

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Facilitating Equal Access to Justice:**  
**An Intermediary/Communication**  
**Assistant Scheme for Tasmania?**

ISSUES PAPER NO. 22

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## Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Ms Terese Henning. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Mr Simon Overland (Secretary of the Department of Justice), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

## How to Respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to answer any or all of those questions in their submissions.**

Before framing your responses to the various questions, the Institute recommends reading Part 4 of this paper as it provides an overview of the various intermediary/communication assistant schemes in other jurisdictions.

There are a number of ways to respond to this paper:

- **Completing the Submission Template**  
The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute's webpage <<http://www.utas.edu.au/law-reform/>>.
- **Answering one, a select number of or all of the Questions**
- **Responding to the Easy Read Summary and Questions**
- **Arranging to meet with the TLRI to discuss your contributions**
- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response — you may choose to answer, all, some, or none of them and instead to raise other matters with us. Please explain the reasons for your views as fully as possible. Submissions may be published on the Institute's website, and may be referred to or quoted from in a final report.

If you do not wish your response to be so published or you wish it to be anonymous, please tell us and the Institute will respect that wish.

## Community Consultation

To ensure that as many Tasmanians as possible have the opportunity to provide feedback on this Issues Paper and to inform the drafting of a Disability Justice Plan for Tasmania, the TLRI and Equal Opportunity Tasmania will be hosting a series of Community Consultations on measures to Improve Access to Justice around Tasmania in June 2016.

The Consultation sessions will give you the opportunity to contribute to the discussion about the issues raised in this paper and to respond in person to some of the questions.

Please refer to the Tasmania Law Reform Website, public noticeboards, local newspapers and social media for information about dates, times and locations for any public meetings.

## Final Report to the Attorney-General

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published. Where possible, responses to the Issues Paper should be made in writing, however, please contact the Institute if you need to make alternative submission arrangements.

Electronic submissions should be emailed to: [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

Submissions in paper form should be posted to:

Tasmania Law Reform Institute

Private Bag 89

Hobart, TAS 7001

The Issues Paper and Easy Read Consultation Paper are available at the Institute's web page at <http://www.utas.edu.au/law-reform/> and can be sent to you by mail or email if you register your interest with the Institute.

Inquiries should be directed to Ms Rikki Mawad on (03) 6226 2042/ 0438 297 569 or [Rikki.Mawad@utas.edu.au](mailto:Rikki.Mawad@utas.edu.au).

**CLOSING DATE FOR RESPONSES: 15 July 2016**

## Terms of Reference

- Identify the existing special measures in Tasmania to support vulnerable witnesses, children and anyone with a communication difficulty to give evidence, from the first point of contact with police throughout the criminal trial process.
- Provide an overview of special measures and approaches in other jurisdictions around Australia and overseas that improve access to justice for people with complex communication needs, particularly the inclusion of expert intermediaries from the first point of contact with police and then throughout the trial process.
- Examine the feasibility of an expert intermediary scheme in Tasmania alongside existing and additional special measures to ensure that a victim, witness or an accused with communication difficulties has equal access to justice.
- Provide recommendations for any necessary law reform while also identifying the broader systemic infrastructure required to enact such a scheme/special measures.
- Any other matters the Tasmania Law Reform Institute considers relevant to the Terms of Reference.

These terms of reference necessitate examination of the following matters:

- national and international research and literature on the use of professional intermediaries in court, in pre-trial directions hearings and in the context of investigative interviews with witnesses;
- the court's authority to obtain the assistance of intermediaries to facilitate witnesses' communication with the court — whether as an exercise of its inherent jurisdiction or pursuant to statutory rules and provisions;
- whether there is a need for statutory reform;
- practical constraints on the use of intermediaries, eg the need to ensure a sufficient pool of adequately skilled people;
- the human rights implications of using intermediaries in an adversarial system, including the significance of a triangulation of fair trial rights and whether the use of intermediaries, and the adaptation of forensic cross-examination techniques that entails, has implications for the defendant's right to a fair trial; and
- the range of intermediary schemes implemented in other jurisdictions and their potential suitability to the Tasmanian justice system.

There are many matters that warrant further investigation that are beyond the scope of this paper, including:

- A consistent approach to recording and investigating complaints and or allegations of abuse that are received by frontline workers in the disability and community sectors by teachers, carers, friends and relatives.
- Other difficulties all people face when involved in the adversarial criminal justice process due to the complex, stressful and serious nature of that process.

- Support for people with communication difficulties in the civil jurisdiction, in Tribunals, in the Federal Court and in the Family Court, including the provision of Easy Read versions of court, rights and process related information.
- The extent to which Tasmanian legislation aligns with the National Decision-Making Principles and Guidelines advanced by the Australian Law Reform Commission to recognise people with disabilities as persons before the law who have the right to make choices for themselves.<sup>1</sup>
- Review of ‘mental capacity’ and the *Guardianship and Administration Act 1995* (Tas).
- Review of the fitness to plead and fitness to stand trial provisions in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and the defence of insanity provided in s 16 of the *Criminal Code 1924* (Tas).
- More general reform of the adversarial trial process to reduce its adversarial nature including through the implementation of an increased number of therapeutic and restorative approaches within the criminal justice system for people with complex communication needs.
- Additional ways in which technology other than CCTV or pre-recording may enable a person to give evidence, including the option of creating a Digital Justice Strategy for the Tasmanian Courts alongside the Disability Justice Plan.
- Communication challenges and cultural barriers facing Indigenous people in the justice system.
- Communication challenges and cultural barriers facing people from culturally and linguistically diverse (CALD) backgrounds.
- Communication challenges and barriers to justice for people from other linguistic minorities that may not be considered within this report.
- The extent to which courts, legal services and police stations may be made more accessible to people with complex communication needs, including through the use of Easy Read signs and resources available in print and online.

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<sup>1</sup> See further Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) <<https://www.alrc.gov.au/publications/disability-dp81>>.

## Executive Summary

This Issues Paper discusses the feasibility of instituting a communication assistant/intermediary scheme in Tasmania for people with complex communication needs involved in the criminal justice system to enhance their ability to gain equal access to justice. It considers whether such a scheme would enhance existing measures enacted to assist such people when providing evidence as witnesses, victims or defendants. It comprises a major step in obtaining advice from the Tasmanian community about whether and how a communication assistant/intermediary scheme might improve access to justice for people with complex communication needs in Tasmania and what might be an appropriate model for such a scheme in Tasmania.

The ability of a person who has been the victim of a crime, a witness to a crime or who has been accused of a crime to communicate effectively with police and give reliable evidence in criminal trials will fundamentally determine whether that person can gain access to justice.

The Tasmania Law Reform Institute recognises that many people have complex communication needs that can fundamentally impede their interactions with the police, lawyers and the courts.

Part 1 of this Issues Paper discusses the background to the preparation of this Issues Paper, sets out its Terms of Reference and lists several matters that are beyond its scope. The terms of reference include:

- the identification of existing measures in Tasmania to support people with complex communication needs in interacting with the police, lawyers and criminal courts;
- the provision of advice about such measures elsewhere in Australia and overseas; and
- examination of the feasibility of instituting an expert intermediary/communication assistant scheme in Tasmania to maximise the opportunity for people with complex communication needs to gain equal access to justice.

In Part 1 of this Issues Paper it is suggested that the term ‘complex communication needs’ be used to denote people with communication and comprehension difficulties that significantly impede their interactions with the police, lawyers and the courts. This term encompasses communication problems arising from physical, mental, intellectual and cognitive impairments including those attributable to physical and mental trauma. It covers learning difficulties, language problems, dyslexia, dyspraxia, dyscalculia and attention deficit (hyperactivity) disorder (ADHD). While the Institute utilises the term, ‘complex communication needs’ in this Issues Paper, it is seeking feedback on whether this is the best term to use and, if not, what might be a more appropriate term.

The terms ‘**communication assistant**’ and ‘**intermediary**’ are used throughout this Issues Paper to denote the people who provide assistance to those with complex communication needs when participating in the criminal justice system.

Part 2 of this Issues Paper examines participation barriers for people with complex communication needs arising from comprehension and communication challenges during both the pre-trial and trial stages of the criminal justice process. It is noted that comprehension and communication difficulties experienced by people with complex communication needs are exacerbated by the criminal justice process itself, by pre-trial interviewing processes and by questioning conventions of criminal trials, particularly those of cross-examination.

Failure to accommodate people with complex communication needs adequately in the criminal justice system has serious ramifications for case outcomes. Those accused of offences may be more likely to plead guilty because they believe that they will not be able to mount an adequate defence to charges against them. Cases involving victims with complex communication needs may not be prosecuted because of the difficulties involved in eliciting comprehensible evidence from them.

The problems that need to be resolved to improve the opportunity for people with complex communication needs to gain equal access to justice fall into two broad categories. First, there is the problem of identification — recognising when a person has comprehension and communication difficulties and the nature of those difficulties. Second, there is the problem of appropriately adjusting pre-trial and trial questions and questioning styles so that they take account of the comprehension and communication capacities of people with complex communication needs.

To resolve the first problem, effective screening measures (including obtaining expert advice) should be developed and used. To tackle the second problem, communication assistants/intermediaries should be employed to advise investigators, courts and legal counsel about appropriate questions and questioning styles for people with complex communication needs. Adequate control of questioning is also facilitated by recording pre-trial (in the absence of the jury) the entire testimony of people with complex communication needs and by holding ground rules hearings to determine and give directions about the types of questions that people with complex communication needs may be asked.

Part 3 of the Issues Paper provides an overview of existing policies, guidelines and statutory provisions that either implement measures to assist people with complex communication needs in navigating the criminal justice system or that might potentially be used to implement such measures.

The *Tasmania Police Manual* contains guidance for the police in managing interactions with people with complex communication needs. It refers police officers to the *Guidelines for Interacting with People with Disability*. It also contains guidance on interacting with children. Both the *Tasmania Police Manual* and the *Guidelines for Interacting with People with Disability* are administrative guidelines and do not have the force of law.

The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) regulates specified aspects of police conduct in relation suspects. It does not cover witnesses or victims. Additionally, it does not make provision for communication assistance to be provided for people with complex communication needs.

A register of disability service providers who may be able to assist the police in interacting with people with complex communication needs is accessible via Radio Dispatch Services which also has a 24 hour contact number for Disability and Respite Services. The question remains whether a specifically trained, readily identifiable cohort of expert communication assistants might assist the police in interacting with people with complex communication needs.

There is currently no statutory or practice framework covering the provision of communication/intermediary services to assist the legal profession or mandating that such assistance be sought. Additionally, there is no register or established group of experts that may be called upon to provide communication assistance for people with complex communication needs during interactions with lawyers.

The Office of the Director of Public Prosecutions (DPP) has established the Serious Crimes Witness Assistance Service, which provides assistance to Crown counsel when communicating with people with complex communication needs.

Legislation has been enacted in Tasmania that enables pre-trial recording of the entirety of the evidence of children and ‘special witnesses’. Ground rules hearings are held in cases where the pre-trial recording process is to be used. This enables directions to be given about the pre-recording and questioning of witnesses. Judges also have a duty under Tasmanian evidence law to control inappropriate cross-examination. Nevertheless, adequate judicial control of cross-examination is difficult to achieve during trials. There is no explicit legislative provision for the use of intermediaries or communication assistants during trial. The question is whether the existing measures that have been implemented in Tasmania to help in eliciting evidence from people with complex communication needs might be enhanced by the introduction of an intermediary/communication assistant scheme.

Part 4 reviews intermediary/communication assistant schemes in other Australian and international jurisdictions. A variety of communication assistant schemes have been implemented in Australia and overseas. They grant communication assistants various responsibilities ranging from the provision of advice to the police, lawyers and the courts about appropriate questioning of people with complex communication needs to translating questions and answers during questioning and intervening in inappropriate questioning. They also differ in prescribing who may perform the role of communication assistant and who may receive communication assistance. While none of these schemes is perfect, overall, the evidence to date is that where properly resourced, communication assistant schemes offer significant potential for facilitating the reception of evidence of people with complex communication needs.

The cross-jurisdictional analysis informs a series of questions on which the Institute seeks feedback, about whether and how an intermediary/communication assistant scheme might enhance access to justice for people with complex communication needs in Tasmania and whether additional measures such as a specialist interviewing ‘house’ like the Barnehus (Children’s House) model in Norway might complement existing and any new measures.

Part 5 of this Issues Paper asks key questions about the various options for reform in Tasmania. The Institute acknowledges that there is scope to retain and better utilise existing measures for people with complex communication needs in Tasmania. However, the Institute also seeks feedback on the possibility of enacting a communication assistant/intermediary scheme in Tasmania and what such a scheme should look like.

There are a number of ways people can provide their views to the Institute about the issues discussed in this Issues Paper, details of which are provided at page iii above (‘How to Respond’).

## List of Questions

The Institute welcomes your response to any individual question or to all questions contained within this paper. A full list of the consultation questions is contained below with page references for questions that relate to different parts of the Issues Paper.

<p><b>Question 1</b> (Page 6)</p>	<p>Is the term, ‘people with complex communication needs’ the best term to use to denote people with communication and comprehension difficulties that significantly impede their capacity to participate in the criminal justice process?</p> <p>If not, what term would you recommend be used instead?</p>
<p><b>Question 2</b> (Pages 12-13)</p>	<p>(a) In your experience do people with complex communication needs face barriers when interacting with the police as victims, witnesses and suspects? If so, please provide details about these barriers.</p> <p>(b) In your experience do people with complex communication needs face barriers when interacting with defence and prosecution counsel? If so, please provide details about these barriers.</p> <p>(c) In your experience do people with complex communication needs face comprehension and communication barriers in relating their experiences and accounts of relevant events during criminal justice proceedings, hearings and trials? If so, please provide details about these barriers.</p> <p>(d) In your experience are there problems in identifying people with complex communication needs at different stages in the criminal justice process, for example:</p> <ul style="list-style-type: none"> <li>• At the investigation stage for the police?</li> <li>• During interactions with defence and prosecution counsel?</li> <li>• For court personnel and judicial officers?</li> </ul> <p>If so please provide details.</p>
<p><b>Question 3</b> (Page 19-20)</p>	<p>(a) Should relevant provisions of the Tasmania Police Manual and <i>Guidelines for Interacting with People with Disability</i> be enacted in legislation to ensure the provision of communication assistance to people with complex communication needs?</p> <p>In this regard, should the <i>Criminal Law (Detention and Interrogation) Act 1995</i> (Tas) be reformed to make such provision for suspects?</p> <p>Should the <i>Evidence (Children and Special Witnesses) Act 2001</i> (Tas) be reformed to make such provision for witnesses, victims and complainants?</p>

	<p>(b) Are the existing mechanisms available to the police for <i>identifying</i> people with complex communication needs and <i>managing</i> interactions with them adequate?</p> <p>(c) Should a common assessment tool be developed in consultation with experts in communicating with people with complex communication needs to enable early identification of people with communication and comprehension problems?</p> <p>(d) Are the existing measures for <i>obtaining</i> communication assistance for people with complex communication needs when interacting with the police adequate?</p> <p>(e) Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist the police in identifying and interacting with people with complex communication needs?</p> <p>(f) Should the establishment of a Barnehus (Children’s House) model similar to that utilised in Norway (discussed in Part 4) as a place for interviewing people with complex communication needs be investigated for Tasmania?</p> <p>(g) If an expert communication assistant/intermediary scheme were available to the police who should bear the financial responsibility for engaging its services?</p> <p>(h) Are the mechanisms currently available to the police to identify existing support persons and advocates for people with complex communication needs adequate?</p> <p>(i) Would the process of identifying existing advocates and support people be enhanced by the creation of an integrated database with relevant government departments (like the DHSS – Disability Services) and allied agencies?</p> <p>(j) Is the current training received by police recruits in identifying and interacting with people with complex communication needs adequate? If not, how might it be improved?</p> <p>(k) Is the on-going training available to police officers in identifying and interacting with people with complex communication needs adequate? If not, how might it be improved?</p> <p>(l) Are there any additional measures that might be implemented to support people with complex communication needs in interacting with the police?</p> <p>(m) What type of communication assistance would be beneficial for people with complex communication needs when interacting with the police?</p> <p>(n) What might be some of the challenges for police when using an intermediary or communication assistant during their interactions with people with complex communication needs?</p>
<p><b>Question 4</b> (Page 21)</p>	<p>(a) Are the measures currently available to defence and prosecution counsel to identify and interact with people with complex communication needs adequate?</p>

	<p>(b) Does undergraduate and postgraduate legal training adequately equip lawyers to identify and interact with people with complex communication needs? If it doesn't how might it be improved?</p> <p>(c) Do continuing legal education programs provide adequate on-going training to the legal profession in identifying and interacting with people with complex communication needs? If they do not, how might they be improved?</p> <p>(d) Are the mechanisms currently available to defence and prosecution counsel to identify existing support persons and advocates for people with complex communication needs adequate?</p> <p>(e) Would defence and prosecution counsel benefit from the establishment of an integrated government database in identifying existing support persons and advocates for people with complex communication needs?</p> <p>(f) Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist defence and prosecution counsel in identifying and interacting with people with complex communication needs?</p> <p>(g) If such an expert communication assistant/intermediary scheme were available to defence and prosecution counsel who should bear the financial responsibility for engaging its services?</p> <p>(h) What type of communication assistance would be beneficial for people with complex communication needs in interacting with defence and prosecution counsel?</p> <p>(i) Are there any additional measures that could be implemented to support people with complex communication needs in interacting with defence and prosecution counsel?</p> <p>(j) What might be some of the barriers to using an intermediary or communication assistant during defence and prosecution counsel interactions with people with complex communication needs?</p>
<p><b>Question 5</b> (Page 21)</p>	<p>In your view what would be a suitable package of screening and support for people with complex communication needs in Tasmania in interacting with the police, defence and prosecution counsel during pre-trial stages of the criminal justice process?</p>
<p><b>Question 6</b> (Pages 30-31)</p>	<p>(a) Does current Tasmanian legislation provide an adequate framework through which communication assistant/intermediary support can be obtained to support witnesses with complex communication needs at trial?</p> <p>(b) Do existing pre-trial directions hearings operate as an appropriate mechanism for identifying and discussing any complex communication needs that witnesses may have?</p>

	<p>(c) Should there be a legislative base for pre-trial directions or ground rules hearings to be held in any case involving witnesses with complex communication needs as is the case in England and Wales for children and youths? (See discussion of the approach in England and Wales at 4.2)</p> <p>(d) Would there be merit in engaging an expert intermediary or communication assistant to provide advice and/or reports pre-trial to judges and lawyers about witnesses' communication and comprehension capacities?</p> <p>(e) Does s 41 of the <i>Evidence Act 2001</i> (Tas) provide an adequate and sufficient mechanism for controlling cross-examination at trial to ensure that witnesses with complex communication needs are asked questions that are suitable to their comprehension and communication capacities?</p> <p>(f) Is the pre-trial recording of witnesses' entire testimony an adequate measure to ensure that people with complex communication needs are asked questions that are suitable to their comprehension and communication capacities and are able to give coherent and reliable testimony about their experiences and relevant events?</p> <p>(g) What legislative and procedural changes may be required to support people with complex communication needs at trial?</p> <p>(h) Should an expert intermediary or communication assistant scheme be introduced in Tasmania to assist people with complex communication needs, lawyers and judges in the trial process?</p> <p>(i) What will some of the barriers be to using an intermediary or communication assistant at trial?</p> <p>(j) What might be a best-practice and integrated package for Tasmania to maximise the opportunity for people with complex communication needs to participate properly in the trial process?</p>
<p><b>Question 7</b> (Page 48)</p>	<p>Should no change be made to the current position in Tasmania with regard to implementing a statutory communication assistant/intermediary scheme for people with complex communication needs?</p>
<p><b>Question 8</b> (Page 48-49)</p>	<p>Who should be able to use a communication assistant or intermediary?</p> <p>Anyone with complex communication needs? Or:</p> <p>(a) Only children;</p> <p>(b) Anyone who is under 18? and/or</p> <p>(c) Anyone who has difficulty communicating accounts of their experiences or comprehending questions and whom an intermediary/communication assistant is likely to assist in giving accurate, complete or coherent testimony;</p>

	<p>(d) Only victims of certain offences and if so, which offences;</p> <p>(e) Only children and special witnesses as defined in the <i>Evidence (Children and Special Witnesses) Act 2001</i> (Tas), which is cognate with s 106R of the <i>Evidence Act 1906</i> (WA).</p>
<p><b>Question 9</b> (Page 49)</p>	<p>(a) When should communication assistance be available?</p> <ul style="list-style-type: none"> <li>• Only during trials?</li> <li>• And/or during pre-trial recording processes?</li> <li>• And/or during police interviews?</li> <li>• And/or during interviews/consultations with legal counsel including prosecution counsel?</li> <li>• And/or prior to police interviews?</li> </ul> <p>(b) Should communication assistance be prescribed on a mandatory basis in some cases for some people and if so, in which cases, when and for which people?</p> <p>(c) If communication assistance is mandatory in some cases for some people, should exceptions be provided to this requirement and if so, what should those exceptions be?</p>
<p><b>Question 10</b> (Page 50)</p>	<p>Should intermediaries/communication assistants act:</p> <ul style="list-style-type: none"> <li>• As interpreters only?</li> <li>• And or as advisors to courts, counsel and the police?</li> <li>• And/or be able to intervene in inappropriate questioning and if so what type of intervention should be permitted?</li> </ul>
<p><b>Question 11</b> (Pages 51)</p>	<p>(a) Should communication assistants/intermediaries be required to have any particular qualifications and if so what qualifications should they have?</p> <p>(b) Should any person deemed suitable and competent be able to act as a communication assistant/intermediary?</p> <p>(c) Should a panel of communication assistants/intermediaries be established who may be assigned to cases based on their particular expertise and/or experience, and if so, who should have responsibility for establishing such a panel?</p> <p>(d) Should courts have the power to appoint anyone considered suitable and</p>

	<p>competent to act as an intermediary/communication assistant?</p> <p>(e) Who/what agency is best placed to assess the suitability of people to act as communication assistants/intermediaries?</p> <p>(f) Should a ground rules hearing be held in every case involving a person with complex communication needs to determine the need for and role to be performed by a communication assistant/intermediary and the type and style of questions that the person with complex communication needs may be asked?</p> <p>(g) Might different communication assistants/intermediaries with different qualifications be employed at different stages of the criminal justice process?</p>
<p><b>Question 12</b> (Page 52)</p>	<p>(a) Who should have financial responsibility for a Tasmanian intermediary scheme?</p> <ul style="list-style-type: none"> <li>• The agency/institution that uses the communication assistant/intermediary?</li> <li>• The State Government?</li> </ul> <p>(b) What training should communication assistants/intermediaries undertake?</p> <p>(c) What organisation(s) are best placed to develop training programs for intermediaries/communication assistants?</p> <p>(d) What additional infrastructure might be necessary to support an intermediary/communication assistant scheme in Tasmania?</p>

## Part 1

# Introduction

## 1.1 Background to the Reference

*1.1.1* This Issues Paper discusses the feasibility of instituting a communication assistant/intermediary scheme for people with complex communication needs<sup>2</sup> involved in the criminal justice system to enhance their ability to gain equal access to justice. It considers whether such a scheme would supplement existing measures enacted to assist such people when providing evidence as witnesses, victims or defendants in the adversarial criminal trial process. It comprises a major step in obtaining advice from the Tasmanian community about whether and how a communication assistant/intermediary scheme might improve access to justice for people with complex communication needs in Tasmania and what might be an appropriate model for such a scheme in Tasmania.

*1.1.2* Proceeding from an understanding that people with complex communication needs face major hurdles in obtaining equal access to justice, this Issues Paper focuses on whether and how an intermediary/communication assistant scheme might enhance their participation in the criminal justice process in Tasmania from their point of entry into the system through to and including their participation in criminal hearings and trials. It discusses existing measures for vulnerable witnesses in Tasmania and examines intermediary schemes implemented in other Australian and international jurisdictions.

*1.1.3* In preparing this Issues Paper the Tasmania Law Reform Institute (TLRI) conducted a number of discussions with key stakeholders and subsequently co-hosted with the Attorney-General, the Hon Dr Vanessa Goodwin, a Ministerial Roundtable attended by over 35 key stakeholders including the Deputy Registrar of the Supreme Court, the Administrator of the Magistrates Court, The Deputy Police Commissioner and Senior Executive Support Personnel from Tasmania Police, the Director of Public Prosecutions (DPP), representatives of the Serious Crimes Witness Assistance Service, The Public Guardian, the Chair of the Mental Health Tribunal, the Commissioner for Children, representatives of Equal Opportunity Tasmania, the Department of Education, the Tasmanian Institute of Law Enforcement Studies (TILES), Anglicare, TasCOSS, the Sexual Assault Support Service, Advocacy Tasmania, SpeakOut, the Hobart Community Legal Service, Headway Rebuilding Lives, the Tasmania Deaf Society, the Law Society of Tasmania, the Alzheimers and Dementia Association of Tasmania, the Brain Injury Awareness Association, the Shadow Attorney-

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<sup>2</sup> Recognising that there is a diverse range of communication difficulties that people may experience, the term ‘complex communication needs’ is used in this Issues Paper in preference to ‘vulnerable witness’. The term encompasses children, people with physical, cognitive, social or communication impairments and includes people who have experienced physical or mental trauma that impedes their communication capacities. The umbrella term ‘complex communication needs’ aims to include anyone with a communication difficulty that may require special measures to be deployed during police interviews and at trial to ensure that they can be heard, understood and concomitantly that they can understand questions and the process. This definition is discussed in greater detail at 1.3.4 where the question of to whom a Tasmanian intermediary scheme should apply is considered.

General and the Tasmanian Greens to obtain advice about key issues to be addressed in this Issues Paper. This consultative process confirmed that key issues to be considered in the consultation phase of this project are:

- how might an intermediary/communication scheme facilitate access to justice for people with complex communication needs;
- to whom should a communication assistance/intermediary scheme apply;
- at what stage or stages in the criminal justice process should communication assistants/intermediaries become involved; and
- who should perform the role of intermediaries/communication assistants.

1.1.4 It is uncontested the case that the capacity of a victim of a crime, a witness to a crime or a person accused of a crime to communicate effectively with police and give reliable evidence in criminal trials fundamentally determines whether that person can gain access justice. Where a person has a complex communication need because of his or her age, mental incapacity, cognitive or physical impairment,<sup>3</sup> his/her ability to navigate, understand and engage in the criminal justice system may be severely limited without access to appropriate measures to ensure that he or she can fully participate in the process. Moreover, such measures may be required to ensure that the psychological impact and trauma of testifying are mitigated.<sup>4</sup>

1.1.5 While a raft of ‘special witness measures’<sup>5</sup> have been implemented in Tasmania to ameliorate the stress of testifying for vulnerable witnesses, it is apparent that there remain barriers to the equal participation in the criminal justice process for people with complex communication needs. The nature and intractability of these problems are considered in Part 2 of this Issues Paper.

1.1.6 Many people with communication difficulties are capable of giving cogent and accurate testimony with the assistance of appropriate measures including the employment of communication assistants/intermediaries to enable them to comprehend fully questions asked and to communicate their responses to the court.<sup>6</sup>

1.1.7 The impetus for reform to tackle this problem has been generated by a growing recognition that people with complex communication needs have been excluded from obtaining access to justice. This understanding has been supported by the work of the Royal Commission into Institutional Responses to Child Sexual Abuse and the Senate Inquiry into the sexual abuse and exploitation of people with disabilities in Australia.<sup>7</sup> Additionally, Australian courts have an obligation within the

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<sup>3</sup> These characteristics are also considered to constitute categories of attribute-based vulnerability, see further Isabelle Bartkowiak-Theron and Nicole L Asquith, ‘The Extraordinary Intricacies of Policing Vulnerability’ (2012) 4(2) *Australasian Policing* 43.

<sup>4</sup> Note the commentary of T Henning, ‘Obtaining the best evidence from witnesses with complex communication needs’ (Keynote Address delivered at the Disability Justice Plan Symposium, Adelaide, 19 November 2015).

<sup>5</sup> See, in particular, the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

<sup>6</sup> See further P Bowden, D Plater, and T Henning, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539; The Honourable Justice Tom Gray, Martin Hinton QC and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012).

<sup>7</sup> Note the Royal Commission into Institutional Responses to Child Sexual Abuse <<https://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>> and the recent Senate Community

International Human Rights framework set out in Article 12 of the UN *Convention on the Rights of the Child* and Article 13 of the UN *Convention on the Rights of Persons with Disabilities* to create the optimum circumstances for children and people with disabilities to give their accounts of events and to participate in criminal justice processes. These Conventions echo the right to a fair trial, the right to be treated with dignity and humanity, the right to equality before the law and the right not to be discriminated against in the *International Covenant on Civil and Political Rights (ICCPR)* to which Australia is a signatory.<sup>8</sup>

1.1.8 It is against this background that the TLRI has undertaken the examination in this Issues Paper of the feasibility of instituting an expert intermediary/communication assistant scheme as a special measure to facilitate the reception of evidence in criminal trials from people with complex communication needs in Tasmania.

1.1.9 Further, as part of the Tasmanian Government's broader reform agenda, the Attorney General has engaged Equal Opportunity Tasmania<sup>9</sup> to create a Disability Justice Strategy for Tasmania. The TLRI work on this reference fits within that agenda and will complement the work of Equal Opportunity Tasmania.

## 1.2 Structure of this Issues Paper

1.2.1 Part 1 of this Issues Paper deals with the background and scope of the reference and definitions of terms used. It provides an introduction to the paper.

1.2.2 Part 2 discusses the challenges people with complex communication needs face in navigating the criminal justice system as victims, witnesses and defendants and identifies the barriers they encounter at key points in the criminal justice process — at the investigative, prosecution and trial stages. It also considers the implications of those barriers for the people concerned and more generally for the integrity of the Tasmanian criminal justice process. It distils those barriers into two critical matters — the difficulty in identifying people with complex communication needs and the need to adapt investigative and trial questioning styles and techniques to take account of those needs. Tackling the first problem necessitates the development and use of an effective screening device. Tackling the second matter requires the deployment of communication assistants/intermediaries during investigative questioning, pre-trial processes and trials to maximise the opportunity for and capacity of people with complex communication needs to give comprehensible and comprehensive accounts of relevant events.

1.2.3 Part 3 of this Paper begins by describing the measures that are currently recognised as providing the best means of overcoming the barriers identified in Part 2. Central to these measures is

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Affairs Reference Committee Inquiry into the Abuse of People with Disabilities which recommended a Royal Commission  
<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report/b01](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report/b01)>.

<sup>8</sup> The *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976) art 14(3)(e). The ICCPR has been replicated in the *Human Rights Act 2004 (ACT)* s 22(2)(g) and in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 25(2)(g)-(h).

<sup>9</sup> Formerly the Anti-Discrimination Commission.

the provision of communication assistant advice about people with complex communication needs to criminal justice agencies and personnel and communication assistance to people with complex communication needs, during pre-trial processes and at trial. Part 3 then assesses the extent to which the major legislative, administrative and institutional measures presently available in Tasmania match those identified as facilitating equal access to justice for people with complex communication needs. The focus here is on the extent to which provision is made for the involvement of communication assistants/intermediaries during investigative and prosecutorial processes, during pre-trial proceedings like pre-trial directions hearings and during trials and hearings including during pre-recording processes. This analysis also examines for whom such assistance may or may not be available.

1.2.4 Part 4 of this Paper considers approaches to the provision of communication assistance/intermediary schemes in other jurisdictions, including elsewhere in Australia, in England and Wales, New Zealand, Canada, South Africa, Israel and Norway.

1.2.5 Part 5 of this Paper asks a series of questions about options for reform in Tasmania, including the option of making no change to existing measures and no additions to them. It then explores the option of instituting a Tasmanian communication assistant/intermediary scheme by asking key questions about what such a scheme should look like were it to be instituted.

## 1.3 Definitions

1.3.1 The following terms are used throughout this Issues Paper. However the TLRI is seeking advice as to whether they constitute the most appropriate terminology to use in the context of the problems dealt with here and whether they adequately encompass the notions sought to be conveyed and dealt with. This matter is canvassed further below from 1.3.2–1.3.4.

1.3.2 The term, ‘people with complex communication needs’ has been adopted from the South Australian Justice Disability Plan, which was developed following widespread community consultation by the South Australian Attorney-General’s Division. This term was endorsed at the Ministerial Roundtable co-hosted by the TLRI in October 2015. It recognises that there are a diverse range of communication difficulties people may experience including those that arise from their level of cognitive and social development. The term also encompasses communication problems arising from physical, mental, intellectual and cognitive impairments including those attributable to physical and mental trauma. Additionally, it is capable of covering specific learning difficulties, specific language impairments, dyslexia, dyspraxia, dyscalculia and attention deficit (hyperactivity) disorder (ADHD).<sup>10</sup>

1.3.3 This term seeks to cover any people with communication difficulties that impede their capacity to participate in the criminal justice process and that might be ameliorated through the use of

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<sup>10</sup> While this is not an exhaustive list of communication difficulties, it incorporates a wide range of the conditions that witnesses will present with in interactions with the criminal justice system. Practice Directions have been developed in the United Kingdom on questioning and identifying people with particular ‘hidden’ communication needs. See further, The Advocate’s Gateway, *Planning to question someone with ‘hidden’ disabilities: specific language impairment, dyslexia, dyslexia, dyspraxia, dyscalculia and AD(H)D* (December 2015) <<http://www.theadvocatesgateway.org/images/toolkits/5planningtoquestionsomeonewithhiddendisabilities-specificlanguageimpairmentdyslexiadyspraxiadyscalculiaandadhd141215.pdf>> alongside other resources contained at The Advocates Gateway, (2016) <<http://www.theadvocatesgateway.org/>>.

a communication assistant/intermediary. This term is used in preference to ‘vulnerable person’ because while those with complex communication needs may be considered in that respect to be vulnerable, vulnerability encompasses a range of problems that are not necessarily sited in communication and comprehension capacities.

1.3.4 The terms ‘**communication assistant**’ and ‘**intermediary**’ are used interchangeably and/or together throughout this Issues Paper because they are the terms that have been adopted in other jurisdictions to denote the people mandated either by legislation or the courts to provide assistance to those with complex communication needs when participating in the criminal justice system. Other terms have also been used in some jurisdictions. For example, the term ‘children’s champion’ is used in NSW in the legislation establishing a pilot communication assistance scheme for children.<sup>11</sup> The term, ‘communication partner’ is used in the relevant South Australian legislation.<sup>12</sup>

## 1.4 Scope of the Reference

1.4.1 The Ministerial Roundtable and early stakeholder consultations revealed that for a full and informed evaluation of the issues associated with this reference, the scope of investigation must include victims, witnesses and accused persons with complex communication needs who may require special measures to give evidence and to participate in the criminal justice system. Moreover, it became apparent that the investigation should extend beyond the trial process to all points in the criminal justice process where people with complex communication needs might require assistance in gaining equal access to justice from their point of entry into the justice process through to, and including, trials and hearings.

1.4.2 This paper considers the use of communication assistants or intermediaries alongside other witness special measures to ameliorate the difficulties experienced by victims, witnesses and accused people with complex communication needs in the criminal justice system. There are, however, a number of significant related issues that fall outside the scope of the present terms of reference that warrant further investigation, including:

- The need to achieve a consistent approach to recording and investigating complaints and/or allegations of abuse received by frontline workers in the disability and community sectors/ by teachers, carers, friends and relatives.
- How to respond to the difficulties faced by all participants in the adversarial criminal trial that arise from the complex, stressful and alien nature of the process.
- The need to provide support for people with communication difficulties in the civil jurisdiction including in Tribunal proceedings.

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<sup>11</sup> See further the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill 2015 (NSW), with children’s champions described at clause 88 noting that the role may also be described as a witness intermediary.

<sup>12</sup> See further the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) which defines communication partners as a person, or a person of a class, approved by the Minister for the purposes of providing assistance in proceedings to a witness with complex communication needs in Part 3—Amendment of *Evidence Act 1929* (SA), s 5—Amendment of section 4—Interpretation.

- Additional ways in which technology other than closed circuit television (CCTV) or pre-recording may enable people to give evidence, including through the creation of a Digital Justice Strategy for the Tasmanian Courts alongside the Disability Justice Plan.
- The need to address communication challenges and cultural barriers facing Indigenous people who become involved in the justice system.
- The need to address communication challenges and cultural barriers facing people from culturally and linguistically diverse (CALD) backgrounds.

<b>Question 1</b>	Is the term, ‘people with complex communication needs’ the best term to use to denote people with communication and comprehension difficulties that significantly impede their capacity to participate in the criminal justice process?  If not, what term would you recommend be used instead?
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## Part 2

# (Un) Equal Access to Justice

## 2.1 People with Complex Communication Needs

2.1.1 This Part of the Issues Paper focuses on the problems generated by the criminal justice process for people with complex communication needs that arise from their capacity to comprehend questions asked and to communicate comprehensible information about relevant events. Comprehension and communication difficulties experienced by people with complex communication needs are exacerbated by the criminal justice process itself, by pre-trial interviewing processes and by questioning conventions of criminal trials, particularly those of cross-examination. A major obstacle to addressing those problems and elevating the opportunity for people with complex communication needs to gain equal access to justice that is encountered across the criminal justice process is the difficulty in identifying people who have communication and comprehension difficulties.

## 2.2 Participation Barriers in the Criminal Justice System

### *Comprehension and communication – pre-trial*

2.2.1 In the pre-trial context, at the point of contact with the police, communication capacities may determine how the police respond to a person's accounts of events, whether their accounts are considered reliable and accordingly, in the case of victims, whether they will be acted upon, and, in the case of suspects, whether they will be detained and/or charged.

2.2.2 At this point in the justice process, it can be very difficult to identify and screen for communication difficulties, particularly if they are not immediately apparent, as may be the case with some conditions such as speech and language disorders, working memory difficulties and other masked or misattributed communication problems.<sup>13</sup> In some instances, where suspects appear uncooperative or recalcitrant, it may in fact be that they experience a hidden communication difficulty.<sup>14</sup>

Communication and comprehension difficulties experienced at the point of entry into the criminal justice system may influence the way matters are dealt with at every subsequent stage in the process and even determine the ultimate outcome of the case. For example, a person with complex communication needs who experiences difficulty in being understood may not persist in making a

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<sup>13</sup> Anecdotal feedback during consultations prior to writing this Issues Paper from Speech and Language Pathology experts and others who attended the Ministerial Roundtable on 'Access to Justice for Tasmanians with Complex Communication Needs' (Parliament House, Hobart, 21 October 2015) ('Ministerial Roundtable') provided several insights into the challenges faced by people with both apparent and masked communication difficulties as complainants and suspects in the criminal justice system.

<sup>14</sup> This commentary is based on anecdotal feedback and contributions to the Ministerial Roundtable, *ibid.*

complaint when they have been the victim of a crime. Similarly, people with complex communication needs who are suspected of committing crimes may be more likely to acquiesce to accusations of wrong doing and to make admissions that they do not fully understand or intend to make. This means that they may make unintentionally unreliable statements to the police, which may then be used against them at trial.

2.2.3 People with complex communication needs also experience difficulties in communicating adequately with defence and prosecution counsel, unless properly supported. Again there is the problem of identifying communication difficulties, both their existence and source. This may be particularly problematic where people have developed devices to mask their problems. Where a communication difficulty is identified, it may not be easy to obtain assistance to deal with it. For example, lawyers at community legal centres have advised the Institute that while they frequently encounter people with complex communication needs there are insufficient sources of assistance available to respond to their clients' needs.

2.2.4 As a result of comprehension and communication problems, defence counsel may remain inadequately instructed, and so may be impeded in their conduct of cases. Where defendants present with significant communication difficulties, defence counsel may tailor their advice according to their perceptions of likely case outcomes having regard to their clients' communication problems.<sup>15</sup> Accordingly, comprehension and communication difficulties may encourage defendants to plead guilty because, in their own estimation or in the view of counsel (should they have counsel), they lack the ability to testify adequately in support of their own case.

2.2.5 Similarly, prosecution counsel may not be able to obtain an adequate account of events from people with complex communication needs who are not adequately supported. This will be particularly problematic if communication/comprehension incapacities remain undetected. At the most fundamental level, because they are determinative of people's competence to testify,<sup>16</sup> communication and comprehension capacities will decide whether people who have difficulties in this regard can be heard at all. Because of its significance for prosecution assessments of conviction prospects, victims' communication capacities may determine whether any offences alleged will be tried.

2.2.6 If a person with a complex communication need presents at court without already having been identified as having comprehension and communication difficulties, courts may not become aware that this is the case until the hearing of the matter is underway. This can result in delays in dealing with matters while advice is obtained about whether and how those difficulties might be overcome and then subsequently obtaining access to the necessary measures to do so. In consultations held with key stakeholders in the preparation of this Issues Paper, the TLRI was advised that courts are heavily reliant upon counsel, mental health liaison officers working in the courts and the Witness Assistance Scheme operating in the office of the DPP, to identify people with complex communication needs and for advice on how to respond to their needs. Nevertheless, early and responsive identification remains problematic.

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<sup>15</sup> Anecdotal evidence obtained through pre-consultation with the Law Society of Tasmania Criminal Practitioners Group (27 October 2015).

<sup>16</sup> Section 13(1) *Evidence Act 2001* (Tas).

### ***Comprehension and communication – at trial***

2.2.7 Comprehension and communication difficulties may also be determinative of trial outcomes. As noted elsewhere,

the ability to understand and be understood and, tangentially, to withstand the rigours and meet the particular demands and standards of the adversarial trial, will determine its outcome. [This is true too for those who are alleged to have committed offences.] Withstanding the rigours of the criminal trial centrally involves not being shredded in cross-examination and meeting juror expectations of what constitutes a reliable witness, both of which also set particular, often unachievable, standards of comprehension and communication for people with complex communication needs. Beyond the trial itself, there is the problem for these witnesses of surviving the trial experience emotionally and psychologically intact.<sup>17</sup>

2.2.8 It is incontrovertibly established that the adversarial trial process exacerbates the particular problems experienced by people with complex communication needs when trying to communicate their accounts of events and when being assessed as reliable and capable communicants of those events. Research has consistently shown that people with complex communication needs:

- are frequently asked questions that sit well beyond their cognitive capacities and developmental levels;<sup>18</sup>
- are often asked questions that are syntactically confusing, complex, framed in confusing or sophisticated language and that conflict with their expectations and experiences of social norms;<sup>19</sup>
- rarely respond to questions by seeking clarification when confused as to the nature of a question and so often attempt to answer questions that are ambiguous or do not make sense to them at all;<sup>20</sup>
- experience comprehension discrepancies, even where questions seem clear, with the result that there is a mismatch between what the questioner thinks is being asked and what the person questioned understands he or she is being asked;<sup>21</sup>

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<sup>17</sup> T Henning, 'Obtaining the best evidence from children and witnesses with cognitive impairments – "Plus ça change" or prospects new?' (2013) 37 *Criminal Law Journal* 155, 155-156.

<sup>18</sup> M Kebell et al, 'Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?' (2004) 9(1) *Legal and Criminological Psychology* 23, 24; J Plotnikoff and R Woolfson, *Measuring Up? Good Practice Guidance in Managing Young Witness Cases and Questioning Children* (NSPCC & Nuffield Foundation, 2009) <[http://www.nuffieldfoundation.org/sites/default/files/measuring\\_up\\_report\\_wdf66579\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/measuring_up_report_wdf66579(1).pdf)>; Joyce Plotnikoff and Richard Woolfson, *Evaluation of Young Witness Support: Examining the Impact on Witnesses and the Criminal Justice System* (2007) <[http://lexiconlimited.co.uk/wp-content/uploads/2013/01/Young\\_Witness\\_Study\\_Report.pdf](http://lexiconlimited.co.uk/wp-content/uploads/2013/01/Young_Witness_Study_Report.pdf)>; Joyce Plotnikoff and Richard Woolfson, *In their own words: The experiences of 50 young witnesses in criminal proceedings* (2004); see also Henning, above n 4, for extrapolated reference details.

<sup>19</sup> Kebell, above n 18.

<sup>20</sup> R Zajac, J Gross and J Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10(1) *Psychiatry, Psychology and Law* 199.

<sup>21</sup> Ibid.

- are subjected to questioning that is often abusive, hostile, repetitive and overly lengthy<sup>22</sup> which effectively intimidates people with complex communication needs into ‘silence, contradictions, or general emotional and cognitive disorganisation’.<sup>23</sup>

All these matters have the effect of undermining the reliability of these people’s testimony and compromising their access to justice.

2.2.9 Studies have demonstrated that adversarial questioning conventions, particularly those associated with cross-examination, which seek to expose unreliable evidence, actually render it unreliable by preventing people with complex communication needs from giving full, accurate, reliable and coherent accounts of their experiences and of the events in issue.<sup>24</sup> For example, the way in which cross-examination, particularly of children, is conducted in court has been described by psychologists and developmental experts as an example of a ‘how not to’ guide for asking children questions.<sup>25</sup> Conventional questioning techniques when deployed for people with complex communication needs often undermine the integrity of their evidence and therefore the court process.

2.2.10 These problems do not arise only for victims and witnesses but also for those accused of committing crimes. Defendants with complex communication needs who testify at trials will experience the same problems as other witnesses who face communication hurdles. Their communication difficulties will inevitably affect how they are perceived by jurors and other fact finders, particularly if they cannot convey their accounts of events consistently and comprehensibly. Further, these difficulties may prevent suspects and defendants from understanding what is happening and why, and so preclude their participation, in any meaningful way, in the criminal justice process. This necessarily undermines the principle of equal access to justice, which should underpin the criminal justice system.

2.2.11 As in the pre-trial stages of the criminal justice process, the fact that a person participating in the trial has a complex communication need may not be immediately apparent and may not be recognised until the trial is underway.

### **Implications**

2.2.12 There is evidence from other jurisdictions that there are high attrition rates in cases involving people with complex communication needs with such cases often not proceeding to trial.

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<sup>22</sup> C Eastwood, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (May 2003) Australian Institute of Criminology Trends and Issues, No. 250, <[http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi250.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi250.pdf)>.

<sup>23</sup> C A Carter, B L Bottoms and M Levine, ‘Linguistic and socioemotional influences on the accuracy of children’s reports’ (1996) 20 *Law & Human Behavior* 335, 336.

<sup>24</sup> E Henderson, ‘Persuading and Controlling: The Theory of Cross-examination in Relation to Children’ in H L Westcott, G M Davies and R Bull (eds), *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice* (John Wiley & Sons, 2002) as further discussed by Henning, above n 4.

<sup>25</sup> See Saskia Righarts, Fiona Jack, Rachel Zajac and Harlene Hayne, ‘Young Children’s Responses to Cross-examination Style Questioning: The Effects of Delay and Subsequent Questioning’ (2015) 21(3) *Psychology, Crime & Law* 274; see also R Zajac, S O’Neil and H Hayne, ‘Disorder in the Courtroom? Child Witnesses under Cross-Examination’ (2012) 32(3) *Developmental Review* 181, 182.

For example, the NSW Bureau of Crime Statistics has reported that for 2013 only around 20 per cent of child sexual assault offences reported to the police proceeded to court.<sup>26</sup>

2.2.13 While there is limited evidence as to the discontinuation of cases where a witness has complex communication needs in Tasmania, anecdotally the TLRI understands that it is not infrequent that matters are not prosecuted because the communication and comprehension difficulties experienced by complainants and other witnesses cannot be overcome.<sup>27</sup> Similarly, the TLRI understands that many defendants are not able to give their account to the court adequately or at all due to a lack of available measures that might overcome or reduce their comprehension and communication difficulties.<sup>28</sup> This means that they are effectively denied the right to a fair trial.<sup>29</sup>

2.2.14 The problems posed for the criminal justice system and the rule of law by the inability to overcome witnesses' and complainants' comprehension and communication difficulties were alarmingly clear in a South Australian case that has achieved some notoriety as a result of a 2011 *Four Corners* expose.<sup>30</sup> In July 2011, the South Australian Director of Public Prosecutions discontinued the prosecution of a bus driver alleged to have sexually abused a child with an intellectual disability. The prosecution formed the view that the child could not give reliable evidence and would not be able to withstand cross-examination. The accused was released. The child's parents were shocked and dismayed. So too were the wider community and parents of other children allegedly abused by the bus driver.

2.2.15 A primary determinant of the decision not to prosecute in this case was a negative assessment of the complainant's capacity to perform under cross-examination. He had apparently limited comprehension levels, which had clear implications for his ability to understand questions about the events in issue and, importantly, to deal with cross-examination and adhere to a credible account of those events. To the public, the decision not to prosecute appeared to demonstrate that the criminal justice system was incapable of protecting children with cognitive impairments from sexual predation. Adapting the words of the Canadian Supreme Court,<sup>31</sup> the decision suggests that the law permits violators to predate children with mental disabilities with near impunity. The apparent inability to prosecute jeopardises one of the fundamental desiderata of the rule of law: that the law be enforceable. It also effectively immunises an entire body of offenders from criminal responsibility for their acts and further marginalises their already vulnerable victims. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

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<sup>26</sup> NSW Bureau of Crime Statistics and Research, *Number of incidents reported each month and the number where a POI was proceeded against to court* (unpublished, 14-12591), cited in NSW Justice Department, *Consultation Paper: Children's Champions and Pre-recording of Evidence*, 2.

<sup>27</sup> While the introduction of the Witness Assistance Service in 2008 has improved the capacity of the DPP to bring matters involving witnesses with complex communication needs to trial, feedback from Prosecutors is that a lack of screening of witnesses for communication difficulties at their point of entry into the criminal justice system can have negative implications for the continuation of matters to trial. See Ministerial Roundtable, above n 13.

<sup>28</sup> Attributed to comments at a meeting of the Law Society of Tasmania Criminal Practitioners Group on 27 October 2015, and further discussions at the Ministerial Roundtable, *ibid*.

<sup>29</sup> *ICCP*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976) art 14(1).

<sup>30</sup> Australian Broadcasting Corporation (ABC), *'St Ann's Secret'*, *Four Corners*, 3 October 2011 (Deb Whitmont and Clay Hichens).

<sup>31</sup> *R v DAI* [2012] SCC 5, [67].

2.2.16 The Royal Commission into Institutional Responses to Child Sexual Abuse is also investigating this problem, which it clearly sees as one of the sources of failure in the delivery of justice to those who have been abused.

## 2.3 Identifying and Responding to Communication Needs

2.3.1 From the discussion in this Part of the Issues Paper it appears that the problems that need to be resolved to improve the opportunity for people with complex communication needs to gain equal access to justice fall into two broad categories. First, there is the problem of identification — recognising when a person has comprehension and communication difficulties and the nature of those difficulties. Second, there is the problem of appropriately adjusting pre-trial and trial questioning processes to overcome, as far as possible, comprehension and communication problems.

2.3.2 Tackling the problem of identifying communication needs necessitates the development and use of effective screening measures (including obtaining expert advice) to identify when people have complex communication needs. Tackling the second issue however requires the deployment of communication assistants/intermediaries to advise investigators, courts and counsel about appropriate questions and questioning styles and to undertake interventionist and interpretive functions during questioning, to control inappropriate questioning and to assist people with complex communication needs in comprehending questions and communicating their answers. The merits and flaws of existing communication assistant/intermediary schemes that have been implemented elsewhere are detailed in Part 4 at [4.4].

2.3.3 The most effective use of communication assistants as advisors, interpreters and interveners during the trial process also necessitates other adaptations to that process — specifically the holding of pre-trial ground rules hearings and the pre-recording of the entirety of the testimony of people with complex communication needs. How these measures work together is explained in Part 3 of this Paper. Part 3 also assesses the extent to which provision is currently made for these measures in Tasmania. This assessment concentrates on the extent to which there is provision for communication assistants to be deployed at different stages of the criminal justice process. Additionally, Part 3 considers how the problem of identifying people with complex communication needs is currently dealt with in Tasmania.

<b>Question 2</b>	<p>(a) In your experience do people with complex communication needs face barriers when interacting with the police as victims, witnesses and suspects? If so, please provide details about them.</p> <p>(b) In your experience do people with complex communication needs face barriers when interacting with defence and prosecution counsel? If so, please provide details about them.</p> <p>(c) In your experience do people with complex communication needs face comprehension and communication barriers in relating their experiences and accounts of relevant events during criminal justice proceedings, hearings and trials? If so, please provide details about them.</p>
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(d) In your experience are there problems in identifying people with complex communication needs at different stages in the criminal justice process, for example:

- At the investigation stage for the police?
- During interactions with defence and prosecution counsel?
- For court personnel and judicial officers?

If so please provide details.

## Part 3

# Communication Measures in Tasmania

3.1.1 This Part first outlines best practice communication assistant measures and then considers the communication assistant measures currently available for people with complex communication needs both pre-trial and during trials. This Part differentiates between the measures available for victims, witnesses, suspects and defendants.

### *Best practice communication measures pre-trial*

3.1.2 As the discussion in Part 2 demonstrates, the key factors in ameliorating comprehension and communication difficulties in the pre-trial context are first, to have the means to identify those difficulties and second, to obtain expert assistance to overcome them as far as possible. Such assistance may be provided by trained experts like speech pathologists or child psychologists, by trained personnel within the agencies involved such as the police, legal aid or the office of the DPP or by allied agencies like the Serious Crimes Witness Assistance Service. It might also be provided by someone who has experience in communicating with the person such as a family member, teacher, health service or other professional with knowledge of the person and his or her communication needs.

### *Best practice communication measures at trial*

3.1.3 In the trial context, as the discussion in Part 2 makes clear, the key to ameliorating comprehension and communication difficulties experienced by people with complex communication needs is to control trial questioning processes to eliminate inappropriate questions and questioning styles. This is particularly the case for cross-examination. Courts must be appropriately armed with the power to control cross-examination. It now appears from research and experience elsewhere that adequate control of questioning is only achievable if three measures are in place:<sup>32</sup>

- the holding of ground rules hearings to give advance directives that regulate the witness examination process;
- the video recording of the entirety of the testimony of people with complex communication needs in the absence of the jury; and
- the use of intermediaries/communication assistants to advise courts about appropriate questions and questioning styles and to aid witnesses in the communication of their testimony.

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<sup>32</sup> There is a significant body of literature, research and experience on these measures. For details, see Bowden, Plater, and Henning, above n 6.

3.1.4 How these measures work together to optimise courts' ability to control questioning of people with complex communication needs and so maximise their ability to participate meaningfully in trials is detailed further below at 3.3.2.

3.1.5 Any consideration of these measures is necessarily located within the human rights framework of art 12 of the UN *Convention on the Rights of the Child* and art 13 of the *Convention on the Rights of Persons with Disabilities*, which place an obligation on courts to create the optimum circumstances in which children and people with disabilities as witnesses are free to give their accounts of events. Also applicable are the right to a fair trial, the right to be treated with dignity and humanity, the right to equality before the law and the right not to be discriminated against.

## 3.2 Communication Assistant Measures Pre-Trial

### *Tasmania Police*

3.2.1 The handling of communication and comprehension capacities in the pre-trial context is largely unregulated by legislation. However, the *Tasmania Police Manual* (TPM) contains instructions and operational guidance for the police in managing interactions with people with complex comprehension/communication needs.<sup>33</sup> TPM Part 2.28 contains guidance for interacting with people with intellectual impairment or cognitive disability and refers police officers to the *Guidelines for Interacting with People with Disability* (the *Guidelines*). TPM Part 9 contains instructions for dealing with children.

3.2.2 A significant problem for the police where people with complex communication/comprehension needs are concerned is identifying that those needs exist. This may not be obvious. Some people with communication problems may appear to be simply recalcitrant, uncooperative or mechanically compliant. The *Guidelines* specify four questions that may be asked to ascertain whether a person has comprehension incapacities. These questions are relevant in detecting reduced comprehension capacities in adults. Where children and youths are concerned, the TPM proceeds from the understanding that youths' intellectual development and capacity varies and that consideration should therefore be given to having a parent, guardian or independent adult (preferably of the youth's choice) present during the taking of any statement.<sup>34</sup> In contrast to the approach taken for adults with a disability, no guidance is given as to how to ascertain the comprehension levels of youths. However, the implicit presumption underlying the guidelines appears to be that a parent, guardian or other independent person should be present. This is an express requirement where youths are interviewed as suspects.<sup>35</sup>

3.2.3 Where a comprehension or communication disability is detected, the *Guidelines* direct that appropriate assistance should be obtained. If possible, such assistance should be sought from the

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<sup>33</sup> The paragraphs of the TPM of relevance to people with disabilities include [2.28], (People with Disability and Impairment), [2.28.2] (Child Victims of Sexual Assault with a Disability), [2.28.3] (Transportation of People with Physical Disability in Police Vehicles), [7.2.7] (Rights to an Interpreter) and [7.2.10], which relates to medical treatment or care orders for people in custody.

<sup>34</sup> TPM [9.1.3(4)].

<sup>35</sup> Ibid [9.1.3(1)].

person's support person or advocate.<sup>36</sup> Where such a person is not identified, the assistance of an independent person should be obtained. If the person has difficulty comprehending or communicating speech, an interpreter should be obtained.<sup>37</sup> In this regard, the *Guidelines* specify as sources of advice the Tasmanian Department of Health and Human Service (DHHS), Speak out Advocacy, Advocacy Tas and the Association for Children with a Disability (Tas) Inc. Additionally, a register of disability service providers who may be able to assist the police in interacting with people with reduced comprehension and communication capacities is maintained by the police and accessible via Radio Dispatch Services which also has a 24 hour contact number for Disability and Respite Services.

3.2.4 During consultations with the police, the TLRI was advised that, in sourcing existing information about available support mechanisms and whether a person already has an advocate or support person, the police would benefit from having access to an integrated database with DHHS and allied agencies.<sup>38</sup> This would expedite the provision of communication assistance and reduce potential delays occasioned by their need to make independent enquiries of relevant government departments and agencies. No relevant integrated database presently exists, which raises the question whether one should be created to support the application of the TPM and *Guidelines* protocols.

3.2.5 With regard to their internal records, the police are encouraged to adopt a consistent approach when dealing with people who have complex communication needs who present on multiple occasions and therefore to maintain records of their existing support mechanisms.<sup>39</sup>

3.2.6 The *Guidelines* also direct that prior to any interview being conducted, interviewing officers should seek the advice or services of an officer who has been trained in interviewing vulnerable witnesses. However, identifying what the source of any communication difficulty is and, so, how best to respond to it, may require expert knowledge. Police recruits have training in screening for communication difficulties. However, specialist vulnerable witness interviewing training and equity and diversity training appears to be focused on detectives, rather than being part of basic training for all police officers.<sup>40</sup>

3.2.7 Tasmania Police is also bound by the National Police Code of Ethics<sup>41</sup> and required to adhere to the policy mandated in the Department of Police and Emergency Management (DPEM) *Disability Action Plan 2014-2017*.<sup>42</sup>

<sup>36</sup> See also *ibid* [2.28.1(5)].

<sup>37</sup> *Ibid* [2.28.1(6)].

<sup>38</sup> It is important to also consider that the devolution of services to the community sector alongside the introduction of the National Disability Insurance Scheme (NDIS) will also need to be part of any future responses.

<sup>39</sup> TPM [2.28.1(7)].

<sup>40</sup> Feedback obtained from discussions with Tasmania Police at the Ministerial Roundtable, above n 13, and the Disability Justice Plan Reference Group Meeting (March 2016).

<sup>41</sup> The National Police Code of Ethics has been incorporated into the TPM and provides that Police officers should carry out their duties with integrity, honesty and should at all times make every effort to respect the rights of all people within the community regardless of colour, social status or religion, enforcing the law justly without fear, favour, malice or ill-will.

<sup>42</sup> The DPEM, *Disability Action Plan 2014-2017* is available <<http://www.police.tas.gov.au.s3.amazonaws.com/wp-content/uploads/2014/08/DPEM-Disability-Action-Plan-2014-2017.pdf>>. A full copy of the TPM must be obtained via a Right to Information Request. For the preparation of this Issues Paper both the TPM and the *Guidelines for Interacting with People with Disability* were provided to the TLRI.

3.2.8 While the TPM and the *Guidelines* do not have the force of law, breaches of their provisions may subsequently have implications for the admissibility of evidence at trial. Courts have discretions to exclude unfairly and improperly obtained evidence, which includes evidence obtained in consequence of the mishandling of evidence taking procedures specified in the TPM and the *Guidelines*.<sup>43</sup> However, this provides an uncertain basis for regulating pre-trial processes and agency conduct<sup>44</sup> and it is, of course, non-specific where overcoming comprehension and communication difficulties is concerned. Further, such surveillance of police conduct can only occur in cases that proceed to trial. Thus the TPM, *Guidelines* and the judicial discretions to exclude unfairly or improperly obtained evidence provide only weak protection to vulnerable suspects and witnesses. They therefore also constitute a relatively weak disincentive to inappropriate treatment of vulnerable suspects. This is supported by Canadian and United States research showing that exclusionary rules of evidence have minimal impact on police conduct. Where they operate on a discretionary basis the effect appears to be to encourage rather than deter improper conduct.<sup>45</sup>

3.2.9 The fact that the TPM and *Guidelines* are not legislated and do not have the force of law may affect their sustainability in policy and financial terms. This raises the question whether the protocols in the TPM and *Guidelines* should be supported by legislation. Where suspects are concerned this could be achieved by enacting relevant reforms to the *Criminal Law (Detention and Interrogation) Act 1995* (Tas). Where witnesses and victims are concerned, reforms might be made to the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

3.2.10 The accessibility of the TPM and *Guidelines* is also restricted by the fact that they are not part of any statutory regime. A full copy of the TPM is only available via a right to information request. Regulatory regimes affecting fundamental rights, including the right to be treated as equal before the law, that are not readily accessible are not human rights compliant. It is a fundamental human right principle that regulatory regimes of this kind should be accessible to the public.<sup>46</sup>

3.2.11 The primary statutory framework in this context, The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) deals solely with police conduct vis à vis suspects. It does not make provision for police conduct in relation to witnesses or victims. Where suspects are concerned, the only section closely relevant to the present discussion, s 5, deals with communication capacity solely in terms of knowledge of the English language. It provides:

#### 5. Rights to an interpreter

(1) If a person in custody does not have a knowledge of the English language that is sufficient to enable the person to understand the questioning or investigation, the police officer conducting the investigation must, before any questioning or investigation under

<sup>43</sup> *Evidence Act 2001* (Tas) ss 90, 138, 139 deal with the discretionary exclusion of evidence on these grounds.

<sup>44</sup> For an overview of relevant Canadian and United States' research on the effect of exclusionary rules of evidence on police conduct see J Stribopoulos, 'In Search of Dialogue: the Supreme Court Police Powers and the Charter' (2005) 31 *Queen's Law Journal* 1, 49-54.

<sup>45</sup> *Ibid.*

<sup>46</sup> See further the *Sunday Times v United Kingdom* (European Court of Human Rights, Application No 6538/74, 26 April 1979) [49]; *Silver and others v the United Kingdom* (European Court of Human Rights, Application Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 25 March 1983) [85-86]; *Malone v the United Kingdom* (European Court of Human Rights, Application No 8691/79, 2 August 1984) [67]; *Khan v United Kingdom* [2000] Crim L R 684; *Amuur v France* (1996) 22 EHRR 533, [50].

section 4 may commence, arrange for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present.

(2) This section does not apply to questioning or investigation in connection with an offence under –

(a) section 4, 6 or 14 of the *Road Safety (Alcohol and Drugs) Act 1970*; or

(b) section 13(1), 16(1), 21(2), 22(3), 24(2), 26(2), 28(3), 33(3) or 38(3) of the *Marine Safety (Misuse of Alcohol) Act 2006*.

3.2.12 No statutory provision is made for engaging an expert communications assistant or intermediary when a person who speaks English may have communication or comprehension difficulties, and of course, this provision does not cover witnesses or victims. As noted above, this raises the question whether statutory provision should be made in this regard by enacting relevant reforms to the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) and the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

3.2.13 Tasmania Police is clearly alive to the problems facing people with complex communication needs in navigating the investigative stage of the criminal justice process. They have established protocols to tackle those problems. The question is whether adequate support is available to the police in operationalising those protocols, that is, whether existing mechanisms for identifying and managing interactions with people with comprehension and communication difficulties are adequate. More specifically, there is the question whether a specifically trained, readily identifiable cohort of expert communication assistants might assist the police and enhance their interactions with people with complex communication needs thus promoting their ability to gain equal access to justice. The discussion here also raises questions about the level of training for police recruits and in-service training for serving officers.

3.2.14 Additionally, there are questions about who should bear the costs of providing communication assistance for people with complex communication needs during investigative procedures. If there are existing support or advocacy arrangements in place organised through the DHHS, then it would appear that the DHHS may bear the cost of providing that assistance during police investigations.<sup>47</sup> Otherwise it is unclear where the costs do and should fall. This is an issue on which the TLRI seeks advice and feedback.

### ***Defence and prosecution counsel***

3.2.15 Defence and prosecution counsel may encounter similar problems to those experienced by the police when interviewing witnesses or taking instructions from clients who have complex communication needs. There are currently only limited specialist training courses available in Tasmania for non-government lawyers through the Continuing Professional Development (CPD) program or other sources that might equip them with relevant skills in identifying and communicating effectively with people with complex communication needs. While there has been some specialised training delivered by speech pathologists and forensic mental health experts, there is no formal law

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<sup>47</sup> Again, this will need to be considered as the NDIS continues to be rolled out.

program either at the undergraduate or postgraduate level covering screening for and interacting with defendants or witnesses with complex communication needs.

3.2.16 The sources of assistance available to lawyers in private practice, at Legal Aid and at Community Legal Services when communicating with people with complex communication needs are essentially the same as those available to the police. If the client or witness already utilises communication assistance or support then, if it is identifiable and available, the same support/assistance might be relied upon during client/witness interviews. Additionally, relatives, counsellors or other professionals who have an established relationship with lawyers' clients or witnesses and have knowledge of how to communicate with them might attend such interviews. Otherwise, lawyers might seek assistance from such agencies as Advocacy Tas, Speak Out Advocacy, the Association for Children with Disability (Tas) Inc or the DHHS (Disability Services). Expert assistance might also be obtained from speech pathologists or child psychologists. However, questions of costs would then need to be addressed and the requisite financial resources to obtain such expert professional assistance may not be available. As discussed in Part 2 at 2.2.4, lawyers have advised the TLRI that accessing such services is often precluded by a lack of adequate financial resources.

3.2.17 There is currently no statutory or practice framework covering the provision of communication/intermediary services to assist the legal profession or mandating that such assistance be sought. While there is the ability to engage an interpreter in languages other than English from the Translating and Interpreting Service (TIS),<sup>48</sup> there is neither a register nor an established group of experts that may be called upon to provide communication assistance for people with other communication needs.

3.2.18 At the Ministerial Roundtable and during consultations conducted prior to the preparation of this Issues Paper, strong support was expressed for the establishment of readily obtainable expert advice and assistance for lawyers in communicating with people with complex communication needs.

3.2.19 The Office of the DPP has established the Serious Crimes Witness Assistance Service (WAS), which has four full-time staff and provides support to DPP lawyers in interacting with people with complex communication needs. The WAS staff have professional qualifications in counselling, teaching, social work and law. The WAS officers have received two days training from a speech pathologist in how to interact with people with communication difficulties. The WAS Guidelines specify that when a witness or victim is identified as having a disability they should be referred to WAS. In addition, relatives, support persons, carers and professionals who are familiar with them may accompany people with complex communication needs when attending meetings with DPP officers.

<b>Question 3</b>	(a) Should relevant provisions of the Tasmania Police Manual and <i>Guidelines for Interacting with People with Disability</i> be enacted in legislation to ensure the provision of communication assistance to people with complex communication needs?
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<sup>48</sup> There are also challenges and barriers in communication that remain while using a TIS Interpreter unless they are specifically accredited or trained to interpret in the legal setting. The TLRI understands that many of the TIS Interpreters may not have experience or accreditation to work in the court or legal settings.

- In this regard, should the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) be reformed to make such provision for suspects?
- Should the *Evidence (Children and Special Witnesses) Act 2001* (Tas) be reformed to make such provision for witnesses, victims and complainants?
- (b) Are the existing mechanisms available to the police for *identifying* people with complex communication needs and *managing* interactions with them adequate?
- (c) Should a common assessment tool be developed in consultation with experts in communicating with people with complex communication needs to enable early identification of people with communication and comprehension problems?
- (d) Are the existing measures for *obtaining* communication assistance for people with complex communication needs when interacting with the police adequate?
- (e) Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist the police in identifying and interacting with people with complex communication needs?
- (f) Should the establishment of a Barnehus (Children’s House) model similar to that utilised in Norway (discussed in Part 4) as a place for interviewing people with complex communication needs be investigated for Tasmania?
- (g) If an expert communication assistant/intermediary scheme were available to the police who should bear the financial responsibility for engaging its services?
- (h) Are the mechanisms currently available to the police to identify existing support persons and advocates for people with complex communication needs adequate?
- (i) Would the process of identifying existing advocates and support people be enhanced by the creation of an integrated database with relevant government departments (like the DHSS – Disability Services) and allied agencies?
- (j) Is the current training received by police recruits in identifying and interacting with people with complex communication needs adequate? If not, how might it be improved?
- (k) Is the on-going training available to police officers in identifying and interacting with people with complex communication needs adequate? If not, how might it be improved?
- (l) Are there any additional measures that might be implemented to support people with complex communication needs in interacting with the police?
- (m) What type of communication assistance would be beneficial for people with complex communication needs when interacting with the police?
- (n) What might be some of the challenges for police when using an intermediary or communication assistant during their interactions with people with complex communication needs?

<p><b>Question 4</b></p>	<p>(a) Are the measures currently available to defence and prosecution counsel to identify and interact with people with complex communication needs adequate?</p> <p>(b) Does undergraduate and postgraduate legal training adequately equip lawyers to identify and interact with people with complex communication needs? If it doesn't how might it be improved?</p> <p>(c) Do continuing legal education programs provide adequate on-going training to the legal profession in identifying and interacting with people with complex communication needs? If they do not, how might they be improved?</p> <p>(d) Are the mechanisms currently available to defence and prosecution counsel to identify existing support persons and advocates for people with complex communication needs adequate?</p> <p>(e) Would defence and prosecution counsel benefit from the establishment of an integrated government database in identifying existing support persons and advocates for people with complex communication needs?</p> <p>(f) Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist defence and prosecution counsel in identifying and interacting with people with complex communication needs?</p> <p>(g) If such an expert communication assistant/intermediary scheme were available to defence and prosecution counsel who should bear the financial responsibility for engaging its services?</p> <p>(h) What type of communication assistance would be beneficial for people with complex communication needs in interacting with defence and prosecution counsel?</p> <p>(i) Are there any additional measures that could be implemented to support people with complex communication needs in interacting with defence and prosecution counsel?</p> <p>(j) What might be some of the barriers to using an intermediary or communication assistant during defence and prosecution counsel interactions with people with complex communication needs?</p>
<p><b>Question 5</b></p>	<p>In your view what would be a suitable package of screening and support for people with complex communication needs in Tasmania in interacting with the police, defence and prosecution counsel during pre-trial stages of the criminal justice process?</p>

### 3.3 Communication Assistant Measures in the Trial

3.3.1 A number of witness 'special measures' have been enacted in Tasmania which enable children and other vulnerable witnesses to give their evidence via closed CCTV and/or by pre-

recorded testimony, to be screened and out of view from the defendant in court and to have support persons with them while they are testifying.<sup>49</sup> These measures largely target the stress of testifying but, with the exception of the pre-recording measure, do not primarily seek to redress the comprehension and communication difficulties experienced by people with complex communication needs when testifying except in a tangential manner as a collateral effect of stress reduction.

3.3.2 As noted above, if people with complex communication needs are able to participate adequately in criminal trials, it is critical to modify questioning processes and techniques to accommodate their comprehension and communication needs. Also, as noted above, the package of measures<sup>50</sup> that best achieves this comprises:

- control of cross-examination;
- setting ground rules for questioning by the provision of advance directives;
- recording of witnesses' entire testimony in the absence of the jury;
- obtaining expert advice and the assistance of intermediaries to facilitate these witnesses' communication with the court.

3.3.3 These measures work together, complementing and supporting each other in optimising the capacity of people with complex communication needs to participate in the justice process. They should therefore be viewed and applied as a unified package of measures for achieving equal access to justice for these people.

3.3.4 In relation to these measures, to date, Tasmania has enacted legislation enabling pre-trial recording of the entirety of the evidence of children and 'special witnesses'<sup>51</sup> and mandating judges to control inappropriate cross-examination.<sup>52</sup> There is no explicit legislative provision for the use of intermediaries or communication assistants during trial. Nevertheless, there are general evidence and criminal procedure provisions that might be applied to make this measure available.

### ***Control of cross-examination***

3.3.5 Control of cross-examination is critical if reliable evidence is to be obtained from people with complex communication needs. In Tasmania, the relevant provision, s 41 *Evidence Act 2001* (Tas), imposes a duty on the court to intervene to disallow improper questioning as statutorily defined. Nevertheless, there remains an inescapable element of uncertainty in this provision,<sup>53</sup> as a result of the necessity for judgment to be made on what is improper questioning in any given case.

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<sup>49</sup> *Evidence (Children and Special Witnesses) Act 2001* (Tas) Part 2; *Crimes Act 1914* (Cth) Part 1AD also applies to children and 'special witnesses' in specified cases.

<sup>50</sup> Note the suite of recommendations outlined in the *Report of the Advisory Group on Video-Recorded Evidence* (Home Office, UK, 1989) ('Pigot Committee Report').

<sup>51</sup> *Evidence (Children and Special Witnesses) Act 2001* (Tas), ss 6, 6A, 8(2)(ii)(b).

<sup>52</sup> *Evidence Act 2001* (Tas) s 41.

<sup>53</sup> A Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia' (*Report, National Child Sexual Assault Reform Committee*, March 2010), 270 [4.106]; T Henning, 'Control of Cross-Examination – A Snowflake's Chance in Hell?' (2006) 30 *Criminal Law Journal* 133, 137.

3.3.6 Research suggests that, despite its mandatory nature, this provision does not displace courts' traditional reluctance to intervene in the cross-examination process.<sup>54</sup> For a raft of reasons judges may be reluctant to intervene.<sup>55</sup> Non-intervention reflects the orthodox view of the role of judges in the adversarial trial as involving minimal interference, respect for the autonomy of the parties and intrusion into the examination of witnesses only to the extent that the rules of evidence and procedure strictly require.<sup>56</sup>

3.3.7 It has also been observed that, (and this represents one of the biggest and most intransigent obstacles to intervention by both judges and counsel) the conventions of cross-examination are so entrenched in and intrinsic to the adversarial trial and to conceptions of what fairness to defendants demands, that they actually prevent trial judges and counsel from recognising or rejecting questioning that is unfair to children and people with cognitive impairments.<sup>57</sup>

3.3.8 Further, s 41 does not lend itself easily to use during trials.<sup>58</sup> For example, in judging whether a question is caught by s 41, the court may be required to take into account the person's age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding, personality and any mental, intellectual or physical disability to which the person is, or appears to be, subject.<sup>59</sup> This can only be done if the trial judge has some background information about the person.<sup>60</sup> The judge must then also fully comprehend the implications of that information for the questioning of the person. This requires trial judges to be finely tuned to what amounts to inappropriate questioning for different groups of people so that they can identify the type of questions that are likely to be misleading or confusing etc within the meaning of the section. This demands a high level of expertise, experience and awareness that trial judges who do not encounter people with complex communication needs on a regular basis may not have the opportunity to acquire. While assistance is provided by bench books<sup>61</sup> in various jurisdictions, which list the kinds of questions to disallow, the question remains how that information is practicably to be marshalled and applied during the course of trials.

<sup>54</sup> In relation to children, see Russell Boyd and Anthony Hopkins, 'Cross-Examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 of the Evidence Act' (2010) 34 *Criminal Law Journal* 149; Judy Cashmore and Lily Trimboli, 'An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot' (Research Report, New South Wales Bureau of Crime Statistics and Research, 2005) 51–6; Justice Roy Ellis, 'Judicial Activism in Child Sexual Assault Cases' (Paper presented at the National Judicial College of Australia Children and the Courts Conference, Sydney, 5 November 2005) [35]; Justice James Wood, 'Child Witnesses: The New South Wales Experience' (Paper presented at Child Witnesses – Best Practice for Courts Conference, AIJA, District Court of NSW, Parramatta, 30 July 2004) 4. In relation to persons with an intellectual disability, see Caitriona M E O'Kelly et al, 'Judicial Intervention in Court Cases Involving Witnesses With and Without Learning Difficulties' (2003) 8 *Legal and Criminological Psychology* 229, 237–8.

<sup>55</sup> See more detailed discussion in Henning, above n 17.

<sup>56</sup> *Doggett v The Queen* (2001) 208 CLR 343, 346 (Gleeson CJ); *Whitehorn v The Queen* (1983) 152 CLR 657, 682 (Dawson J); *Libke* [2007] HCA 30, [85] (Hayne J delivering the majority judgment).

<sup>57</sup> E Davies, E Henderson and K Hanna, 'Facilitating Children to Give Best Evidence: Are there Better Ways to Challenge Children's Testimony?' (2010) 34 *Criminal Law Journal* 347; Boyd and Hopkins, above n 54.

<sup>58</sup> The difficulties associated with s 41 may explain why it has been invoked to exclude questioning in relatively few significant cases: *R v TA* (2003) 57 NSWLR 444 and *National Auto Glass Supplies (Australia) Pty Limited v Nielsen & Moller Autoglass (NSW) Pty Limited (No 5)* [2001] FCA 569 being exceptions that prove the rule.

<sup>59</sup> See for example s 25(4) *Evidence Act 1929* (SA) and similarly s 41(2) *Uniform Evidence Act*.

<sup>60</sup> On this point see Justice Roy Ellis above n 54, [36]–[37].

<sup>61</sup> See for example, Department of the Attorney General WA, *Equality Before the Law Bench Book* (2009); Judicial Commission of New South Wales *Equality Before the Law Bench Book* (2001); Australian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

3.3.9 It has been noted that lawyers' and judges' perceptions of proper questioning derive from long accepted adversarial tactics.<sup>62</sup> These perceptions and the conventions that drive them are often in direct conflict with research findings concerning the type of questioning that is particularly inimical to eliciting reliable evidence from children and witnesses with cognitive impairments. This suggests that the logic of cross-examination itself operates against the effective use of s 41 Uniform *Evidence Act 2001* (Tas) to control cross-examination.<sup>63</sup>

3.3.10 These problems suggest that judges would benefit from the provision of expert advice before and during questioning about the appropriate types and styles of questions to be deployed with witnesses with complex communication needs to maximise their comprehension and communication capacities and participation in trials.

3.3.11 Also relevant to the control of questioning is s 42 of the *Evidence Act 2001* (Tas), which focuses exclusively on leading questions. Use of leading questions is particularly inimical to the taking of reliable evidence from children and witnesses with cognitive impairments. Under s 42(3)<sup>64</sup> a court *must* disallow a leading question if satisfied that the facts would be better ascertained if leading questions were not used. Relevantly, s 42(2)(d) directs courts, in deciding whether to disallow leading questions, to take into account the witness's age, or any mental, intellectual or physical disability to which the witness is subject that may affect his or her answers. Clearly this provision has particular relevance to people with complex communication needs who are susceptible to being misled by leading questions into answering as they think the questioner wishes them to.<sup>65</sup>

3.3.12 Nevertheless, it is probable that courts should not assume, in the absence of evidence about a particular witness, that s 42(3) will apply.<sup>66</sup> In applying both s 42(3) and 42(2)(d) courts are faced with similar practical problems as are posed by s 41.

3.3.13 If judges experience difficulty in intervening in court before juries during questioning of witnesses, measures that preclude the problems associated with in court non-intervention should be

<sup>62</sup> Boyd and Hopkins, above n 54; Davies, Henderson and Hanna, above n 57.

<sup>63</sup> On this point see, Davies, Henderson and Hanna, above n 57, 354-355.

<sup>64</sup> Section 42 provides:

42. Leading questions

- (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which –
  - (a) evidence that has been given by the witness in examination in chief is unfavourable to the party calling the witness; and
  - (b) the witness has an interest consistent with an interest of the cross-examiner; and
  - (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
  - (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.
- (3) The court is to disallow the question, or direct the witness not to answer it, if satisfied that the facts concerned would be better ascertained if leading questions were not used.
- (4) This section does not limit the court's power to control leading questions.

<sup>65</sup> S J Ceci and D Richard, 'Suggestibility of Children: Scientific Research and Legal Implications' (2000) 86 *Cornell Law Review* 33; H Dent and R H Flin (eds), *Children as Witnesses* (John Wiley & Sons, 1992) 5.

<sup>66</sup> *Stack v State of Western Australia* (2004) 29 WAR 526; [2004] WASCA 300, [43] (Murray J considering the common law discretion to disallow leading questions in cross-examination, Steytler J, Templeman J concurring, [117]-[129]).

instituted and exploited. This is where pre-trial directions hearings, the pre-trial recording of the entirety of witnesses' testimony and the provision of expert advice to the courts and communication assistance for witnesses enter the frame.

### ***Ground rules/pre-trial directions hearings***

3.3.14 Good practice guidance<sup>67</sup> tells us that the pre-trial setting of ground rules with counsel for questioning people with complex communication needs is crucial to restraining improper questioning and maximising proper questioning during trials. Ground rules hearings also provide the opportunity for courts to determine what measures, if any, might be utilised to enable people with complex communication needs to testify. For example, in a recent case in the Supreme Court, the possibility for a witness who could not speak to give evidence through a computerised voice simulator was identified at a pre-trial directions hearing and the witness was then permitted to use this device to testify.

3.3.15 There are a number of Tasmanian statutory and regulatory provisions,<sup>68</sup> which expressly or implicitly give courts broad powers to hold directions hearings in order to give advance directives about the conduct of cases and the admissibility of evidence. Further, courts may rely on their inherent jurisdiction to control their own proceedings to hold ground rules hearings and give advance directives. Prof Wendy Lacey describes this jurisdiction as 'the ability of superior courts to prevent an abuse of process and to develop rules that regulate and protect their procedures and process.'<sup>69</sup> She further states that, 'It has long been accepted that a court's inherent powers may be invoked by a court to ensure the integrity, efficiency and fairness of its process, and in a manner that protects, among other things, due process and the provision of a fair trial.'<sup>70</sup>

3.3.16 Foremost among the statutory provisions in the uniform *Evidence Acts* that empower courts to make rules for the holding of directions hearings are s 192A and 193(2). Section 193 gives courts covered by the uniform *Evidence Acts* the power to 'make rules to enable its effective operation.'<sup>71</sup> Section 192A gives the court power to make advance rulings and findings.

3.3.17 Of equal significance is s 9 of the *Evidence (Children's and Special Witnesses) Act 2001* (Tas), which mandates the holding of a preliminary hearing in any case involving the making of orders under that Act in respect of taking evidence from children and other 'special witnesses'. The same legislation enables rules of court to be made with respect to the preliminary hearing,<sup>72</sup> which clearly enables the court to prescribe the kinds of matters to be covered in the preliminary hearing. In

<sup>67</sup> See for example, Plotnikoff and Woolfson above n 18; New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26 (1996); Australian Institute of Judicial Administration Incorporated, above n 61, [4.6], [5.2], [5.3]; His Hon Commr Kevin Sleight, 'Managing Trials for Sexual Offences – A Western Australian Perspective' (Paper presented at the AIJA Conference, Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration, Sydney, 7-9 September 2011) 8.

<sup>68</sup> *Evidence Act 2001* (Tas) s 192A; *Criminal Code 1924* (Tas) s 361A; *Criminal Rules 2006* (Tas) Part 1A.

<sup>69</sup> I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 51; Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449, 458.

<sup>70</sup> Wendy Lacey, 'Inherent jurisdiction, judicial power and implied guarantees under chapter III of the Constitution' [2003] 31(1) *Federal Law Review* 57.

<sup>71</sup> *Re Z* (1996) 134 FLR 40 (Nicholson CJ and Frederico J).

<sup>72</sup> *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 9(2).

addition, the Chief Justice of the Supreme Court may issue practice directions in relation to procedural matters. So for example, in December 2015, the Chief Justice of the Tasmanian Supreme Court issued a Practice Direction (No 3 of 2015) in relation to the editing of pre-trial recordings made under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 6. However, the Tasmanian courts have not yet developed extensive directions or guidelines for counsel in dealing with people with complex communication needs at trial of the kind developed by the Judicial Council in England and Wales (see further at 4.2.1 below). These directions include an extensive checklist<sup>73</sup> of matters that should be settled at different stages of the court process.

3.3.18 There is anecdotal evidence that in pre-trial directions hearings conducted to date concerning the pre-recording of children's testimony, judges are taking the opportunity to provide guidance to counsel about the kinds of questions that should be used and those that should be avoided and to direct them to relevant information in benchbooks about questioning witnesses with complex communication needs. They have also actively sought information about what difficulties witnesses might experience in testifying and how they might be overcome. Were an expert intermediary/communication assistant scheme to be enacted, the operation of s 9 could be extended to give explicit legislative imprimatur to courts to obtain expert advice at this stage about the appropriate questioning of people with complex communication needs and how their comprehension and communication at trial might be facilitated.

3.3.19 Even with this raft of legislative possibility detailed above at [3.3.16]–[3.3.17], in the absence of explicit provision, fair trial concerns may inhibit courts from giving extensive directions about witness questioning and, more particularly, the use of communication assistants. There is no evidence that Tasmanian courts have yet exerted the level of control of questioning via ground rules hearings that we see in some courts in England. The experience in those courts that have implemented pre-trial recording of the entirety of witnesses' testimony<sup>74</sup> is that ground rules hearings are the key to the successful operation of this measure.<sup>75</sup> Cross-examining counsel are required to submit their proposed questions for approval at a ground rules hearing and to certify that they have read the relevant protocol applying to the pre-recording measure as well as the toolkit on the UK Advocates' Gateway.<sup>76</sup> Early indications are that this has meant that questions are phrased appropriately and focus only on the issues required to be addressed in cross-examination. The result has been that pre-recording proceedings are much shorter than cross-examination conducted in the traditional manner, usually lasting no longer than 20 minutes.<sup>77</sup>

<sup>73</sup> This checklist can be found at *Judicial College Bench Checklist: Young Witness Cases* (January 2012) Courts and Tribunals Judiciary <<http://www.judiciary.gov.uk/publications-and-reports/guidance/2012/jc-bench-checklist-young-witness-cases>>.

<sup>74</sup> This measure has been implemented as a pilot in Leeds, Liverpool and Kingston-upon-Thames.

<sup>75</sup> Scottish Court Service, *Evidence and Procedure Review Report* (March 2015), 19 <[www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-review-report---publication-version-pdf.pdf?sfvrsn=2](http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-review-report---publication-version-pdf.pdf?sfvrsn=2)>.

<sup>76</sup> The United Kingdom has been developing resources for practitioners who act in cases involving children and witnesses with cognitive impairments with great enthusiasm in the last two years. They can be accessed at the Advocates' Gateway website <<http://www.theadvocatesgateway.org/>>, which contains toolkits on a number of topics including: Case management in cases involving vulnerable witnesses; Ground rules hearings; General principles from research re vulnerable witnesses; Planning to question vulnerable witnesses and witnesses with specific impairments; and the effective participation of young defendants.

<sup>77</sup> Scottish Court Service, above n 75, 19.

3.3.20 It is not known whether and to what extent Tasmanian courts have obtained expert advice pre-trial about the comprehension and communication capacities of people with complex communication needs. However, at the Ministerial Roundtable and consultations conducted prior to the preparation of this Issues Paper, support was expressed for such expert advice to be available to and obtained by courts at this stage.

### ***Pre-recording of evidence***

3.3.21 Pre-recording of evidence is now being conducted in Tasmania under the recently enacted ss 6 & 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). In consultations with the Institute during preparation of this Issues Paper, prosecutors indicated that they are particularly impressed with the way it enables them to capture in a timely manner the evidence of vulnerable witnesses and witnesses whose memories may be prone to deteriorate over time. This means that they can then manage subsequent trials including trial dates more flexibly unburdened by the need to enable these witnesses to exit the trial process as early as possible. It also affords flexibility in case preparation.

3.3.22 Pre-recording is of particular value in taking evidence because it opens the way for increased judicial intervention in the questioning process as it is occurring. This is because agreed editing out of such intervention (and any inappropriate questioning) circumvents the problems associated with it noted earlier. For this reason as well, pre-recording promotes discussion and agreement about the questioning process as that questioning occurs and in this way also facilitates the application of s 41 and s 42 of the *Evidence Act 2001* (Tas). As noted above, in December 2015, the Chief Justice of the Tasmanian Supreme Court issued a Practice Direction (No 3 of 2015) in relation to the editing of pre-trial recordings made under s 6.

Any anxiety about the effect of pre-recorded evidence on jurors' perceptions of witnesses' and defendants' credibility may be allayed by an Australian Institute of Criminology study which found no systematic effect on juror perceptions from the mode in which the evidence was presented — via CCTV, by face to face testimony or by pre-recorded video tape.<sup>78</sup>

### ***Intermediaries/communication assistants***

3.3.23 It follows from what has been said thus far that the necessary control of questioning in trials can only realistically be achieved if the court understands exactly what are the comprehension and communication levels and needs of particular witnesses including defendants. To this end expert advice should optimally be obtained from someone who has relevant experience of the particular witness or relevant training in the comprehension and communication capacities of people with complex communication needs either generally or in particular respects. Such advice should address the level of sophistication and style of questioning appropriate for these witnesses. In recognition of this necessity, a number of jurisdictions in Australia and overseas have enacted intermediary/communication assistant schemes.

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<sup>78</sup> N Taylor and J Joudo, *The Impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision making: an experimental study* (Australian Institute of Criminology, 2005).

3.3.24 Intermediaries/communication assistants perform a variety of functions at different points throughout the criminal justice process. They may act as quasi-interpreters, whose role is to reformulate questions into language that people with complex communication needs can understand and where necessary translate those people's responses to the police and or the court. Additionally, communication assistants/intermediaries may be communication specialists who are able to assess and report to courts on the cognitive abilities of people with complex communication needs, an advisory function. Their reports make recommendations on how best to meet these people's specific communication needs and they may provide advice to courts and counsel before and during proceedings about the appropriateness of questioning in a general and specific sense. They also facilitate communication at investigative interview and trial. Intermediaries/communication assistants may also have an interventionist role, intervening in proceedings to prevent inappropriate questioning and advising courts and questioners about appropriate forms of questions.

3.3.25 In Australia intermediary/communication assistant schemes have been enacted in South Australia, New South Wales and Western Australia. Overseas such schemes operate in a number of countries including and most notably in the United Kingdom, Norway, Israel and South Africa. They have been considered in New Zealand. These schemes are considered in Part 4 of this Issues Paper.

3.3.26 Tasmania has not yet instituted a statutory scheme that enables intermediaries/communication assistants to assist people with complex communication needs in comprehending questions and communicating answers at trial or to provide pre-trial advice to courts about these matters. This means, of course, that there is no scheme that expressly allows intermediaries/communication assistants to intervene in inappropriate questioning as it is occurring or to advise the court how questions should appropriately be phrased for particular witnesses. Consequently, the full armoury for controlling inappropriate questioning is not yet available to Tasmanian courts. While pre-recording of testimony may encourage necessary intervention, in the absence of expert advice, judges and counsel may not always perceive the need to intervene, or understand how questions should be couched.

3.3.27 However, the patchwork of Tasmanian legislative provisions considered above for the holding of pre-trial directions hearings<sup>79</sup> (none of which is directed at the issue of complex communication needs) might offer the means for courts to conduct pre-trial directions hearings to obtain expert advice about the comprehension and communication capacities and needs of witnesses and defendants and to utilise that advice in laying ground rules for eliciting evidence from them. The ground rules might include directions as to whether communication assistants/intermediaries should be deployed.

3.3.28 The weakness of these provisions is that they do not explicitly empower or mandate courts to obtain expert assistance or to order that communication assistance be provided during trials to people with complex communication needs. In the absence of express legislative imprimatur, courts may not be willing to do this.

3.3.29 Section 13 of the *Evidence Act 2001* (Tas) provides a potential vehicle, in some circumstances, for courts to order that intermediaries be deployed to assist witnesses with complex

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<sup>79</sup> See earlier commentary at 3.3.14–3.3.17.

communication needs to testify. Section 13 prescribes the qualifications witnesses must have to be competent to testify. It specifies that a person is not competent to testify if he or she does not have the capacity to understand questions or to give comprehensible answers and that incapacity cannot be overcome. Because s 13 permits the disqualification of people from testifying only if any incapacity they have cannot be overcome, where witnesses' competence is in issue, s 13 potentially enables courts to order that intermediaries or communication assistants be employed during trials to render witnesses competent to testify. It also arms courts with the power to take expert advice on and prescribe the kinds of questions that may be asked during the course of questioning.<sup>80</sup> Section 13 provides:

13. Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) –

(a) the person does not have the capacity to understand a question about the fact; or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact –

and that incapacity cannot be overcome.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person –

(a) that it is important to tell the truth; and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

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<sup>80</sup> *Evidence Act 2001* (Tas) s 13(8).

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

3.3.30 Questions of competence can be determined pre-trial<sup>81</sup> and the trial judge can, at that stage, obtain expert assistance under sub-s (8) in determining what measures might be employed in overcoming anyone's incapacity to comprehend questions and communicate answers.

3.3.31 There may be some potential for using provisions relating to interpreters<sup>82</sup> and deaf and mute witnesses<sup>83</sup> to incorporate intermediaries/communicators into the trial process. The Tasmanian *Evidence Act* provision in relation to interpreters is couched in sufficiently broad terms to permit them this scope. The New South Law Reform Commission seems tacitly to accept this proposition in relation to the uniform legislation in its 1996 report, *People with an Intellectual Disability and the Criminal Justice System*.<sup>84</sup> Nevertheless, the Commission acknowledges that there are major distinctions between the role of an interpreter and that of an intermediary. An intermediary may rephrase questions to overcome communication difficulties even when the witness speaks the official court language (English), whereas an interpreter translates questions and answers directly from one language into another.

3.3.32 The discussion in this Part indicates that there are a number of statutory provisions that potentially provide a vehicle for the courts to deploy communication/assistants as advisors, communicators and interveners. However, because none of these provisions is explicit in this regard, their operation and application in the way suggested is uncertain. They probably cannot, therefore, be regarded as a satisfactory or sufficient basis on which to ground or maintain a communication assistant/intermediary scheme.

<b>Question 6</b>	<p>(a) Does current Tasmanian legislation provide an adequate framework through which communication assistant/intermediary support can be obtained to support witnesses with complex communication needs at trial?</p> <p>(b) Do existing pre-trial directions hearings operate as an appropriate mechanism for identifying and discussing any complex communication needs that witnesses may have?</p> <p>(c) Should there be a legislative base for pre-trial directions or ground rules hearings to be held in any case involving witnesses with complex communication needs as is the case in England and Wales for children and youths? (See discussion of the approach in England and Wales at 4.2)</p>
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<sup>81</sup> *Evidence Act 2001* (Tas) s 189 coupled with *Criminal Code 1924* (Tas) s 361A.

<sup>82</sup> *Uniform Evidence Acts* s 30; *Evidence Act 1977* (Qd) s131A; *Evidence Act 1929* (SA) s 14.

<sup>83</sup> *Uniform Evidence Acts* s 31.

<sup>84</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) [7.8]–[7.9].

- (d) Would there be merit in engaging an expert intermediary or communication assistant to provide advice and/or reports pre-trial to judges and lawyers about witnesses' communication and comprehension capacities?
- (e) Does s 41 of the *Evidence Act 2001* (Tas) provide an adequate and sufficient mechanism for controlling cross-examination at trial to ensure that witnesses with complex communication needs are asked questions that are suitable to their comprehension and communication capacities?
- (f) Is the pre-trial recording of witnesses' entire testimony an adequate measure to ensure that people with complex communication needs are asked questions that are suitable to their comprehension and communication capacities and are able to give coherent and reliable testimony about their experiences and relevant events?
- (g) What legislative and procedural changes may be required to better support people with complex communication needs at trial?
- (h) Should an expert intermediary or communication assistant scheme be introduced in Tasmania to assist people with complex communication needs, lawyers and judges in the trial process?
- (i) What will some of the barriers be to using an intermediary or communication assistant at trial?
- (j) What might be a best-practice and integrated package for Tasmania to maximise the opportunity for people with complex communication needs to participate properly in the trial process?

## Part 4

# Intermediary/Communication Assistant Schemes in Other Jurisdictions

## 4.1 Introduction

4.1.1 This Part considers communication assistant/intermediary schemes instituted elsewhere in Australia and overseas including the measures that operate in the pre-trial context, during police interviews as well as the regimes that apply in trials. As in Part 3, this discussion differentiates between witnesses, victims, suspects and defendants. It focuses primarily on measures instituted in Australia and the United Kingdom but also gives brief consideration to approaches adopted in mixed inquisitorial models. Intermediary schemes in other jurisdictions are instructive about such issues as: the potential scope of intermediary measures — to whom and at what points in the criminal justice process they should apply; the roles that intermediaries should perform; and who should perform those roles. Accordingly, the discussion here concentrates on these aspects of the different models discussed.

4.1.2 One of the most extensively used and comprehensively evaluated intermediary schemes is that operating in England and Wales. Accordingly, this model is detailed first.

4.1.3 In three Australian jurisdictions, South Australia, Western Australia and New South Wales,<sup>85</sup> there is statutory provision for some people with complex communication needs to be assisted in testifying by communication assistants. These regimes are different from each other in significant respects and so will be considered separately.

## 4.2 Approaches in England and Wales and Australia

### *England and Wales*

4.2.1 The witness intermediary scheme (WIS) adopted in England and Wales is one of the longest running schemes in any common law jurisdiction. It is based on recommendations of the 1989 Pigot Committee Report<sup>86</sup> and was implemented by the *Youth Justice and Criminal Evidence Act 1999* (UK)

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<sup>85</sup> *Evidence Act 1906* (WA), s 106F; *Criminal Procedure Act 1986* (NSW), ss 275B, 306ZK and Schedule 2, cls 88-90; *Statutes Amendment (Vulnerable Witnesses) Act 2015* ss 8 & 12 which will amend the *Evidence Act 1929* (SA) by amending s 13A (special arrangements for vulnerable witnesses) and inserting s 14A (entitlement to communication assistance) into it.

<sup>86</sup> See Pigot Committee Report, above n 50.

(‘YJCEA’). It first came into effect as a pilot in 2004 and was extended nationwide in 2008, operating in 43 Police and Crown Prosecution Service areas.<sup>87</sup>

4.2.2 The WIS Registered Intermediaries are available to three categories of witnesses: children, adults whose quality of evidence is likely to be affected by a mental disorder or impairment of intelligence and social functioning and adults who have a physical disorder or disability.<sup>88</sup> Intermediaries provide assistance at trials as well as to the police in communicating with these people during investigative interviews.<sup>89</sup> The police have established procedures for the use of intermediaries at the interview stage. Additionally, a range of resources have been developed to assist the police and the legal profession in the use of intermediaries.<sup>90</sup>

4.2.3 This regime also makes provision for certain young and vulnerable defendants to be assisted by an intermediary but only when they testify at trial.<sup>91</sup> However, this provision is yet to be implemented. In the interim, the courts have exercised their inherent jurisdiction to enable intermediaries to assist vulnerable defendants in giving evidence at trial.<sup>92</sup> The experience with the use of intermediaries for witnesses during investigative interviews has prompted requests for its extension to defendants during investigative interviews.<sup>93</sup>

4.2.4 A WIS Intermediary may perform a variety of functions including translation and communication functions pre-trial and at trial, the preparation of reports for the courts providing advice about witnesses’ comprehension and communication capacities, appropriate styles of questioning to be used for witnesses with comprehension and communication incapacities and special facilities that they might need.<sup>94</sup> The primary role of an intermediary is to enable witnesses to achieve ‘complete, coherent and accurate communication.’ There are established procedures for the use of intermediaries to assist at the pre-trial police investigative interviewing stage, at ground rules hearings and in court.<sup>95</sup> While an intermediary may have extensive pre-trial involvement with police, lawyers and judicial officers, in court, intermediaries accompany and sit with witnesses while they testify and may indicate to the court whether there are any questions that require rephrasing or that are inappropriate.<sup>96</sup>

<sup>87</sup> See further the foreword and discussion in the *Registered Intermediary Procedural Guidance Manual* (2015) <<http://www.theadvocatesgateway.org/images/procedures/registered-intermediary-procedural-guidance-manual.pdf>>.

<sup>88</sup> *YJCEA* s 16.

<sup>89</sup> *Ibid* s 29.

<sup>90</sup> See The Advocates Gateway, above n 10; Crown Prosecution Service UK (CPS), *Guidelines on Prosecuting Cases of Child Sexual Abuse* (October 2013) <[www.cps.gov.uk/legal/a\\_to\\_c/child\\_sexual\\_abuse](http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse)>; Courts and Tribunals Judiciary UK, *Criminal Practice Directions* (October 2013) <[www.judiciary.gov.uk/](http://www.judiciary.gov.uk/)>.

<sup>91</sup> *YJCEA* inserted by the *Coroners and Justice Act 2009* (UK) s 104 yet to be implemented.

<sup>92</sup> *R (C) v Sevenoaks Youth Court* [2010] 1 All ER 735; *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin) and *R v Walls* [2011] EWCA Crim 443.

<sup>93</sup> B O’Mahoney, ‘The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and the Members of the Judiciary’ (2010) 38 *British Journal of Learning Disabilities* 232.

<sup>94</sup> *YJCEA* s 29.

<sup>95</sup> See further the examples of the role an intermediary can play in the various case studies outlined in Plotnikoff and Woolfson, above n 67, and note also the *Registered Intermediary Procedural Guidance Manual*, above n 87.

<sup>96</sup> *Registered Intermediary Procedural Guidance Manual*, above n 87.

4.2.5 The WIS Registered Intermediaries are a composite profession comprising speech and language therapists, psychologists, social workers, nurses, teachers or occupational therapists.<sup>97</sup> They are recruited, assessed and accredited by the Ministry of Justice. They are trained and placed on a national register from which they are assigned to witnesses on the basis of their area of specialisation.<sup>98</sup> WIS Intermediaries are remunerated by the Crown Prosecution Service and/or the Ministry of Justice for their participation in the pre-trial and trial phases with the average cost per matter estimated to be £1200.<sup>99</sup>

4.2.6 The intermediaries available to defendants, while not currently registered under the WIS, are still professionally trained. They are privately engaged at the discretion of the court and or on request of defence counsel.<sup>100</sup> As noted earlier, under the *YJCEA*, a defendant is not currently eligible for the intermediary special measure. Section 104 of the *Coroners and Justice Act 2009 (UK)*, which is yet to be implemented, will allow for certain vulnerable accused to give oral evidence at trial with the assistance of an intermediary. Until s 104 is implemented, there is no statutory framework enabling the use of intermediaries for defendants. In practice, however, judges have exercised their inherent jurisdiction to ensure that defendants with complex communication needs receive fair trials by granting defence applications to allow them to be assisted by intermediaries while testifying and, in many cases, throughout trials.<sup>101</sup>

4.2.7 The WIS is strongly supported by the judiciary, lawyers, the police and associated professionals. An extensive range of training resources and relevant practice directions have been developed which are available through the Advocates Gateway and the Equal Before the Law Benchbook.<sup>102</sup>

4.2.8 To support the provisions under the *YJCEA* a comprehensive set of pre-trial directives has been created for courts in England and Wales by the Judicial College. It operates as an extensive checklist<sup>103</sup> of matters that should be settled at different stages of the court process in cases involving children. In the pre-trial stage that checklist covers:

<sup>97</sup> A Watts, *To investigate models of intermediaries for child victim and witnesses in the criminal justice system in England, Ireland, Austria and Norway*, (2104) Churchill Fellow's Report to the Winston Churchill Fellowship of Australia <[https://www.churchilltrust.com.au/media/fellows/Watts\\_Amy\\_2013.pdf](https://www.churchilltrust.com.au/media/fellows/Watts_Amy_2013.pdf)>.

<sup>98</sup> A person skilled at supporting people with Autism for example will most likely be assigned to a witness with Autism.

<sup>99</sup> See further Watts, above n 97.

<sup>100</sup> See further instructions via the CPS <[http://www.cps.gov.uk/legal/s\\_to\\_u/special\\_measures/#a06](http://www.cps.gov.uk/legal/s_to_u/special_measures/#a06)> and the Advocates Gateway <<http://www.theadvocatesgateway.org/>>. Note also the two major private intermediary service providers – Triangle <<http://www.triangle.org.uk>> Communicourt <<http://www.communicourt.co.uk>>.

<sup>101</sup> See above n 74. Note also that the CPS guide for practitioners outlines to Prosecutors that s 104 of the *Coroners and Justice Act 2009 (UK)* allows only for the provision of an intermediary for a defendant's oral evidence giving and not the duration of the trial. However, the judgment in *C v Sevenoaks* [2009] EWHC 3008 (Admin) provides authority for the court to appoint an intermediary to support a defendant's oral evidence giving throughout the court process, including during trial.

<sup>102</sup> See further The Advocates Gateway, noting in particular the Practice Directions and resources available <<http://www.theadvocatesgateway.org/resources>> and the Courts and Tribunals Judiciary (UK), *Equal Treatment Bench Book (2013)* (2015) <<https://www.judiciary.gov.uk/publications/equal-treatment-bench-book>>.

<sup>103</sup> See, Courts and Tribunals Judiciary (UK), *Judicial College Bench Checklist: Young Witness Cases* (2012) <<http://www.judiciary.gov.uk/publications-and-reports/guidance/2012/jc-bench-checklist-young-wit-cases>>.

- obtaining information about the development/ health/ concentration span of the witness;
- determining whether the witness is likely to recognise a problematic question or tell the questioner that (s)he has not understood;
- giving directions to counsel at so called ‘ground rules discussions’ about:
  - adapting questions to the witness’s developmental level, enabling *this witness’s* ‘best evidence’ to be obtained;
  - asking short, simple questions (one idea at a time);
  - following a logical sequence;
  - speaking slowly, pausing and allowing the witness enough time to process questions (which for younger children, is indicated to be almost twice as much time);
  - allowing a full opportunity to answer;
  - avoiding particular question types that may produce unreliable answers. For example, ‘Tag’ questions such as, ‘He didn’t touch you, did he?’ are particularly problematic for cognitively immature witnesses and should be put more directly — ‘Did Jim touch you?’ and if the answer is ‘yes’: ‘How did Jim touch you?’
  - avoiding allegations of misconduct without reasonable grounds. Being accused of lying, particularly if repeated, may cause a child or witness with a mental impairment to give inaccurate answers or to agree simply to bring questioning to an end;
  - Not asking children to demonstrate intimate touching on their body, but instead using a body diagram;
  - Prescribing how the witness is to be questioned about matters arising from third party disclosure;
  - Determining how the defence case is to be put. For witnesses with immature levels of cognitive development, it may be appropriate to inform the jury of evidence believed to undermine the witness’s credibility, without necessarily addressing the matter in detailed cross-examination.<sup>104</sup>

The same or a similar checklist might be developed and applied to people with complex communication needs in Tasmania.

### ***South Australia***<sup>105</sup>

4.2.9 Following extensive public disquiet about the St Anne’s School case in 2011 discussed at [2.2.15], the South Australian Government implemented a suite of legislative reforms in 2015 to improve access to justice for people with complex communication needs.<sup>106</sup> A principal component of

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<sup>104</sup> For details see *R v Barker* [2010] EWCA Crim 4, [42].

<sup>105</sup> Note that in South Australia the Commissioner for Victims’ Rights has, alongside the Attorney-General’s division been a key proponent of reforms for vulnerable witnesses. It is important to note that Tasmania does not have a similar Commissioner role, however has a framework through which various functions of a Victims’ Rights Commissioner are accommodated. Note the *Tasmanian Charter of Rights for Victims of Crime*, additionally, the *Sentencing Act 1997* (Tas) s 81A and the *Justice Rules 2003* (Tas) Part 9A provision for a Victim Impact Statement to be given to the court.

<sup>106</sup> *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

these reforms is a statutory scheme, which gives people with complex communication needs an entitlement to be assisted while testifying by a communication partner or a person who has been approved by the court to provide such assistance.<sup>107</sup> Such assistance may be given to victims, witnesses or defendants.

4.2.10 The reforms empower the Minister to approve a person or a class of persons for the purposes of providing assistance in proceedings to witnesses with complex communication needs. These people are designated ‘communication partners’ by the legislation.<sup>108</sup> There is no restriction on the people who may be approved, but it is planned that a pool of trained independent communication partners will be available under the legislative scheme.<sup>109</sup> Additionally, *courts* may approve people to provide communication assistance.<sup>110</sup>

4.2.11 Courts may also approve the use of devices (like a speak and spell communication device) to facilitate the taking of evidence from witnesses.<sup>111</sup>

4.2.12 The reforms also insert a new provision into the *Summary Offences Act 1953* (SA) (s 74H) to enable Regulations to be made under that Act to make provision for suspects, children under 14 years of age and people with a disability that adversely affects their capacity to give coherent accounts of their experiences to be accompanied during investigative interviews by a person of a prescribed class for the purposes of providing emotional support, or communication assistance or any other assistance, during the interview.<sup>112</sup>

4.2.13 While at the time of the writing of this paper, the reforms were yet to take effect, the South Australian model arguably constitutes one of the most far-reaching and flexible responses to providing communication assistance for people with complex communication needs. Section 14A of the *Evidence Act 1929* (SA) (as amended) will be particularly instrumental in this regard. It applies broadly to all proceedings and to all witnesses with complex communication needs.

Subsection (3) of s 14A provides:

Without limiting the kind of order that may be made under this section, the court may make one or more of the following orders:

- (a) an order that the witness be accompanied by a communication partner;

<sup>107</sup> *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA), s 7 which will insert s 12AB into the *Evidence Act 1929* (SA) and relevantly, provision for communication assistants to be made available in pre-trial special hearings to record the entirety of the evidence of witnesses with complex communication needs: s 12AB(2), (5). Further, s 8 of the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) will amend s 13A *Evidence Act 1929* (SA) and insert s 14A into that Act to make communication assistance available to people with complex communication needs during trials.

<sup>108</sup> *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) s 5, which amends the definition section (s 4) of the *Evidence Act 1929* (SA) to include a definition of ‘communication partner’ in these terms.

<sup>109</sup> *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) s 5, which amends the definition section (s 4) of the *Evidence Act 1929* (SA) to include a definition of ‘communication partner’ in these terms.

<sup>110</sup> *Evidence Act 1929* (SA) ss 12AB(5), 13A(5A), 14A(4), when they come into force will enable courts to approve people other than ‘communication partners’ to provide communication assistance to witnesses.

<sup>111</sup> *Evidence Act 1929* (SA), ss 12AB(2)(a)(ii), 13A(2)(e)(ii), 14A(3)(b) as amended by the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

<sup>112</sup> *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) s 5, which amends the definition section (s 4) of the *Evidence Act 1929* (SA) s 29.

(b) an order that the witness use a device or device of a kind, approved by the court, for the purpose of facilitating the taking of evidence from the witness;

(c) an order that the evidence be taken in some other particular way (to be specified by the court) that will, in the court's opinion, facilitate the taking of evidence from the witness

4.2.14 The primary role of communication partners under the South Australian scheme is to assist witnesses and defendants as quasi-interpreters. But there is no apparent reason why they should be limited to this role. They might also perform advisory functions to courts and counsel about the appropriate phrasing of questions and how witnesses' capacities to testify might be maximised. Further, they might even be granted an interventionist role where appropriate. Certainly the flexibility imported into the scheme by s 14A(3)(c) would seem to make this possible.

4.2.15 The primary flaw in the South Australian scheme is that it is legislatively complex. It is difficult to work out which provision applies when, to whom and in what way. In particular it is unclear why any provision other than s 14A is required to institute a communication assistance scheme across the trial process, both at the pre-recording stage and during trials proper.

### *New South Wales*<sup>113</sup>

4.2.16 In New South Wales, while there are gaps across the criminal justice system in the terms of access to justice for people with complex communication needs, there is a well-developed tri-agency cross-departmental response to child sexual abuse from the point of entry and arguably throughout the system. The Joint Investigation Response Team (JIRT) was established to provide a seamless service response in NSW to children and young people at risk of significant harm, as a result of sexual assault, physical abuse and neglect.<sup>114</sup> The JIRT's role is to undertake joint investigations of statutory child protection matters that require a criminal justice response. The JIRT model is designed to ameliorate the trauma experienced by young witnesses, ensuring greater protections to vulnerable children by minimising the number of interviews conducted, ensuring these interviews take place in a child friendly environment, and delivering timely access to medical treatment, care and support as required.

4.2.17 The JIRT team are effectively the primary gateway for receiving victims of child sex offences in NSW, with teams operating throughout most of the State. Throughout the proceedings of the Royal Commission into Institutional Responses to Child Sex Abuse there have been criticisms of

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<sup>113</sup> There are some jurisdictional differences between Tasmania and NSW that are important to consider in relation to the operation of intermediaries and other witness special measures. In NSW, similar to South Australia there is Commissioner of Victims' Rights. NSW also have a specialist police team known as the Joint Investigation Response Team (JIRT) who are trained interview and investigate child sexual assault offences in partnership with the Department of Community Service and the Department of Health. The JIRT exclusively services children and young people under age 18 in NSW and is a critical part of the pre-recording of a child witness's evidence.

<sup>114</sup> This commentary was based on conversations with NSW Victims Services representatives on 5 November 2015. For information about JIRT see further the overview of the JIRT <[http://www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/joint-investigation-response-team-\(jirt\)](http://www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/joint-investigation-response-team-(jirt))>.

the specialist interviewing in NSW due to the exclusion of parents and support persons from that process.<sup>115</sup>

4.2.18 It is important to note that the JIRT team is only a special mechanism for child victims and witnesses to support the prosecution of child sex offence matters with specialist support not extending to young offenders. While NSW has several other youth justice initiatives designed to support young offenders in the criminal justices system, following the discontinuation of the Joint Assessment and Review Team that was in place for the Youth Drug and Alcohol Court there is no longer specialist support for child defendants.<sup>116</sup>

4.2.19 There has been provision for intermediaries during trials in New South Wales for some time. The relevant provisions are ss 275 B and 306ZK of the *Criminal Procedure Act 1986* (NSW).<sup>117</sup> It is not known to what extent these provisions are actually used but there is no evidence that their use is widespread. In relation to s 275B this may be because this section provides that communication assistance may be provided ‘only if the witness ordinarily receives assistance to communicate from such a person or persons on a daily basis’. This is likely to have a significantly limiting effect on its operation and appears to preclude the use of expert communication assistants as are used in England and Wales under the WIS or of the kind stipulated<sup>118</sup> for the pilot scheme instituted by the *Criminal Procedure Act 1986* (NSW), Schedule 2, Part 29. Further, there are no procedures or guidelines in place for the administration of this provision and it is not clear from the provision if parties are entitled to seek assistance on behalf of the witness, or if it is for the judge to invoke the provision.<sup>119</sup>

4.2.20 Similarly, it appears that s 306ZK(3)(b) has never been applied in practice, and there are no procedures or guidelines in place for its administration. In fact, information provided to support people appointed under this provision by the New South Wales Department of Justice states that they must not speak during the hearing or help witnesses to answer questions.<sup>120</sup> This suggests that there may be a misconception abroad that support people must always play a purely passive role in proceedings as emotional props to witnesses. It further suggests that courts do not currently utilise these provisions to assist witnesses to comprehend questions and communicate their answers.

4.2.21 In 2015, NSW supplemented the existing measures in ss 275B and 306ZK(3)(b) of the *Criminal Procedure Act 1986* (NSW) by inserting Part 29 into Schedule 2 of that Act. This creates a pilot scheme which is to operate for three years<sup>121</sup> for two district courts incorporating a ‘children’s

<sup>115</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, above n 7. See also the transcript from Case Study 38 <<http://www.childabuseroyalcommission.gov.au/case-study/1c1a2449-93cd-4268-86da-7dd7e3272797/case-study-38,-march-2016,-sydney>>.

<sup>116</sup> As discussed with Victims Services NSW, above n 114.

<sup>117</sup> *Criminal Procedure Act 1986* (NSW), s 306ZK(3)(b) (children and witnesses with cognitive impairments may have a support person with them when they testify who may act as an interpreter and assist them to give evidence); *Criminal Procedure Act 1986* (NSW) s 275B (any witness who has difficulty communicating may use a person who may assist him or her to do so if the witness *ordinarily receives such assistance on a daily basis.*)

<sup>118</sup> See *Criminal Procedure Act 1986* (NSW) Schedule 2, Part 29, cl 89(2).

<sup>119</sup> Victoria Law Reform Commission (VLRC), *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) [8.85].

<sup>120</sup> See, for example, Victims Services, Department of Attorney-General and Justice, *Information for Court Support People*, <[http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs\\_justicejourney/vs\\_justicejourney\\_Hidden/VS\\_courtsupportpeopleinfo.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_justicejourney/vs_justicejourney_Hidden/VS_courtsupportpeopleinfo.aspx)>

<sup>121</sup> *Criminal Procedure Act 1986* (NSW) Schedule 2, Part 29, cl 81.

champion' regime for children in prescribed sexual offences cases. It is too early to say how these provisions are working but review of their operation is to occur within two years of their commencement. The Children's Champions pilot operates on a mandatory basis. It *mandatorily* assigns an intermediary who is a paid, tertiary trained expert recruited by NSW Victims Services to any child witness who is under 16 years of age in prescribed sexual offences cases.<sup>122</sup> However, in specified circumstances the court is not required to appoint a 'children's champion' including where it is not practical to do so, where it is not in the interests of justice to do so and where it is unnecessary or inappropriate to do so.<sup>123</sup> For children over the age of 16, the court may, of its own motion or on the application of a party to the proceedings appoint a children's champion.<sup>124</sup>

4.2.22 The children's champion scheme applies only to complainants in prescribed sexual offences cases not to defendants.<sup>125</sup> It also applies only to children and not to other witnesses who have complex communication needs.<sup>126</sup>

4.2.23 The scheme narrowly circumscribes the people who may perform the role of 'children's champion'. The Victim's Services Department of the Justice Department of New South Wales, must appoint a panel of 'children's champions'. Only people with tertiary qualifications in the fields of psychology, social work, speech pathology, occupational therapy or like fields may be appointed.<sup>127</sup> The legislation specifically proscribes the appointment of a 'children's champion' for a witness if the person is a relative, friend or acquaintance of the witness, or has assisted the witness in a professional capacity (otherwise than as a children's champion), or is a party or potential witness in the proceedings concerned.<sup>128</sup> The elimination of anyone who is a relative or who has previously worked in a professional capacity with the witness may reduce the effectiveness of the scheme. Some people with complex communication needs may not communicate willingly or easily with people with whom they do not have an established relationship of trust.

4.2.24 In contrast to the narrowness of the new pilot scheme, ss 275B *Criminal Procedure Act 1986* (NSW) applies in all proceedings and to all witnesses with complex communication needs. There is no requirement that the person who provides the communication assistant have any particular expertise, professional or tertiary qualifications. The only restriction is that the communication assistance provided must already be used by the witness 'on a daily basis'. This means that the assistance could potentially be provided by a family member. Further, s 275B(2) permits the use of communication devices or aids if they are used by the witness 'on a daily basis'. This provision also potentially applies to anyone who requires communication assistance when testifying including defendants as well as other witnesses.

4.2.25 Section 306ZK also has broader application than the new pilot scheme. It applies to children and people with cognitive impairments<sup>129</sup> in proceedings relating to personal assault offences,

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<sup>122</sup> Ibid Schedule 2, Part 29, cl 89(3).

<sup>123</sup> Ibid Schedule 2 Part 29, cl 89(4).

<sup>124</sup> Ibid Schedule 2 Part 29, cl 89(3)(b).

<sup>125</sup> Ibid Schedule 2 Part 29, cls 82, 83, 88(1).

<sup>126</sup> Ibid Schedule 2 Part 29, cls 82, 88(1).

<sup>127</sup> Ibid Schedule 2 Part 29, cl 89(1)-(2).

<sup>128</sup> Ibid Schedule 2 Part 29, cl 89(5).

<sup>129</sup> Ibid s 306M.

applications for apprehended violence orders, civil proceedings arising from personal assaults, Civil and Administrative Tribunal proceedings relating to applications made under the *Victims Rights and Support Act 2013* (NSW) in respect of personal assaults and proceedings relating to child protection orders.<sup>130</sup> Section 306ZK explicitly applies to defendants as well as to other witnesses<sup>131</sup> and permits the witness to be assisted by a broad range of people including a parent, guardian, relative, friend or support person. That person may act as an interpreter, for the purpose of assisting the witness with any difficulty he or she has in giving evidence associated with an impairment or a disability, or for the purpose of providing support.<sup>132</sup> The court may also permit more than one support person to be present.<sup>133</sup> The limitation of the provision is that it does not apply to complainants in sexual offences cases.<sup>134</sup> In such cases, complainants are entitled to have a support person with them when they testify including a parent, guardian, relative, friend or support person of the complainant, or (interestingly) a person assisting the complainant in a professional capacity.<sup>135</sup> However, there is no provision for complainants in these cases to be assisted by the support person as an interpreter. Nevertheless, s 275B (with its particular limitations) continues to apply in such cases.<sup>136</sup> It is unclear why complainants and, indeed defendants, in sexual offences cases are distinguished in this way from witnesses in personal assault cases. Prima facie this distinction is discriminatory because it disentitles complainants and defendants in sexual offences cases to the full panoply of assistance available to people with complex communication needs in other cases involving personal violence.

4.2.26 The designated role of the intermediaries under ss 275B and 306ZB is to communicate and explain to witnesses the questions put to them, and to explain to the court the evidence given by them.<sup>137</sup> Deployed in this way, they serve a quasi translator function. These provisions do not give intermediaries either an advisory or interventionist function.<sup>138</sup> The ‘children’s champion’ scheme does however incorporate an advisory function. It prescribes that the ‘children’s champion’ is to provide a written report to the court on the communication needs of the witness.<sup>139</sup> The scheme incorporates provisions for practice directions to be given and the making of rules of court.<sup>140</sup> This enables procedures for ground rules hearings to be established.

4.2.27 The problem with the New South Wales approach is that it is very difficult to untangle the different schemes on offer. The schemes differ from each other and each scheme contains significant

<sup>130</sup> *Ibid* s 306ZA.

<sup>131</sup> *Ibid* s 306ZK(6).

<sup>132</sup> *Ibid* s 306ZK(3)(b).

<sup>133</sup> *Ibid* s 306ZK(5).

<sup>134</sup> *Ibid* s 294C(7).

<sup>135</sup> *Ibid* s 294C(3).

<sup>136</sup> *Ibid* s 294C(8).

<sup>137</sup> *Criminal Procedure Act 1986* (NSW) s 306ZK(3)(b) (children and witnesses with cognitive impairments may have a support person with them when they testify who may act as an interpreter and assist them to give evidence); *Criminal Procedure Act 1986* (NSW) s 275B (any witness who has difficulty communicating may use a person who may assist him or her to do so if the witness *ordinarily receives such assistance in everyday life*) and *Criminal Procedure Act 1986* (NSW) Schedule 2, Part 29, cls 88-90.

<sup>138</sup> VLRC, above n 119, [8.83] citing Harriet Ketley, ‘A Witness Intermediary Scheme in NSW — Issues and Challenges’ (Paper presented at Intermediary Programs and Communication Models Symposium, Melbourne, 18 February 2015) 22–3.

<sup>139</sup> *Criminal Procedure Act 1986* (NSW) Schedule 2, Part 29, cl 89(6).

<sup>140</sup> *Criminal Procedure Act 1986* (NSW) Schedule 2, Part 29, cls 93, 94.

restrictions that exclude particular cohorts from communication assistance. None of these schemes applies during the pre-trial phase of the criminal justice process.

4.2.28 The Children's Champion pilot is due to commence mid-2016 in two district courts, one in Downing Centre and the other in Newcastle. In addition to the existing JIRT procedures the pilot will incorporate additional training for the police and other associated parties to be provided by Professor Penny Cooper. It will also involve the appointment of two additional judges to assist with the case demand.<sup>141</sup> Victim's Services NSW will recruit, register and train a pool of 60 tertiary qualified 'Children's Champions' or Intermediaries who will work across the two courts.<sup>142</sup>

### ***Western Australia***

4.2.29 In 1992, the *Evidence Act 1906* (WA) was amended to make provision for the use of communication assistants ('communicators') for children and 'special witnesses'. Where children are concerned, under s 106F of the Act, in *any proceedings*, courts may appoint *anyone* they consider suitable and competent to act as communicators. This provision is couched in sufficiently broad terms to enable the appointment of communicators for both witnesses and defendants. There is no limitation under this provision on who may perform the role of communicator and no limitation as to the type of proceedings where a communicator may be used. Unlike the NSW pilot scheme, no particular qualifications are stipulated for 'communicators'. This is a matter that courts are free to determine on a case by case basis, depending on the nature of the matters in issue and the needs and capacities of the person for whom communication assistance is to be provided. Section 106F is, however, significantly limited in one respect — it applies only to children.

4.2.30 Under s 106R(4)(b) *Evidence Act 1906* (WA), people declared by courts to be 'special witnesses' may also be assisted by communicators when testifying. The scope of this provision is not entirely clear, however. The lack of clarity arises from the qualification to this entitlement contained in s 106R(4b), which provides that where a communication assistant order is made in respect of a special witness, s 106F will apply, 'as if the special witness were an affected child'. Since the term 'affected child' is defined in s 106A of the Act by reference to Schedule 7 offences,<sup>143</sup> the effect of the qualification may be to restrict the availability of communication assistance to special witnesses who are the victims of offences specified in Schedule 7 of the Act. If this is the correct interpretation of this provision, then defendants would not be eligible for communication assistance under s 106R.

4.2.31 People may be declared to be 'special witnesses' if, in the court's opinion, by reason of physical disability or mental impairment, they would be unlikely to be able to give evidence, or to give evidence satisfactorily if not treated as a special witness. Courts may also declare people to be special witnesses if by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant,

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<sup>141</sup> NSW Victims Services, above n 114.

<sup>142</sup> Ibid.

<sup>143</sup> The *Evidence Act 1906* (WA) Schedule 7 also refers to children in respect of whom applications are made under Part 4 or 5 of the *Children and Community Services Act 2004* (WA), but that is not relevant in the special witnesses context because s 106R does not apply to 'affected children' (s 106R(6)). It simply specifies that where the court directs that a communicator be used for a special witness, s 106F will apply as if 'as if the special witness were an affected child'.

they would be likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily if not treated as a special witness.<sup>144</sup>

4.2.32 The role of ‘communicators’ is specified as being to communicate and explain questions put to the child and the answers given by the child to the court. This is an interpretive function rather than an interventionist or advisory one. Nevertheless, the pre-trial special hearings process mandated by s 106S *Evidence Act 1906* (WA) to determine whether and what orders should be made under s 106F and s 106R of the Act may provide courts with the opportunity to obtain advice from communicators about the communication capacities and needs of children and special witnesses.

4.2.33 It appears that communicators have not been utilised to any great extent in Western Australia.<sup>145</sup> A communicator does appear to have been used recently in at least one case on the initiative of the Child Witness Service of WA.<sup>146</sup> Further, the Victorian Law Reform Commission (VLRC) has recently reported that the Western Australian scheme has been used several times since it was *first used in 2011*, though does not indicate precisely how often.<sup>147</sup> Notably, the scheme was enacted in 1992, so its apparent lack of use is not encouraging. The low level of the scheme’s use has been attributed to the fact that the required infrastructure is yet to be created.<sup>148</sup>

4.2.34 A major deficiency with the Western Australian scheme is that it does not apply to defendants who are not children. Further, there does not appear to be any statutory regime covering the use of communicators during the pre-trial phase of the criminal justice process other than during the recording of interviews with children or people with mental impairments who have been physically or sexually abused where the recording is being made to be used subsequently as these people’s evidence-in-chief.<sup>149</sup>

## 4.3 Approaches in Other Jurisdictions

### *New Zealand*

4.3.1 Historically, New Zealand has been conservative in enacting reforms to enable special measures for vulnerable witnesses. In relation to intermediaries, in 2011 the New Zealand Government agreed in principle to provide for the use of intermediaries for children under the age of 18 together with a regulation-making power to prescribe procedures for their use. Notwithstanding broad community and stakeholder support for the scheme that would specifically benefit Maori children who are substantively overrepresented as victims of crime, the mooted scheme was not supported by the Minister of Justice. The Minister argued:

<sup>144</sup> Section 106R *Evidence Act 1906* (WA).

<sup>145</sup> H Jackson, ‘Child Witnesses in the Western Australian Criminal Courts’ (Paper presented at the AIJA Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1-2 May 2003) 9.

<sup>146</sup> NSW Justice Department, above n 26, [1.55].

<sup>147</sup> VLRC, above n 119, [8.82] citing Harriet Ketley, ‘A Witness Intermediary Scheme in NSW—Issues and Challenges’ (Paper presented at Intermediary Programs and Communication Models Symposium, Melbourne, 18 February 2015) 22-3.

<sup>148</sup> Jackson, above n 145, 9; NSW Justice Department, above n 26, [1.55].

<sup>149</sup> *Evidence Act 1906* (WA), ss 106 HA, HB.

- intermediaries are more suitable in inquisitorial criminal justice processes not in the adversarial process;
- the defendant's right to cross-examine a witness and therefore the right to a fair trial may be adversely impacted;
- it would be difficult to find people with the requisite skills to fulfil the role of intermediaries.<sup>150</sup>

### ***South Africa***

4.3.2 Section 170 of the *Criminal Procedures Act 1977 (South Africa)* provides a mechanism for the appointment of an intermediary for a vulnerable witness who is under the age of 18. The aim of the scheme is to reduce miscommunication through the translation of questions to a level of sophistication appropriate for the witness while not undermining the fairness of the trial.<sup>151</sup> Intermediaries sit with witnesses in a separate room apart from the courtroom, and listen to questions from prosecution and the defence counsel (who are in the courtroom), through an ear-piece and then explain them to witnesses. The court is able to observe the witnesses, but the witnesses cannot see or hear what is happening in the court.<sup>152</sup> Versions of the scheme have been adopted in Namibia and Zimbabwe.

### ***Israel***

4.3.3 In Israel there is a presumption that children will not testify in court.<sup>153</sup> This presumption was enacted in the *Evidence Revision (Protection of Children) Law 1955*, which created an intermediary scheme involving youth interrogators who have a highly interventionist role in proceedings.<sup>154</sup> They are the only people who may question children and specified vulnerable adult witnesses.

4.3.4 It is mandatory for children under 14 years of age who are involved in any capacity in cases involving sexual offences, accusations of parent or guardian cruelty, neglect or serious violence to be interviewed by a qualified interrogator. These interrogators are appointed at the pre-trial phase of the criminal justice process to obtain video recorded statements from children and vulnerable adult witnesses. This usually occurs within days of the offence being reported.<sup>155</sup> The interrogators are then responsible for making unreviewable decisions about whether the witnesses will testify in court and

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<sup>150</sup> See further New Zealand Ministry for Justice, *Amendments to the Evidence Act 2006* (12 November 2013) <<http://www.justice.govt.nz/publications/global-publications/a/amendments-to-the-evidence-act-2006>>.

<sup>151</sup> See further the commentary of C R Matthias and F N Zaal, 'Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa' (2011) 19(2) *International Journal of Children's Rights* 251 as discussed in M Powell, P Bowden and M Mattison, 'Stakeholders' Perceptions of the Benefit of Introducing an Australian Intermediary System for Vulnerable Witnesses' (2015) 48(4) *Australian and New Zealand Journal of Criminology* 498.

<sup>152</sup> Gert Jonker and Rika Swanzen, 'Intermediary Services for Child Witnesses Testifying in South African Criminal Courts' (2007) 4(6) *Sur - International Journal on Human Rights* 91 <[http://www.scielo.br/pdf/sur/v4n6/en\\_a06v4n6.pdf](http://www.scielo.br/pdf/sur/v4n6/en_a06v4n6.pdf)>.

<sup>153</sup> See further Emily Henderson, 'Alternative Routes: Accusatorial Jurisdictions on the Slow Road to Best Evidence' in J R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 43, 61.

<sup>154</sup> Powell, Bowden and Mattison, above n 151.

<sup>155</sup> Henderson, above n 153.

whether further questioning should take place at any stage.<sup>156</sup> Interrogators also assess children's reliability as witnesses and determine their role in the investigative and trial processes. They accompany witnesses throughout any investigative processes like identification parades, medical examinations etc. After interviewing witnesses, interrogators compile reports and send them and the recorded interviews to the police who forward them to prosecutors. Only a small percentage of children testify at trials. If children are deemed unable to testify, interrogators will recount their disclosures to the court, provide an assessment of their credibility and explain why they are not testifying. However, no one can be convicted on uncorroborated accounts provided by interrogators. If witnesses are not permitted to testify, defence counsel can only challenge their accounts by testing interrogators' assessment of their reliability.

4.3.5 If witnesses do testify in court, interrogators may act as intermediaries. If the investigator deems that a witness should not testify in court, because of potential 'mental anguish', the initial recorded interview is played in court and the investigator provides an assessment about the witness's credibility.<sup>157</sup>

### **Norway**

4.3.6 The Norwegian criminal justice system contains elements of both the inquisitorial and adversarial systems. The approach in Norway regarding special witnesses measures for children dates back to 1926 but has been reformed and readjusted a number of times since then. A significant feature of the Norwegian approach where children (16 years of age and in some cases up to 18 years of age) and people with mental impairments are concerned is the 'Barnehus' or Children's House. In cases of alleged sexual or physical abuse or exposure to domestic violence, children and people with mental impairments are taken to the Barnehus where medical examinations and forensic interviews take place. Forensic interviews are conducted by trained police officers who sit in a room with a live link to a court hearing room. Judges, prosecution and defence lawyers, the witness' lawyer and a psychologist from the Barnehus observe the interview from the court hearing room. The psychologist assesses the witness' psychological health as the interview progresses. When interviewing officers are satisfied that they have obtained comprehensive accounts of witness' experiences, a break will occur in interviews while they confer with the judges and other observers to determine whether further questions should be asked. The entire interview is recorded and replayed at the trial.<sup>158</sup> If the child is over 15 years of age the interview will be conducted at the courthouse, but specialist interviewers still has sole responsibility for conducting the interview.

4.3.7 The forensic interviewers are trained in best practice procedures for eliciting complete and accurate evidence from children and people with mental impairments using the National Institute of Child Health and Human Development (NICHD) Investigative Interview Protocol.

4.3.8 The aim of this process is to enable interviews with children and people with mental impairments to be conducted only once. Unless the witness makes further disclosures at a later date,

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<sup>156</sup> See further D Pugach, *Are we over-protective? A comparative critique of criminal justice approaches to child witnesses in sexual abuse cases* (PhD Dissertation, Kings College, 1997).

<sup>157</sup> Henderson, above n 153.

<sup>158</sup> See Watts, above n 97.

no further questioning will occur either before or at the trial. This process also seeks to ensure that interviews are conducted by appropriately qualified people in a way that is appropriate to the cognitive capacities and emotional needs of the interviewee.<sup>159</sup> This approach represents a high watermark in achieving control of investigative and trial questioning through the deployment of specialist interviewers. It excludes others from directly putting questions to interviewees. However, while counsel cannot question witnesses directly they can suggest lines of enquiry, questions to challenge the testimony and contradictions in the testimony they wish to be investigated.

## 4.4 Evaluation

4.4.1 Where they are utilised it appears that intermediary/communication assistance regimes are generally well regarded.<sup>160</sup> In England and Wales, the intermediary special measure has been described as,

extremely useful in advising those at court how best to communicate with the witness, ensuring that the witness understands questions and that their answers are understood.<sup>161</sup>

4.4.2 Reliance on intermediaries clearly has advantages over relying solely on counsel to phrase questions appropriately or on judges to disallow inappropriate questions. Neither may have the degree of knowledge about particular witnesses that intermediaries have and that may be critical to ensuring that questions are framed appropriately. Reliance on an intermediary therefore may reduce the intensity of the trial judge's role in gauging and being alert to questions that are inappropriate for particular witnesses. Additionally, a particular advantage of intermediary schemes is that, unlike a simple witness supporter or a traditional interpreter, an intermediary can help the court by identifying communication problems during questioning and, with the court's permission, help to resolve them.<sup>162</sup>

4.4.3 There is evidence that use of intermediaries, particularly when coupled with the pre-recording of evidence, can increase effective case management and the early disposal of cases resulting in cost savings. Specifically, they facilitate an accurate early assessment of the viability of prosecutions and not guilty pleas with consequent fiscal benefits from reductions in court time.<sup>163</sup>

4.4.4 However, there are flaws in the operation of different communication special measures including their under-utilisation, an over-reliance by judges on intermediaries to control questioning of witnesses and consequent entrenchment of their own non-interventionist approach, deficits in

<sup>159</sup> See further K Hanna, E Davies, E Henderson, and L Hand, 'Questioning child witnesses: Exploring the benefits and risks of intermediary models in New Zealand' (2013) 20(4) *Psychiatry, Psychology & Law* 527. See more at: <<https://www.aut.ac.nz/profiles/kirsten-hanna#sthash.ZIRJMV5I.dpuf>>; T Myklebust, 'The Position in Norway' in Spencer and Lamb, above n 153, 157.

<sup>160</sup> The General Council of the Bar of England and Wales, *European Commission Communication on the Rights of the Child 2011-2014: Contribution of the Bar Council of England and Wales* (2010) 3.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> E Davies, E Henderson and F W Seymour, 'In Reply To: The Interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings' (1997) 4 *Psychiatry, Psychology and Law* 217; K Hanna, E Davies, E Henderson, C Crothers and C Rotherham, *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (2010) Institute of Public Policy, AUT University, 181 <[http://www.ipp.aut.ac.nz/\\_data/assets/pdf\\_file/0020/119702/Child-Witnesses-in-the-NZ-Criminal-Courts-full-report.pdf](http://www.ipp.aut.ac.nz/_data/assets/pdf_file/0020/119702/Child-Witnesses-in-the-NZ-Criminal-Courts-full-report.pdf)>; Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005) 132.

intermediaries' intervention, failure by counsel to adhere to questioning protocols stipulated by intermediaries, and the persistence of adversarial questioning techniques that seem to be beyond the power of intermediaries to influence.<sup>164</sup>

4.4.5 Nevertheless, overall, the evidence to date is that where properly resourced and where adequate interventionist scope is allowed, intermediary schemes offer significant potential for facilitating the reception of evidence of people with complex communication needs. But therein, of course, lies the rub — the provision of adequate resourcing and allowing intermediaries to play an adequately interventionist role. The Western Australian and New South Wales experience demonstrates that it is not enough to make statutory provision for intermediaries. The necessary infrastructure (a sufficient number of trained intermediaries and the availability of training programs) is essential to the success of this measure.

4.4.6 Additionally, the judiciary and legal practitioners must be prepared to accord intermediaries a meaningful interventionist role, which they support and promote. They should neither strangle that role by overly confining it nor abrogate their own responsibility to ensure appropriate questioning by delegating that responsibility in its entirety to the intermediary.<sup>165</sup> This means that the success of these schemes essentially depends upon their becoming part of the legal culture in the way that has been achieved in Western Australia for its pre-recording scheme.<sup>166</sup>

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<sup>164</sup> P Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (City University London, 2012) 13.

<sup>165</sup> See criticism of the United Kingdom and South African processes in Hanna, Davies, Henderson, Crothers and Rotherham, above n 163.

<sup>166</sup> C Eastwood and W Patton, *The Experience of Child Complainants of Sexual Abuse in the Australian Criminal Justice System* (2001) Australian Institute of Criminology, 127  
<<http://www.criminologyresearchcouncil.gov.au/reports/eastwood.html>>.

## Part 5

# Options for Reform

5.1.1 In this Part of the Issues Paper, possible options for reform are considered. The discussion here commences by considering the option of not making any change to the current position in Tasmania. If it is considered desirable to institute an intermediary/communication assistant scheme in Tasmania, then a number of issues about what that scheme should look like must be addressed. This includes what its scope should be — to whom it should apply and at what points in the criminal justice process it should apply; who should perform the role of intermediary/communication assistant and what that role should be. The analysis of a possible scheme for Tasmania is structured around these issues.

## 5.2 Retain and Utilise Existing Special Measures

5.2.1 The discussion in Part 3 about the current approach in Tasmania revealed that there are no specific legislative measures dedicated to providing communication assistance to people with complex communication needs involved in the criminal justice process. While there are general provisions in statutes like the *Evidence Act 2001* (Tas) that might be utilised (as indicated in Part 3) to make such assistance available on a case by case basis, in the absence of specific legislative imprimatur, courts, counsel and investigative agencies may not perceive the possibility of utilising those provisions in that way and may, in fact, be reluctant to do so. The TLRI is not aware that those provisions have been deployed in that way to date.

5.2.2 This means that in the absence of specific statutory provision, communication assistants/intermediaries are unlikely to be used for witnesses with complex communication needs. If they are used, in the absence of a legislated scheme, this may occur in an ad hoc, case-by-case and, therefore, potentially inconsistent and uncertain manner.

5.2.3 The discussion in Parts 2, 3 and 4 shows that communication assistant/intermediary schemes can make a valuable contribution to ensuring that people with complex communication needs gain equal access to justice. Such schemes complement and maximise the potential of other measures like the pre-recording scheme enacted in ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) to assist vulnerable people in gaining equal access to justice.

5.2.4 Participants, at the Ministerial Roundtable in October 2015, including representatives of Tasmania Police, the Law Society, the Bar Association, the DPP and the Courts, made it clear that their work would be facilitated by the availability of a communication assistant scheme in Tasmania.

5.2.5 These considerations suggest that an intermediary scheme should be instituted in Tasmania to maximise the potential of and complement existing measures for vulnerable witnesses.

<b>Question 7</b>	Should no change be made to the current position in Tasmania with regard to implementing a statutory communication assistant/intermediary scheme for people with complex communication needs?
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### 5.3 A Tasmanian Intermediary/Communication Assistant Scheme?

#### *Scope – who should be able to use a communication assistant/intermediary?*

5.3.1 There is no uniformity in the scope of intermediary schemes instituted in other jurisdictions. Some schemes are limited to particular people, for example, child complainants of sexual offences, as in the recently enacted New South Wales pilot scheme. Other schemes are limited to victims of particular offences, like s 306ZK of the New South Wales *Criminal Procedure Act 1986*, which is confined to cases involving personal violence other than sexual offences. Some schemes have general application, like s 14A *Evidence Act 1929* (SA) (yet to be implemented). Some schemes are available to both defendants and other witnesses as is the case under s 106F *Evidence Act 1906* (WA) (though this provision applies only to children) and s 275B *Criminal Procedure Act 1986* (NSW) (although this provision is limited to people who use communication assistance on a daily basis); some apply only to witnesses and complainants but not to defendants (s 106R *Evidence Act 1906* (WA) and the pilot scheme in New South Wales). Some schemes apply only where the person needing assistance makes use of such assistance on a daily basis as under s 275B *Criminal Procedure Act* (NSW).

5.3.2 Those schemes that exclude defendants arguably breach fair trial principles and the right of everyone to be equal before the law. The experience with the scheme operating in England and Wales indicates that courts are likely to be very alive to this problem and so willing to extend witness schemes to defendants utilising their inherent jurisdiction. It is preferable, if the justice process is not to be brought into disrepute and community faith in it is to be maintained, that any Tasmanian scheme apply equally to defendants and other witnesses. In fact, it is arguable that any scheme which privileges any particular cohort over another in the provision of measures designed to advance equal access to justice, undermines that right. Nevertheless, the fact that schemes enacted elsewhere are not generally of universal application raises the question whether a Tasmanian scheme should also be available only to particular people and if so, to whom?

<b>Question 8</b>	<p>Who should be able to use a communication assistant or intermediary?</p> <p>Anyone with complex communication needs? Or:</p> <p>(a) Only children?</p> <p>(b) Anyone who is under 18? and/or</p> <p>(c) Anyone who has difficulty communicating accounts of their experiences or comprehending questions and whom an intermediary/communication assistant is</p>
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	<p>likely to assist in giving accurate, complete or coherent testimony?</p> <p>(d) Only victims of certain offences and if so, which offences?</p> <p>(e) Only children and special witnesses as defined in the <i>Evidence (Children and Special Witnesses) Act 2001</i> (Tas), which is cognate with s 106R of the <i>Evidence Act 1906</i> (WA)?</p>
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***Scope – at what point in the criminal justice process should a Tasmanian intermediary scheme be available?***

5.3.3 The Ministerial Roundtable and consultations conducted with key stakeholders in preparing this Issues Paper revealed that the need for communication assistance for people with complex communication needs extends beyond the trial process to pre-trial phases of the criminal justice process. This is also recognised in the recently enacted South Australian scheme and in the regime operating in England and Wales. The lack or availability of communication assistance during the pre-trial stages of the justice process can be determinative of whether access to justice is achieved in all succeeding phases.

5.3.4 There is also a consensus that pre-trial recording schemes like that provided in ss 6 and 6A *Evidence (Children and Special Witnesses) Act 2001* (Tas), operate optimally and achieve their maximum potential in promoting equal access to justice for people with complex communication needs when supported by a communication assistant/intermediary scheme. There are also questions about how such schemes should operate: should they have mandatory application to some people with designated situational exceptions or should their application remain discretionary? This is the approach adopted for the New South Wales pilot scheme.

<b>Question 9</b>	<p>(a) When should communication assistance be available?</p> <ul style="list-style-type: none"> <li>• Only during trials?</li> <li>• And/or during pre-trial pre-recording processes?</li> <li>• And/or during police interviews?</li> <li>• And/or during interviews/consultations with legal counsel including prosecution counsel?</li> <li>• And/or prior to police interviews?</li> </ul> <p>(b) Should communication assistance be prescribed on a mandatory basis in some cases for some people and if so, in which cases, when and for which people?</p> <p>(c) If communication assistance is mandatory in some cases for some people, should exceptions be provided to this requirement and if so, what should those exceptions be?</p>
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***What should be the role of communication assistants/intermediaries?***

5.3.5 The discussion in Parts 3 and 4 reveal that communication assistants are able to play a number of different roles in assisting people with complex communication needs to gain equal access to justice. At the very least they act as quasi-interpreters explaining questions to witnesses and their answers to the court as is the case under s 306F *Evidence Act 1906* (WA). Additionally, they may perform a pre-trial advisory function to judges, counsel and investigative agencies about the comprehension and communication capacities and needs of people with complex communication needs as in the New South Wales pilot scheme. They may also identify people with complex communication needs at critical stages in the justice process, as is the case in England and Wales. For example, the New South Wales pilot scheme grants ‘children’s champions’ an advisory role with the court. This is also the approach adopted for the scheme in England and Wales.

5.3.6 In some regimes, intermediaries have an interventionist role enabling them to alert the court to inappropriate questioning and to interrupt such questioning and suggest ways to rephrase questions or prevent them from being asked. This is the case in England and Wales although it appears that this aspect of that scheme may be under-utilised.<sup>167</sup> The most interventionist of the schemes considered here is that operating in Norway where intermediaries have sole responsibility for questioning vulnerable witnesses.

5.3.7 It is the preliminary view of the Institute that intermediary/communication assistant schemes operate optimally in achieving their legislative intent where they grant intermediaries/communication assistants the full range of interpretive, advisory and interventionist functions although the interventionist role can vary in its extent.

<b>Question 10</b>	<p>Should intermediaries/communication assistants act:</p> <ul style="list-style-type: none"> <li>• As interpreters only?</li> <li>• And or as advisors to courts, counsel and the police?</li> <li>• And/or be able to intervene in inappropriate questioning and if so what type of intervention should be permitted?</li> </ul>
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***Who should be permitted to perform the role of intermediary/communication assistant?***

5.3.8 There is little consistency in various statutory regimes in relation to the qualifications of communication assistants. At one end of the spectrum, the New South Wales pilot scheme requires that ‘children’s champions’ have relevant tertiary qualifications. At the other end of the spectrum, the Western Australian scheme enables courts to approve anyone as a ‘communicator’. This enables the issue of who can be a ‘communicator’ to be determined on a case-by-case basis according to the exigencies of the particular case. The South Australian scheme occupies a position somewhere in between enabling courts to approve communication assistants and also providing for the constitution of a panel of trained ‘communication partners’ approved by the Minister. This enables courts to

<sup>167</sup> See further Cooper, above n 164.

respond to the particular demands of the cases before them and also for a panel of expert or quasi-expert communication partners to be established from which communication assistants are able to be assigned to cases as needed.

5.3.9 There is also the question whether certain people should be excluded from acting as communication assistants. This is the approach adopted in the New South Wales pilot scheme, which excludes relatives, friends and acquaintances of the witness, or anyone who has assisted the witness in a professional capacity. As noted in Part 3, the disadvantage of this approach is that it may reduce the effectiveness of the scheme. Where the communication assistant does not have an established personal or professional relationship with the witness, the witness may be inhibited in communicating with or through him or her. Additionally, the communication assistant may lack a depth of understanding of any communication or comprehension peculiarities the witness may have and so not be able to advance to the greatest possible extent the witness's communication of his or her experiences. The advantage of excluding certain people from the role of intermediary/communication assistant is that it prevents people who may have a stake in the case or motive to influence the witness from performing the role. However, this problem can be dealt with by instituting a court approval process.

<b>Question 11</b>	<p>(a) Should communication assistants/intermediaries be required to have any particular qualifications and if so what qualifications should they have?</p> <p>(b) Should any person deemed suitable and competent be able to act as a communication assistant/intermediary?</p> <p>(c) Should a panel of communication assistants/intermediaries be established who may be assigned to cases based on their particular expertise and/or experience, and if so, who should have responsibility for establishing such a panel?</p> <p>(d) Should courts have the power to appoint anyone considered suitable and competent to act as an intermediary/communication assistant?</p> <p>(e) Who/what agency is best placed to assess the suitability of people to act as communication assistants/intermediaries?</p> <p>(f) Should a ground rules hearing be held in every case involving a person with complex communication needs to determine the need for and role to be performed by a communication assistant/intermediary and the type and style of questions that the person with complex communication needs may be asked?</p> <p>(g) Might different communication assistants/intermediaries with different qualifications be employed at different stages of the criminal justice process?</p>
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### ***Ancillary Issues***

5.3.10 There are a number of ancillary issues to be determined to ensure that any scheme instituted in Tasmania is supported by the necessary infrastructure from the outset and so does not suffer the

birthing pains apparently experienced in relation to the Western Australian ‘communicator’ regime and in NSW in respect of ss 275B and 306ZK of the *Criminal Procedure Act 1986* (NSW).

<b>Question 12</b>	<p>(a) Who should have financial responsibility for a Tasmanian intermediary scheme?</p> <ul style="list-style-type: none"><li>• The agency/institution that uses the communication assistant/intermediary?</li><li>• The State Government?</li></ul> <p>(b) What training should communication assistants/intermediaries undertake?</p> <p>(c) What organisation(s) are best placed to develop training programs for intermediaries/communication assistants?</p> <p>(d) What additional infrastructure might be necessary to support an intermediary/communication assistant scheme in Tasmania?</p>
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