hide the witness’s face during certain testimony (i.e. to pull up a hood, to turn on’s back) or to whisper certain information to the CA who then tells the court or types or writes answers.

More recommendations: Intervention During Courtroom Examination

5.4 Where the CA is directed to attend the trial, the Judge usually directs him or her to intervene in examination to alert the Judge to communication problems (see below "CA Interventions at Trial"). Courts have agreed that CAs can intervene at trial:

- (a) When a question is too complicated or otherwise inappropriate;²⁰
- (b) While in the first instance the CA only alerts the judge to a problem question,²¹ often they are then asked to help rephrase questions, and may be directed to ask some or all questions, including follow-up questions (according to counsel's list of questions or topics and with consultation with counsel during the examination);²²
- (c) When counsel is speaking too quickly²³ or too quietly or counsel's facial expression/tone/body language may be interpreted as aggressive²⁴ or otherwise inappropriate;
- (d) When the witness needs a break;²⁵
- (e) Stress management during examination: The Courts have also allowed CAs to intervene to tell the witness to breathe²⁶ or to provide "emotional containment" or physical comfort/arm around shoulders.²⁷

Case Example: Being flexible: Alternatives to Spoken Answers

A ten-year-old witness using CCTV in a sexual violence trial was too shamed to say names for genitalia aloud. The Judge allowed the child to write them down but the child was still too shy. After a chambers discussion with counsel and the CA, the Judge directed that the CCTV cameras be turned off but audio recording continue. The child was asked to tell the CA only, even in a whisper. The child was able to say the words to the CA. The cameras were then turned back on and the CA repeated what the child has said to her to the Court.

6. Finding a CA

No accredited list

6.1 At this time there is no accredited list of providers nor any accreditation process, although there are a number of qualified people with experience in the role.

Specialisation essential

6.2 The CA should:

(a) Be a specialist in communication and specialist in the particular communication issue experienced by the vulnerable person;²⁸

(b) Have an understanding of the court process (both the challenges the vulnerable person will face and their own ethical duties as CA);

(c) Have prior experience as a CA (see below).

6.3 The role requires expertise (normally a professional qualification) in and professional experience with the particular communication need and in designing strategies to facilitate persons with that issue to communicate, AND an awareness of the issues likely to arise in a justice setting. It also requires experience in assessment and report writing, together with a robust and professional character suitable to the role of assisting at and intervening in court.

6.4 Generally, Speech Language Therapists will be preferable but other groups including mental health specialists, psychologists, Occupational Therapists, specialist teachers, and some social workers will be appropriate.

6.5 Less likely candidates for CA are lay people and teacher aides and other unqualified support people. Except in exceptional cases, lay people are not qualified to make communication assessments, however well they know the person. In rare cases, when it comes to trial a lay person may be the only option (e.g.: where the person's language is so idiosyncratic that only a particular caregiver understands it).²⁹ In such a case, the specialist's assessment will recommend using the caregiver as the CA at trial or having the caregiver and a specialist work in tandem. Neutrality and impartiality issues would need to be addressed in such cases as typically a CA is not previously known to the person they assist.

Prior court experience preferred

6.6 It is strongly recommended that you only engage experienced CAs or those who are supervised by experienced CAs.

6.7 Unless the person thoroughly understands the court process and the role of CA, there is a risk he or she may produce a substandard report, and/or go on to create problems or even contaminate the evidence in the performance of their duties in interview/Court.

Tag teaming: Multiple CAs

6.8 Where a person has complex needs, the CA may recommend a multi-disciplinary approach, with one CA taking the lead role in facilitating communication but working alongside another specialist with complementary skills. For example, a CA may work alongside a Deaf interpreter for a Deaf person³⁰ or Deaf relay interpreters³¹ or language interpreter for a non-English speaker,³² or a professional with experience of working with the person.

6.9 Alternatively, where the appointment is for a defendant for the totality of the trial time, two similarly qualified CAs may alternate to avoid one CA becoming exhausted.³³ This approach is particularly important for long trials or to allow for changes to planned schedules.

6.10 Two similarly qualified CAs may also be appointed consecutively, for example, when the original CA is not able to continue in the role, or where the defendant lives far from the trial court.

6.11 Where a second CA is appointed, that person should have full access to reports and information given to the original CA and be able to undertake a brief re-assessment with the vulnerable person to gain their own understanding of the person's interaction abilities and style.

7. Funding

7.1 Funding for CAs comes mainly from the Ministry of Justice and occasionally from Crown Law or Legal Aid or the Police. In Youth Justice matters, Oranga Tamariki also fund communication assistance at FGCs.

7.2 To date, the NZ Police have not made much use of CAs and the funding sources they use are not established. For the suggested police process for using CAs go to the [CA resource page](#).

7.3 Best practice is to apply for funding through the Courts. However, there is considerable variation in who funds CAs at present. In some cases, Courts are directing the Ministry pay part of the cost relating to the CA's courtroom role but requiring funding for other aspects of the CA's work with a vulnerable person to be sought from Legal Aid or Crown Law.

7.4 The CA should provide a quote for services before proceeding. Quotes are generally provided in two, sometimes three parts: CA Assessment, CA Pre-trial Assistance and CA Assistance at trial. Quotes generally show the component amounts as well as the combined total.

7.5 The CA must receive notice of the Court's acceptance and engagement for each phase before commencing work.

8. How to apply for a CA

Introduction

8.1 This part of the guideline focuses on the practicalities and recommended procedures when a CA is required for Court.

8.2 *If a CA is required for Court, or court-ordered funding is required, an application **must** be made to the Court, although a CA may have been engaged by one or other party even before charging (e.g.: to assist the Police or counsel in interviews).*

8.3 A CA application can be granted by consent or, if opposed, a hearing must be convened.

When to Apply

8.4 Applications can be made at any time, from committal to part-way through trial/hearing.³⁴

8.5 Early is best: Most benefit is gained where applications are made early (e.g.: by the Case Review Hearing):

(a) Ample time is needed for assessments and report-writing, especially where CAs are required for more than one person in the trial (e.g. defendant and complainant or several complainants/witnesses);

(b) Involving a CA earlier means the Court and counsel have the benefit of his or her report and advice in making directions and/or preparing for questioning.

8.6 However, that the need for a CA was not recognised early and the EVI was done without one does not make the EVI invalid.³⁵

Application Process

8.7 An application for a CA is made under s 80 Evidence Act 2006.

8.8 Applications must include:

Supporting evidence:

- If a CA Assessment Report is not already complete, enough support for a CA appointment and assessment may be found in a Mode of Evidence Report or a Fitness to Plead Report, or an affidavit from caregivers or professionals such as teachers or the witness's doctor or paediatrician;

- The simplest process is to apply using evidence other than that of your prospective CA, so that the CA Assessment and report come after the Court's appointment. This avoids blurred lines as to whom the CA reports to/is engaged by;
- However, there will be times when specialist communication assistance is needed early, (e.g. to assist pre-committal at police interviews or client interviews);
- In such cases, it is preferable for the vulnerable person that the same specialist remains in the role of providing communication assistance throughout the case. An application specifying that person should be made to the Court as soon as possible. The specialist's own Assessment Report may be the best supporting evidence for the application (although after their appointment they must not be treated as an expert witness if their role is to be successful);
- In order to prevent any appearance of or actual bias, if a specialist is engaged early/pre-committal, his or her neutrality must be respected, he or she must act as if he or she were already a Court-appointed CA throughout (including providing any reports to both sides).

Funding Quote:

8.9 A quote for CA services if funding is sought through the Ministry of Justices interpreters' budget (see above "Funding").

Additional Directions

8.9 In the application, consider seeking additional directions as follows:

- (a) For the filing of any report in Court and its dissemination to parties and timetabling the same;
- (b) For funding of the CA's role by the Ministry of Justice;
- (c) If a CA Assessment Report is already complete (e.g. the police or lawyer already engaged a suitable CA early to assist with interviews) and that person is appointed CA, that his or her recommendations be considered immediately at the hearing;³⁶
- (d) If the prospective CA is present during the hearing, he or she may then be able to take the oath (see below);
- (e) Scheduling a GRH to discuss the practical details of the CA's role at least a fortnight before the trial (see "Ground Rules Hearings" below);

(f) Directing counsel consult the CA in planning their questions prior to the GRH.³⁷

Grounds for Application

8.10 This section covers the threshold for communication assistance and the case law on communication assistance, together with some common arguments for and against granting communication assistance.

Legislative Threshold

8.11 The Evidence Act 2006 sets very low and inclusive requirements:

(a) Section 80(1) states that a defendant is “entitled” to communication assistance if he or she needs the assistance to “understand the proceeding” and “give evidence”, if he or she chooses;

(b) Section 80(3) states that a witness is “entitled” to communication assistance “to enable the witness to give evidence”.

Section 4 further states that communication assistance is due where the person:

(a) “does not have sufficient proficiency in the English language to understand court proceedings conducted in English; or give evidence in English; or

(b) has a communication disability.”³⁸

8.12 “Communication disability” is not further defined in the Act. However, the NZ Courts have underlined the broad availability of assistance. A “communication disability” means “difficulty rather than incapacity” and “entails a spectrum ranging from difficulty to incapacity in relation to oral questioning.”³⁹

8.13 The appointment of a CA may be required to meet the objectives of the Evidence Act 2006:

(a) Securing a just determination;

(b) The promotion of promoting fairness to all; and

(c) The enhancement of access to justice.⁴⁰

8.14 A CA may also be required to meet obligations to disabled persons under the UNCRPD. See the [UNCRPD Overview](#).

8.15 UNCROC: It may also be possible to argue that a CA is necessary to meet NZ's international obligations under UNCROC to facilitate children to have their views heard.

Case Law Reasoning

8.16 The NZ Courts have so far set a reasonably low threshold for the acceptance of CA applications. They have stated that a witness's ability to communicate unaided at a minimal level is not sufficient or enough to show that he or she does not need assistance. The mere ability to give short, uninformative answers and to maintain the "bones" of his or her allegations/defence under cross-examination is not an indication of a capacity to give evidence unaided.⁴¹

8.17 The English Court of Appeal has similarly held that a witness is entitled to the opportunity to give their "best evidence" and that the Court must adopt measures which enable or facilitate witnesses to give evidence to that standard.⁴²

8.18 Caselaw on witness applications increasingly reflects the principle that a fair trial for all interested parties (defendant, complainant, witnesses and society at large) requires "best evidence" (in the old sense familiar from hearsay law) from every witness and that, accordingly, it is the Court's duty to adapt conventional practice where necessary to facilitate a witness to give that evidence.⁴³

8.19 The Courts have been clear that this is a requirement of a fair trial for the defendant but also for society and all witnesses. The case law also states that the fact that the defence may suffer if a witness's ability to communicate is improved does not diminish the defendant's right to a fair trial.⁴⁴

8.20 Case law on defendant applications indicates that a CA may be required to ensure a vulnerable defendant gets a fair trial⁴⁵ and one who is fit to plead is fit to be tried.⁴⁶

8.21 The defendant's right to participate in his or her own trial requires that he or she be enabled to understand the proceedings to "the fullest extent possible".⁴⁷

8.22 The court has a broad discretion to adopt any measure (which still enables the evidence to be seen and heard) which facilitates best evidence.⁴⁸

8.23 In England and Wales the Courts consider that provision of a CA should always be considered for any vulnerable defendant, especially a young one.⁴⁹ However, the English criminal courts have said that it is not

presumed that a vulnerable defendant will always require the CA's presence throughout trial, as opposed to when giving evidence, provided the defendant has a skilled counsel.⁵⁰ Conversely, English Family Court decisions increasingly emphasise that a CA's presence throughout a hearing can be essential to a vulnerable party, even where counsel is highly experienced.⁵¹

NZ Case Law Examples

8.24 The NZ Courts have indicated that witnesses or defendants with the following characteristics are likely meet the eligibility threshold:

- (a) Typically developing pre-school and primary school-aged child witnesses;⁵²
- (b) Child witnesses with language delays and disorders or developmental disorders such as Down Syndrome;⁵³
- (c) Typically developing child defendants;⁵⁴
- (d) Child defendants with Foetal Alcohol Spectrum Disorder (FASD) and Traumatic Brain Injury (TBI);⁵⁵
- (e) Adult witnesses with mental distress or depression;⁵⁶
- (f) Adult defendants with low IQ and/or cognitive impairments;⁵⁷
- (g) Adult defendants with cognitive issues and reading issues;⁵⁸
- (h) Elderly defendants with stroke-related impairment; and
- (i) Deaf or hearing-impaired adult defendants;⁵⁹
- (j) Highly suggestible or compliant witnesses or defendants;⁶⁰
- (k) Those who are unlikely to realise they have not understood questions and who won't complain, meaning misunderstandings may go undiscovered.⁶¹

Note that English courts have also directed their equivalent of CAs, Registered Intermediaries, assist in a broad variety of situations.

Case Example: Ensuring Participation

In meetings with his lawyer, a young defendant with Foetal Alcohol Spectrum Disorder could not sit still and would turn away from interactions, cutting off conversations with "All good," and asking "can I

leave now?" after only a short time. His experienced lawyer struggled to be sure he understood and to gain instructions.

A CA was engaged and reported that the youth had better comprehension of simple written sentences than of the spoken word.

During hearings, the CA immediately presented spoken information in writing, using simple language. With this help and the ability to play with fidget objects the youth sat through hearings, concentrated and understood. He was even able to tell the CA in real time "That's not right" as he listened to evidence. The CA then assisted at breaks so that the youth could give his lawyer instructions regarding the evidence.

Objections to the use of a CA and rebuttals

Objection 1: CA was not needed at police interview

The CA is not needed at trial because the witness or defendant coped well without a CA in the EVI/suspect interview and therefore will cope well in court without one; and/or the concerns and recommendations in the CA report are inflated and unnecessary.

Reply

(a) Coping with a police interview is not indicative of a person's likelihood of coping at trial. Trial is generally more stressful and questioning styles/language may be far more challenging and difficult to comprehend. The level of communication support required at trial is likely to be much higher e.g. police interview questions are in general more open requiring a narrative, where trial based questions can be more structured and complex, requiring a person to define and describe;

(b) For defendants, testifying at trial involves understanding the entire trial process, including other people's evidence, in addition to giving their own evidence (if they choose to do so) there is also the issue of full comprehension of the charges laid and the summary of facts, all of which are often written in complex vocabulary and language structure;

(c) Good communication during a police interview may be more apparent than real, once the actual extent of the witness/defendant's difficulties are appreciated.

Objection 2: The CA Report is enough

Counsel will be able to comply with the recommendations in the CA Report so the CA's attendance at court is not necessary.

Reply

(a) Even very experienced lawyers find it more difficult to adapt their questions than they anticipate;

(b) It can also be difficult to adhere to the recommendations when formulating questions on the spot. A CA is in a better position to alert the court to any miscommunication or other issues which may diminish the quality of the witness' evidence (e.g., loss of concentration, disengagement, and so on).

Objection 3: Lack of CA intervention at police interview

The CA attended the police interview/EVI but did not intervene often (or at all), so there is no need for a CA at trial.

Reply

(a) The CA may not have needed to intervene because the police interviewer had an extensive briefing and planning session with the CA before the interview and was able to adapt the questions and questioning style during the interview. Not all police interviewers or counsel are able to adapt their questioning.

(b) The witness's coping at the police interview should not be used to estimate their coping with the higher level of difficulty in the trial, together with a potentially more stressful environment and often over a longer period.

Objection 4: CA neutrality/expertise

The CA's expertise having been challenged at the application hearing or on voir dire does not prevent a person being appointed as CA.⁶²

The CA who acted in the original trial refusing to reprise their role in a retrial does not invalidate his or her performance in the first trial.⁶³

9. Communication Assessment Process

9.1 The first and crucial task for the CA is to conduct a full Communication Assessment of the person suspected of having communication impairments.

9.2 A Communication Assistant Assessment is a specialist assessment of functional communication abilities and difficulties in relation to participating in justice contexts.

9.3 The subsequent Communication Assessment Report gives a detailed description of the person's communication abilities and impairments and gives practical, functional recommendations as to how to adapt normal court process and questioning etc., so that the person can participate fully.

Assessment Process

9.4 The current process for Communication Assessment, whether of a defendant, witness or civil party, is as follows:

(a) *Briefing*: Having engaged a CA, the lawyer or police officer whose client/witness it is (for young defendants/offenders probation or Youth Justice workers may also get involved) briefs the CA on the concerns about the witness' communication, supplying only that information which relates to communication. Information about the proceedings and alleged offending is only given if it is strictly relevant (e.g., when assessing a child in a case involving allegations of sexual assault, the police interviewer and/or Court may need the CA to ascertain the child's words for relevant body parts);

(b) *Information sharing*: If information has been obtained about the witness' communication and other needs from family, carers and other professionals, this can be shared with the CA (with the person's consent or consent of a guardian where applicable);

(c) The CA keeps written case notes throughout.

Time/venue

9.5 The OC or counsel contacts the defendant/witness/party to organise the time and venue for the assessment.

Venue options should be agreed upon with the CA.

9.6 Appropriate venues may include:

(a) For a witness or party, the CA's own offices, police premises, neutral premises or, if these are not possible, the witness' home (but not at a witness' school);

(b) For a defendant, counsel's chambers, a meeting room at the court (for those on bail) or at correctional facilities. Where an assessment must be conducted at a correctional facility, defence counsel must arrange the visit including providing introduction letter and arrange permission for the CA to use any equipment he or she requires.

Conduct and observation of assessment

9.7 The CA assesses the witness in the presence of a responsible person who may be called as a witness if the case goes to trial:

- For a witness, the third party should be a police officer or a forensic interviewer;
- For a defendant, the third party should be the defence counsel.

9.8 Attending the assessment can give invaluable insights into the person's issues.

Police, forensic interviewers and counsel report that observing an assessment gives them invaluable insight into the witness' communication competencies and how they should adapt their questioning.

Plotnikoff & Woolfson (2015)

9.9 Although the CA is NOT an expert witness, he or she must keep detailed notes and preferably the assessment should be audio or visually recorded (with the witness' consent) to keep an accurate and detailed record.

9.10 More than one assessment may be needed. With particularly vulnerable people, the CA may need to spend a considerable amount of time building rapport before the assessment can proceed.

10. Preliminary Reports and Assistance

10.1 Where a police interviewer or counsel urgently need assistance communicating with the vulnerable person, a CA may give preliminary advice and may assist at interview, before completing the formal Communication Assessment Report.

CA preliminary report

10.2 If fast feedback is important, such as where advice is urgently required for an imminent Police or client interview, the CA may prepare a preliminary written report and/or give an oral briefing. The preliminary report/briefing can inform the planning for, and conduct of, pre-trial interviews, including lawyers advising and taking clients instructions.

10.3 A preliminary report may also be necessary if there are additional steps required before a full assessment can be completed (e.g. someone with previously undiagnosed or untreated hearing issues may need a full audiological assessment and hearing aids fitted before the CA Assessment, or an interpreter may be required if the CA discovers that the person is being assessed in their second language).

Planning for pre-trial interviews

10.4 The CA may assist counsel to plan for interviews or may assist the police, although this is rare in NZ (refer to the CA resource page for the suggested process). This may include determining the best time of day to interview, the layout of the interview room, the frequency of breaks, the vocabulary appropriate to the client, how to make instructions and questions clear and unambiguous, the use of visual aids (e.g., pen and paper for drawing, maps, pictures, models etc) and how and when visual aids might be introduced during the interview.

Attendance at pre-trial interviews

10.5 The CA may also then attend interviews to monitor communication and advise and assist should difficulties arise. However, CAs do not conduct the interview themselves.

10.6 If the CA attends interviews he or she must maintain complete neutrality and inform the witness that he or she is independent. The CA should keep notes of assistance given (not confidential communications). See "Neutral and Independent" above.

Case Example: Taking Instructions

A CA was engaged to assess a 30-year-old defendant with a diagnosis of Bipolar Disorder and a noticeable presentation of learning difficulties, although two psychologists' reports declared him fit to plead.

The CA's assessment reported that the defendant had:

- Verbal comprehension abilities in the 1st to 25th percentile, similar to that of a child aged between 8 and 10 years;
- A very limited vocabulary; and
- A tendency to rush answers without fully understanding questions.

The CA supported the defence counsel to explain the evidence (including ESR evidence) and get instructions.

Despite his difficulties understanding speech, the defendant had a relative strength in reading. Therefore each piece of evidence or concept counsel explained verbally was typed into a brief phrase using key words and/or drawn as a diagram.

The CA would also repeat the lawyer's explanation verbally, breaking down any complex language.

The CA would also repeat the lawyer's explanation verbally, breaking down any complex language.

Counsel would then check the man understood (e.g.: "tell me in your own words what we said?").

However, after 2 ½ hours, the man still turned to his lawyer and said, "well I might as well plead not guilty, then, and get this over with!"

Outcome:

- Following two further 3 hour sessions, the lawyer and CA working hard to ensure he understood all of the evidence and all of the charges, the man was able to explain his instructions to each charge: "I'm guilty" "It means I did it" and "It was wrong because he [the complainant] was weak." (His word for vulnerable).
- He could also voice what measures he needed to take to be safe and keep others safe around him.
- The time in court to enter his guilty plea? Five minutes.

11. Communication Assessment Report

11.1 The CA Assessment Report, whether for a witness or for a defendant, is the key element of the CA process in justice contexts. It consists of an assessment of the person's communication capacities and issues, followed by detailed recommendations as to how to adapt conventional process (including questioning) enable the person to communicate and to participate to the "fullest extent possible".⁶⁴

NB: Mode of Evidence Reports and Fitness to Plead Reports are NOT the same as Communication Assessment Report, although the former may flag the need for the latter.

For a template of a Communication Assistant Assessment Report visit the [CA resource page](#).

Content

11.2 The CA Report should only contain what is necessary and relevant. As a CA Report on a witness is likely to be seen by the defendant or at least discussed with him or her, it should only contain information that is relevant to the report and not personal data or information about the witness which the defendant should not already know.

The CA report should:

- (a) Include a statement of the CA's acceptance of the neutrality and independence of the role and ultimate responsibility to the Court;
- (b) Include a summary of the CA assessment process;
- (c) Explain the conclusions regarding the person's functional communication abilities, giving actual examples of communication.

Case Example: Explaining problems

In her report on a severely impaired woman's communication, the CA included a short sample of her responses to questions on a neutral topic.

The prosecutor noted that the woman's inadequate responses to even simple "Wh" questions suggested that her high levels of acquiescence to other questions resulted from compliance rather than agreement. This helped him to understand the CA's recommendation that he apply for a high level of courtroom assistance.

The Crown applied for measures including that each question be put using visual aids, and that they only be put by the CA.

- (d) Indicate if a CA is necessary at court to facilitate a witness to give best evidence and / or support a defendant's or party's effective participation in the proceedings;
- (e) Indicate what other special measures or accommodations besides the CA that are necessary at trial to facilitate communication with the vulnerable person;

This may include opinion on:

- Use of CCTV (or screens);
- Remote participation via AVL;
- Pre-recorded evidence;
- Live link evidence for the defendant;

- Scheduling the court day and the timing and length of breaks (ie: short sitting days, early or late starts or finishes, frequent breaks or the use of “mini-breaks”);⁶⁵
- The use of visual aids, to assist in comprehension and expression.

(f) Recommend any other arrangements or accommodations which are necessary to support effective communication, such as the witness meeting the judge or counsel before trial, or practising with the live link before trial.

(g) Recommend how questions should be modified, giving explanations of what is and is not appropriate, with practical examples of how to modify questions appropriately. For example, the report should cover question types, the need for “signposting” (e.g. careful introductions of topic changes), vocabulary, question length, the person’s comprehension of non-literal language, pace and tone etc.

Case Example: Getting to know you

When a prosecutor met with a child to introduce herself, she tried to use open-ended questions about the drawing the child was doing (“tell me about your drawing”), but the child refused to respond. The CA, who was also present, knew that the child responded more readily to non-leading closed questions (“what colour are you using?”), but would “warm up” and answer open questions with detail and description once she had success in single word responses. The CA helped the prosecutor work out some closed questions about the drawing before attempting open questions.

This technique was successful and the prosecutor subsequently got the Court to allow her to use it during examination in chief.

(h) Indicate whether it would be recommended that the CA help counsel prepare questions or understand appropriate sentence construction;

(i) Recommend how a person’s emotional wellbeing should be managed. For example: scheduled breaks and mini-breaks, use of stress toys/objects, appropriate access to activities for break times (e.g. music, physical movement, calming routines). This is particularly important for those with a history of mental distress or mental health disorder and for trials over several days.

Case Example: Management of “state”

Two sisters aged 6 and 8 were witnesses in the same trial.

During the CA assessment, the CA noted that when the older sister got stressed and anxious she needed time out alone, whereas the younger sister needed activity and to literally run or bounce to manage her emotions.

Working with the Victim Advisor, the CA set the CCTV room up with a small play tepee for the older child and a small re-bouncer trampoline for the younger one to give them appropriate activities to manage their emotions in break times.

(k) Recommend how the CA should operate at trial (e.g., whether they sit next to the witness, how to indicate to the judge if there is a communication problem).

(l) Provide recommendations in a format that enables special measures / accommodations to be “checked” off at GRH. See the [CA resource page](#).

Addendum Reports

11.3 Some cases require an addendum to the original CA report, particularly if the report is many months old by the time of trial and/or the vulnerable person’s needs have changed since the initial assessment. If the first assessing CA is no longer available for the trial, a ‘new’ CA will need to conduct their own brief assessment and write a report, although only a short addendum may be required. The new CA must meet the vulnerable person and should liaise with the original CA. The addendum report is not a critique of the original report and should not be regarded as such.

Report Submission

11.4 Where an application for the use of a CA at trial has already been made to the Court (whether or not the outcome is known) the report is submitted directly to the Court and the Court disseminates it to the parties.

12. CA Ground Rules Hearings

12.1 Where a CA is attending trial, it is essential to hold a Ground Rules Hearing (“GRH”)⁶⁶ or additional/extended Trial Callover to discuss the practicalities of the accommodations needed for trial.

Overview

12.2 A GRH considers the need for further adaptations to facilitate communication with a vulnerable person, and especially considers the CA

Report recommendations. This is in addition to basic measures such as mode of evidence or the mere direction that a CA be used, which will have been determined in earlier pre-trial hearings. See “Ground Rules Hearings” in [Pre-Trial Case Management Guideline](#).

12.3 Directions made at GRH are sometimes referred to as “ground rules”.

12.4 The GRH should be held at least a fortnight out from trial so appropriate preparations can be made, including preparation of any visual aids and any necessary consultation over questioning with counsel completed.

12.5 The GRH is not a normal call-over as more time is required, and it is not appropriate to try to cover the subject matter at a normal call-over or at the outset of trial as “housekeeping”. More than one GRH may be necessary and the GRH can be reconvened during trial if initial recommendations need changing.

12.6 It is vital the CA attends the GRH to discuss the CA Report and recommendations (even if only by teleconference). The Registry should alert the CA to the GRH but applicants should check with the CA that he or she knows the date and time.

12.7 All directions should be recorded in writing to avoid misunderstanding at trial. If a new judge is assigned to the trial, a further GRH will be needed to confirm earlier directions. While time will be short, this should be at least a day or so ahead of trial. The morning of trial is not appropriate because there is not adequate time to absorb and apply directions, especially directions as to language.

12.8 Counsel should file memoranda regarding the GRH directions sought/opposed.

CA Attendance at GRH

12.9 It is vital that the CA is present at the GRH to advise the court and counsel on language issues and other adaptations.⁶⁷ CAs should also be present at any further GRH and at any housekeeping or communication-related chambers hearing during the trial where their recommendations or related issues are discussed.⁶⁸

12.10 The Registry should notify the CA of the GRH but the applicant’s lawyer should check this has occurred.

12.11 At the GRH, as an officer of the Court, the CA needs to be seated somewhere that allows him or her to join the discussions easily. This may

be in the witness box or on counsels' benches beside (but independent of either) counsel.

Agenda for GRH

12.12 The main subject matter for GRH is to consider the CA Assessment Report recommendations in so far as not already ruled upon. In addition, the GRH should also finalise practical details for the CA's involvement including the following:

(a) The CA's oath:

12.13 CAs swear or affirm an oath similar to that of interpreters, although additions must be made as the interpreters' role is more limited.

At present there is no legislative ruling on the form of the oath for CAs and variations exist.⁶⁹ However, an oath has been developed for the Serious Sexual Offences Court Pilot.⁷⁰

12.14 The oath should include:

(a) A promise that the CA will not disclose any substantive matters discussed in or disclosed in any consultation with either counsel (whether during interviews with defendants or question preparation sessions), making it a contempt of court to reveal information;

(b) An obligation to alert the judge to any communication issue arising at trial.⁷¹

12.15 If the oath is undertaken during the initial GRH, it will ensure the CA can participate freely and ensure confidentiality when either counsel consult the CA over question preparation.

(b) CA Jury directions:

(a) The use of a CA requires a jury direction to remedy any possible prejudice that might otherwise occur.⁷² The Court of Appeal has approved that given in *R v Hetherington*.⁷³

(b) If the Court also directs restrictions on the language of questioning and/or duty to put the case, the Court should also be asked to:

- Give a direction to the jury as to the restrictions counsel is under;⁷⁴
- In regard to the duty to put the case, give counsel the opportunity to make a statement to the jury as to what allegations would have been put to the witness but for the restrictions;⁷⁵ and
- Allow counsel to question other witnesses on matters on which he or

she was restricted from questioning the witness;⁷⁶ and

- Allow counsel to make submissions on the restricted material in closing.

(c) CA seating arrangements:

12.16 Directions also need to be given as to where the CA sits at trial: The CA should sit beside the person to whom they are appointed;⁷⁷ either beside the witness in the box or CCTV⁷⁸ room or beside the defendant in Court.⁷⁹

(d) Directions for CA interventions at trial:

12.17 It is essential the Court makes directions as to how the CA intervenes during trial.

12.18 In NZ, intervention can take many forms and is often a stepped process. Usual process is as follows:

(a) Initial intervention is by raising a hand to signal to the judge or the CA may interrupt proceedings with "Your Honour.";

(b) When the CA has the judge's attention, they describe the issue briefly (e.g., poor question or need for break), preferably referencing the GRH directions and/or report recommendations;

(c) If the issue is counsel's language, the judge may then ask counsel to re-phrase the question;

(d) If counsel's rephrasing is inadequate, the judge may ask the CA to suggest an appropriate question or to put the question to the witness directly in an appropriate form;

(e) Alternatively, the judge may direct the CA to suggest an alternative phrasing as part of the initial intervention.

12.19 An agreed "safe phrase" to use when intervening is a useful way to signal the need for a more extensive chambers discussion without drawing the jury's attention.

(e) Consultation on Questions:

12.20 To reduce the need for the CA to intervene in questioning at trial, best practice is that each counsel consult the CA privately when planning their questions.⁸⁰

12.21 Arrangements to consult are often made at the GRH. Courts in England and Wales can and do direct counsel to consult CAs, but so far NZ courts have not done so.

12.22 The Sexual Violence Court Pilot oath (see above) enables the judge to direct the CA to keep confidential all matters raised by counsel in such discussions. For this reason, some counsel may prefer for the CA to take the oath at the GRH or earlier and to consult with them afterwards.

12.23 Counsel who have not consulted the CA by the GRH should seek an adjournment until they have done so or a further GRH afterwards, as the consultation may alter counsel's position on the directions.

12.24 When consulting a CA it is helpful to prepare proposed questions in writing.⁸¹ Proposed questions can be forwarded via the Registry, who ensure such questions are not passed to opposing counsel.⁸²

(f) Ruling on Written Questions

12.25 In addition or in the alternative to consulting the CA privately, lawyers' questions can be put to the Court in writing at the GRH (as with s 44 questions) for discussion with the CA present.

12.26 In at least one NZ Court, by consent, counsel have provided their questions to the judge and CA in writing at GRH for consultation.⁸³

12.27 The English Court of Appeal has ruled that judges can direct counsel to submit questions in writing at the GRH⁸⁴ and that judges can rule on what, and how, questions may be asked of vulnerable defendants and witnesses,⁸⁵ and it appears that counsel accept this is appropriate.⁸⁶ Anecdotally, it appears that judges are beginning to adopt this practice in trials involving CAs in NSW and Victoria, especially where counsel declined to consult the CA privately.

Case Example: When "simple" isn't "short"

Defence counsel consulted with the CA regarding cross examination of a 6 year old witness. Saying "I only have a few questions," he presented the CA with nine topics he needed to cover.

The CA broke each topic into concepts and formulated simple single or two-part questions containing no tags. She helped counsel to develop verbal signposting and created visual aides to assist him. In the end, more than 80 questions were required to do the job properly.

A "few" questions do not necessarily work for vulnerable witnesses as long complex questions need to be broken down to their level.

(g) Assistance in defendant interviews

12.28 During the trial, in addition to attending at court, it may also be appropriate to ask for the CA's brief to include assisting defence counsel to communicate with the defendant outside court during trial,⁸⁷ or to assist the Police to communicate with witnesses, or to monitor the defendant or a witness's emotional state during adjournments. In such meetings, the CA should be accompanied at all times by counsel or a Police officer as appropriate.

(h) After trial role:

12.29 It is helpful to include a direction that there be a discussion following the trial to arrange any extension of the CA role post-verdict (i.e., to explain outcomes to witnesses or defendants and/or to prepare either for sentencing).

13. CA at trial

Overview

13.1 At trial, the CA sits with the vulnerable person, monitors communication and understanding and intervenes where necessary. If the judge directs, the CA can also assist counsel to rephrase questions or even put the questions to the witness directly, on counsel's instructions.⁸⁸

13.2 For process flow diagrams clearly setting out the CA process from identification of a communication disability to attendance at trial go to the [CA resource page](#).

Trial Checklist

- Has the form of oath been agreed and the CA been sworn in?
- Are the jury directions (on CA presence and any language restrictions) ready?
- Has an intervention process for the CA been agreed?
- Are the sight lines between CA, judge and lawyers clear?
- Is the CA authorised to attend the defendant/witness outside the courtroom?
- Is a post-verdict discussion scheduled to discuss the CA's role after trial?

Ground Rules

13.3 "Ground Rules" (detailed directions for using a CA) should already be in place. If not, a Ground Rules Hearing should be convened asap before the trial begins (see "Ground Rules Hearing" above).

Remember further GRH can be reconvened as necessary as issues arise.

Check for sight lines

13.4 Before the witness begins testifying, check that there are good sight lines or visual communication between the CA, judge and counsel, so that CAs can communicate non-verbally (e.g., CA are often directed to intervene in the first instance by signalling to the judge with a raised hand). Test sight lines when using CCTV: Some CCTV cameras only show the witness, impeding visual communication between CA, judge and counsel.

Problems with CA interventions at trial

13.5 A process for CAs to intervene in questioning at trial should already have been agreed at the GRH. See "Directions for CA interventions at trial" above.

13.6 Should any dispute as to the extent of interventions arise, the Court of Appeal is clear that although a CA's interventions may be extensive:

(a) Any prejudice or sympathy caused by the CA's presence can be remedied by proper judicial directions;⁸⁹

(b) If a CA's involvement lengthens the trial and causes interruptions it is justified by the necessity to ensure a fair trial, including for witnesses, and the need to ensure a proper investigation.⁹⁰

Communication Crises During Trial

13.7 Where significant communication issues arise at trial (e.g., a witness breaks down or refuses to continue, a defendant self-harming, or counsel simply unable to adapt his or her language), best practice is to adjourn for a further GRH.⁹¹

13.8 Fresh or additional directions may be required (e.g., the intervention process may be shortened so that the CA rephrases questions immediately, or a further adjournment may be ordered for counsel to consult the CA about how to adapt their language).

13.9 If the issue is the defendant's or witness' continued coping, the judge may direct the CA to conduct a brief additional assessment before the GRH, before making further recommendations.

After Trial

13.10 After the trial, the CA's further involvement may be required to:

- (a) Explain the verdict or outcome to the defendant or to a witness; and/or
- (b) Assist the witness to prepare and/or deliver a Victim Impact Statement;
- (c) Assist the defendant to communicate with probation officials for the Pre-Sentence Report;
- (d) Assist the defendant to understand the sentencing.

13.11 Directions for the extension of the CA's role should be sought at the conclusion of the trial. The CA may have raised the possibility in the Report and at the GRH the Court will already have directed that these issues be revisited.

14. Acknowledgements

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15. References

[1] *R v Hetherington* [2015] NZCA 248: The original trial decision was that of the Kaikohe District Court in 2012 per MacDonald J.

[2] People who are parties to/applicants in proceedings in the Family, Employment or ordinary civil courts.

[3] *R v Moeke* [2017] NZHC 1314; *R v Hetherington*, above n [1](#).

[4] [Evidence Act 2006](#), s 4.

[5] *R v Hetherington*, above n [1](#), at [22], [12].

[6] [Evidence Act](#), s 80(5).

[7] Right to initiate discussion and speak directly to the judge as lawyers do. Otherwise people may only speak if required to do so by the judge.

[8] E.g. The court has said that a person's ability to maintain the bones of their story under cross-examination is not sufficient to deny them a CA. See also *Jones v R* [2015] NZCA 601.

[9] See *R v Aitchison* [2017] NZHC 3222 for Palmer J's excellent description of the system in action; and the pre-trial directions in *R v Hetherington*, above n 1 (*R v Heatherington* Kaikohe DC, CRI-2011-029-341, 20 May 2013 per MacDonald J).

[10] See Regulation 7 of the [Evidence Regulations 2007](#). Although the regulation refers to an interpreter, as interpreters are appointed under the same section, the regulation must logically also include a CA.

[11] The police do not yet use CAs to interview witnesses and suspects, although they are commonly used in England and Wales and are being used in the NSW and Victorian pilots. A suggested process for the police based on international practice is available in the [CA resource page](#).

[12] *Dixon v R* [2013] EWCA Criminal 465 at [94].

[13] *R v Hetherington*, above n 1.

[14] *R v IA and others* [2013] EWCA Crim 1308.

[15] *R v Aitchison*, above n 9; *Dixon v R*, above n 12; *R v IA*, above n 14 at [17]; *Hemi v Police* [2017] NZHC 714 at [17].

[16] *Dixon v R*, above n 12 at [94].

[17] *Dixon v R*, above n 12 at [94]; CA helps VD follow evidence and read documents; *R v Beards and Beards* [2016] EW Misc B14 (CC) at [7].

[18] *R v Beards and Beards*, above n 17, at [7]; *Dixon v R*, above n 12, at [94].

[19] *Dixon v R*, above n 12, at [94].

[20] *R v Great Yarmouth Youth Court* [2011] EWHC 2059 at [4-5],[8]

[21] *R v Hetherington*, above n 1, at [22].

[22] *R v Aitchison*, above n 9, a case where the witness had a serious fear of males and counsel and judge were all male.

[23] *R v Great Yarmouth Youth Court*, above n 20, at [8]; *R v Christian* [2015] EWCA 1582 at [31].

[24] *R v Christian*, above n 23, at [31].

[25] *R v Hetherington*, above n 1.

[26] *R v Christian*, above n 23, at [30]

[27] [R v Christian](#), above n [23](#), at [29]

[28] [R v Hetherington](#), above n [1](#); c.f.: [R v Willeman](#) [2008] NZAR 644 (had to be caregiver).

[29] [R v Willeman](#), above n [28](#); [R v AR](#) (NZCA302/05) at [8, 16].

[30] [Barton v R](#) [2012] NZCA 295 at [19], [32-33]; [R v IA](#), above n [14](#), at [36]; [Re C \[2014\] EWCA Civ 128](#); [Re R \[2014\] EWCC B41 Fam](#); c.f.: the somewhat variable Australian approach: [R v Keevers](#) [2011] ACTSC 118 ; [Re Goltz](#) [2012] QMHC 17.

[31] Relay deaf interpretation is when two or more deaf interpreters work together, often used where one with expertise in the witness's specific or idiosyncratic sign language signs to another in general sign language who then communicates with the Court in spoken words: [R v AR](#), above n [29](#), at [8], [16]; [R v IA](#), above n [14](#), at [17]; [Re R](#), above n [30](#); [Re C](#), above n [30](#); [Re Goltz](#), above n [30](#).

[32] [R v F](#) [2013] EWCA Crim 424 at [10].

[33] [R v MR](#) [2012] NZHC 1813 at [3-4].

[34] [R v Eruera](#) [2015] NZHC 3220 at [40, [47].

[35] [R v AR](#), above n [29](#); [R v Christian](#), above n [23](#), at [27 - 28].

[36] Where a CA Assessment Report is not yet available, this is usually done later at a Ground Rules Hearing ("GRH") but if a report is already available, it is useful if at least some directions are made early (e.g., facilitating preparation of any visual aids, time charts or vocabulary sets for core boards etc., that are required). A follow-up GRH should then be convened closer to trial.

[37] [R v Aitchison](#), above n [9](#), at [10], [16]; [Boxer, R v](#) [2015] EWCA Crim 1684; [FA](#) [2015] EWCA 209; [R v RL](#) [2015] EWCA 1215 [6-7].

[38] [Evidence Act](#), s 4.

[39] [R v Moeke](#), above n [3](#), at [9]. However, the test is one of actual difficulty, not merely diagnosis with a condition that might theoretically cause issues for some people. If a witness has capacity to understand and respond to complex and testing questions despite a diagnosed vulnerability (dementia) then they don't need a CA and their trial wasn't unfair because they didn't get one: [Love v R](#) [2017] NZCA 265 at [54].

[40] [Evidence Act](#), reprint as at 14 July 2017 Purpose

The purpose of this Act is to help secure the just determination of proceedings by—

- (a) providing for facts to be established by the application of logical rules; and
- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses; and
- (d) protecting rights of confidentiality and other important public interests; and
- (e) avoiding unjustifiable expense and delay; and
- (f) enhancing access to the law of evidence.

[41] [Jones v R](#), above n [8](#), at [52].

[42] [R v Barker](#) [2010] EWCA 4.

[43] [R v GJ](#) [2014] NZHC 2276 at [41]; [R v Chase](#) [2016] NZHC 1509 at [23]; [R v Moeke](#), above n [3](#), at [12], [30]; [R v Hetherington](#), above n [1](#), at [22]; see also [Stanley v Police](#) [2017] NZHC 790 [18] (s 85 Evidence Act 2006 obliges judges to ensure questions are comprehensible and appropriate). See also Australian decisions [R v BL](#) [2016] ACTSC 209 [28] [60-63], [67-68] [94]; [Ward v R](#) [2017] VSCA 37; [Matsoukatidou v Yarra Ranges Council](#) [2017] VSC 61 [122-32], [147-51], [168]; and also the significant recent line of English Court of Appeal authority, especially [R v Barker](#), above n [42](#), at [42] & [R v Lubemba](#) [2014] EWCA Crim 2064 [42-45].

[44] [R v BL](#), above n [43](#), at [28]. See also [R v Edwards](#) [2011] EWCA Crim 3028.

[45] [Police v HJ](#) [2016] NZYC 168, at [3]. See also [SC v the United Kingdom](#) 2005 40 EHRR 10; [R v Camberwell Green Youth Court](#) 2005 UKHL 4; [C v Sevenoaks Youth Court](#) [2009] EWHC 3088; [R v Great Yarmouth Youth Court](#), above n [20](#).

[46] [Jones v R](#), above n [8](#); [Barton v R](#), above n [30](#); [R v Walls](#) [2011] EWCA Crim 443; [Dixon v R](#), above n [12](#), C.f.: [Ruka v R](#) [2011] NZCA 404; [R v Cox](#) [2012] EWCA Crim 549; [R v Rashid](#) [2017] EWCA Crim 2; [Love v R](#), above n [39](#).

[47] [Police v HJ](#), above n [45](#), at [3].

[48] [SC v the United Kingdom](#), above n [45](#); [R v Camberwell Green Youth](#), above n [45](#); [C v Sevenoaks Youth Court](#), above n [45](#); [R v Great Yarmouth Youth Court](#), above n [20](#).

[49] [Jones v R](#), above n [8](#); [Barton v R](#), above n [30](#); [R v Walls](#), above n [46](#); [Dixon v R](#), above n [12](#), C.f.: [Ruka v R](#) [2011] NZCA 404; [R v Cox](#), above n [46](#); [R v Rashid](#), above n [46](#); [Love v R](#), above n [39](#).

[50] [Rashid, v R](#), above n [46](#).

[51] [Re D \(No.3\)](#) [2016] EWFC 1; [Re R](#), above n [30](#); [Re C](#), above n [30](#); [Wiltshire Council v A](#) [2013] EWHC 3502 (Fam); [R v Rashid](#), above n [46](#).

[52] This is done in the NZ Child Witness Pilot and Serious Sexual Violence Pilot Courts but for citations see English case [R v RL](#), above n [39](#).

[53] [R v Hetherington](#), above n [1](#).

[54] [Police v HJ](#), above n [45](#).

[55] [DP v R](#) [2016] 2 NZLR 306

[56] [R v Eruera](#), above n [34](#), at [47].

[57] [Hemi v Police](#), above n [15](#); [Jones v R](#), above n [8](#), at [49].

[58] [R v Eruera](#), above in [34](#), at [47].

[59] *Hemi v Police*, above n [15](#) (slight hearing loss and comprehension issues); *Barton v R*, above n [30](#), at [19], [32]: The NZ CA has encouraged the appointment of more than one communication assistant (e.g.: a sign language interpreter, a specialist CA and a friend with familiarity with the person's language use). Multiple appointments are made in cases involving deaf witnesses in England & Wales. See for example *Re C*, above n [30](#) ; *Re R*, above n [30](#); *R v F* [2013] EWCA Crim 424 at [10]; *R v IA*, above n [14](#), at [36]; see also Australia's variable approach: *R v Keevers*, above n [30](#).: *Re Goltz*, above n [30](#).

[60] *R v Moeke*, above n [3](#), at [26]; *Jones v R*, above n [8](#), at [52].

[61] *R v Moeke*, above n [3](#), at [28].

[62] *R v IA*, above n [14](#), at [29].

[63] *R v IA*, above n [14](#), at [40].

[64] *Police v HJ*, above n [45](#), at [3] (Court's instructions to the CA for the Report).

[65] "Mini-break" means a very short break where everyone (witness, defendant, lawyers, jury) remain in situ in court, the jury screens are switched off and a few minutes are given for the witness to compose themselves. Witnesses may stand up and move around in this time. This is done where a usual length break may be unnecessary for or destructive of the witness's concentration.

[66] A Ground Rules Hearing is an extended final callover to discuss the practicalities of implementing directions for accommodations for vulnerable people, especially language directions. They are useful in all cases involving vulnerable people but are considered essential where a CA is involved. The practice developed in England and Wales and has been adopted in NZ. See *R v Aitchison*, above n [9](#) per Palmer J for discussion.

[67] This is mandatory in England & Wales: CPR 3.9(7)(a).

[68] *R v Aitchison*, above n [9](#) notes that the CA was present during such hearings.

[69] For example: "Do you solemnly, sincerely and truly declare that you will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of you according to the best of your skill and understanding" **or** "Do you [*insert name*] swear by almighty God/solemnly declare and affirm that you will assist this person to understand all communication and express himself as effectively as possible during these proceedings to the best of your knowledge, skill and belief."

[70] "Do you swear by Almighty God/solemnly declare and affirm that you shall truly and faithfully assist the Court and Counsel by providing communication assistance during the questioning of _____ to the best of your skill and ability, and do you further swear that in the event that counsel request your assistance to formulate age appropriate questions you will not divulge any information given to you during that process to any other person including the witness(es) for whom you are providing communication assistance."

[71] *R v Hetherington*, above n [1](#).

[72] *R v Hetherington*, above n [1](#), at [26]; *R v Moeke*, above n [3](#), at [31].

[73] *R v Hetherington*, above n [1](#). See also the direction in *R v RL*, above n [37](#), at [10].

[74] *R v Hetherington*, above n [1](#).

[75] *R v Edwards*, above n [44](#).

[76] *R v Edwards*, above n [44](#).

[77] *R v Hetherington*, above n [1](#); *R v Aitchison*, above n [9](#); *R v Beards and Beards*, above n [17](#), at [7].

[78] E.g.: *R v Hetherington*, above n [1](#); *R v Aitchison*, above n [9](#).

[79] E.g.: *R v Beards and Beards*, above n [17](#), at [7]. See also *R v MR*, above n [33](#), at [3-4] where CAs for a deaf defendant sat in front of the dock so that the defendant could lip read their translations.

[80] *R v Aitchison*, above n [9](#), at [10], [16]; *R v Boxer*, above n [37](#); *Re FA*, above n [37](#); *R v RL*, above n [37](#), at [6-7].

[81] *R v Aitchison*, above n [9](#); *R v Lubemba*, above n [43](#).

[82] *R v Aitchison*, above n [9](#); *R v Lubemba*, above n [43](#).

[83] *R v Aitchison*, above n [9](#). See also *Boxer, R v* above n [37](#); *Re FA*, above n [37](#), Re [2015] EWCA Crim 209, where questions were submitted by consent.

[84] *R v Lubemba*, above n [43](#), at [45]; *R v Dinc* [2017] EWCA 1206.

[85] *R v RL*, above n [37](#), at [6-7].

[86] Emily Henderson "A Very Valuable Tool' Judges, Advocates and Intermediaries discuss the intermediary system in England and Wales" (2015) 19 Int J of Evidence and Proof 154 at 157 – 158.

[87] CA attended meetings with the VD outside the courtroom twice a day during the trial to summarise the events of the trial *Dixon v R*, above n [12](#), at [94].

[88] *R v Aitchison*, above n [9](#).

[89] *R v Hetherington*, above n [1](#), at [26]; *R v Moeke*, above n [3](#), at [31].

[90] *R v Hetherington*, above n [1](#). See also *R v Simpson* (CA204/06) at [30-31]: a deaf CA/relay interpreter is right to interrupt to ensure she understands counsel's question.

[91] *R v Beards and Beards*, above n [17](#); *R v Aitchison*, above n [9](#).