

TASMANIA
LAW REFORM
INSTITUTE

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

FINAL REPORT NO 23

JANUARY 2018

Contents

Information about the Tasmania Law Reform Institute	iv
Acknowledgements.....	iii
Terms of Reference	v
Executive Summary.....	vi
Recommendations	xiv
Part 1: Introduction.....	1
1.1 Background to the Reference.....	1
1.2 Conduct of the reference	3
1.3 Structure of this Report	5
1.4 Definitions.....	6
1.5 Scope of the reference.....	8
Part 2: (Un)Equal Access to Justice	10
2.1 People with communication needs	10
2.2 Participation barriers in the criminal justice system	12
2.3 Conclusions.....	20
Part 3: Communication Measures in Tasmania.....	22
3.2 Communication assistant measures pre-trial	23
3.3 Communication assistant measures in the trial	34
3.4 Control of cross-examination	35
Part 4: Intermediary/Communication Assistant Schemes in Other Jurisdictions	51
4.1 Introduction	51
4.2 Approaches in England and Wales and Australia	51
4.3 Approaches in Other Jurisdictions.....	64
4.4 Evaluation	68
4.5 Human rights implications	70
Part 5: Options for Reform	72
5.2 The model for a Tasmanian intermediary/communication assistant scheme.....	72
5.3 Additional requisite measures	103

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 Associate Professor Terese Henning. The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Margaret Otowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (Deputy-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).

Acknowledgements

This Final Report was prepared for the Board by Associate Professor and Director of the Tasmania Law Reform Institute, Terese Henning, Ms Kate Brown, then Crown Counsel with the Office of the Director of Public Prosecutions and the Assistant Director of the Tasmania Law Reform Institute, Ms Rikki Mawad. The Issues Paper that preceded this Report was prepared for the Board by Terese Henning and Rikki Mawad. Both these documents were edited and formatted by Mr Bruce Newey. Valuable feedback on drafts of this Report was provided by Justice Helen Wood, Chief Magistrate Catherine Geason and the TLRI Board. The community consultation that preceded the preparation of the Issues Paper and this Final Report was one of the most wide-ranging undertaken by the Institute. It was organised and undertaken by Rikki Mawad.

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 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.

Executive Summary

This Report discusses the institution of an intermediary/communication assistant scheme in Tasmania for people with communication needs involved in the criminal justice system. Such a scheme would enhance their ability to participate in the justice process and help to optimise their opportunity to gain equal treatment before the law and access to justice, by ensuring that they can understand and be understood during their interactions with the police, legal practitioners and the courts. This Report considers how such a scheme would enhance existing measures enacted to assist people with communication needs when providing evidence as witnesses, victims, suspects or defendants. It comprises the final step in providing advice to the Tasmanian Government and community about whether and how an intermediary/communication assistant scheme might improve access to justice and participation in the justice process for people with communication needs in Tasmania and what might be an appropriate model for such a scheme.

Its principal recommendation is that an expert intermediary/communication scheme should be established in Tasmania. That is, a cohort of expertly trained intermediaries/communication assistants should be created to provide advice to the courts, legal practitioners and the police and to assist people with communication needs who are involved in the criminal justice process whether as witnesses, victims of crime, suspects or defendants. The intermediaries/communication assistants should have a range of functions including advisory and interpretive roles as well as the power to intervene in inappropriate questioning and to suggest how it should be altered. In this way intermediaries/communication assistants enable people with communication needs to participate to the best of their ability in the criminal justice process.

The intermediary/communication assistant scheme recommended by the Institute should be established by legislation and should operate across the entire criminal justice process including during the pre-trial interactions of people with communication needs with police officers and members of the legal profession and during court hearings and trials.

The ability of a person who has been the victim of a crime, a witness to a crime, who is suspected of having committed a crime or who has been accused of a crime to communicate effectively with police and legal counsel and to participate in criminal trials will fundamentally determine whether that person can gain access to justice *and whether justice can in fact be done*.

The Tasmania Law Reform Institute recognises that many people have communication needs that can fundamentally impede their interactions with the police, lawyers and the courts. These needs might spring from a variety of sources including their age or linguistic development, as with children, from language or cognitive impediments, from physical or mental trauma like acquired brain injury, from their social development, learning difficulties and behavioural problems. Communication needs of these kinds can have a significant impact upon people's abilities to participate in the justice process, to give comprehensible and comprehensive accounts of events and, therefore, to gain access to justice and to be treated as equal before the law.

In the Issues Paper, the term 'people with *complex* communication needs' was used to denote people with communication and comprehension needs of this kind. Question 1 of the Issues Paper asked whether that is the best terminology to use in this context and for the purpose of this reference. Responders to that

question were opposed to the inclusion of the word ‘complex’ on the basis that it has negative¹ connotations for the people concerned and because it has a technical meaning in the Speech Pathology field.² Upon consideration of the submissions, the Tasmania Law Reform Institute decided to use instead the term ‘communication needs’ to denote people who would benefit from an intermediary/communication assistant when involved in the criminal justice system. This term is broad enough to encompass the intended range of communication needs, including those arising from linguistic and intellectual development, physical, mental, intellectual and cognitive impairments and those attributable to physical and mental trauma. It also covers learning difficulties, language problems, dyslexia, dyspraxia, dyscalculia and attention deficit (hyperactivity) disorder (ADHD). It is the term used throughout this Report.

It is hoped that this simplification of the terminology will decrease the chance of negative connotations being attached to the term and prevent any confusion that might result from using a term that has a particular meaning in a closely related specialist field.

The terms, ‘**communication assistant**’ and ‘**intermediary**’ are used throughout this Report together and interchangeably to denote the people who provide expert communication assistance to those with communication needs when participating in the criminal justice system. The purpose of such assistance is to maximise the opportunity for people with communication needs to participate in the criminal justice process by optimising their communication and comprehension capacities. It is important to distinguish the role of intermediaries/communication assistants from those of advocates and of support people within the meaning of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). Intermediaries’/communication assistants’ task is (as their names clearly denote) to optimise the communication and comprehension capacities of people with communication needs. They do not act as advocates nor do they provide emotional or psychological support of the kind envisaged for support people under the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

Part 1 of this Report details the background to this reference, its scope, the conduct of the reference including initial consultations with key stakeholders prior to the writing of the Issues Paper and the subsequent broad-based community consultation on the questions asked in the Issues Paper. It also describes the structure of this Report and provides definitions of key terms. The Terms of Reference are set out at page iv. A cross-jurisdictional analysis in the Issues Paper provided the basis on which the Institute sought feedback about whether and how an intermediary/communication assistant scheme might enhance access to justice for people with communication needs in Tasmania and whether additional measures such as a specialist interviewing ‘house’ like the Barnehus (Children’s House) in Norway might complement existing measures in Tasmania.

Throughout the Report, submissions received to questions asked in the Issues Paper are detailed. Those submissions informed all recommendations for reform made in this Report.

Part 2 of this Report examines participation barriers faced by people with communication needs during all stages of the criminal justice process, both pre-trial, during interactions with the police and legal counsel, and at trial. It is noted that comprehension and communication difficulties experienced by people with 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.

¹ The Tasmanian Aboriginal Community Legal Service, Speak Out Advocacy.

² Referring to people who use alternative or augmentative communication aids, rather than speech, as their primary mode of communication.

Failure to accommodate people with communication needs adequately in the criminal justice system has serious ramifications for case outcomes, and, importantly, for justice itself. It may mean that crimes they report are not prosecuted or that they are exposed to unjust conviction for crimes they are alleged to have committed.

The problems that need to be resolved to improve the opportunity for people with communication needs to gain equal access to justice and equal treatment before the law fall into two broad categories. First, there is the problem of identification — recognising when a person has comprehension and communication needs and the nature of those needs. Second, there is the problem of appropriately adjusting pre-trial and trial processes, questions and questioning styles so that they take account of and accommodate the comprehension and communication capacities of people with 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, legal counsel and courts about appropriate processes, questions and questioning styles for people with communication needs. Measures to control questioning also need to be instituted including the holding of ground rules or pre-trial directions hearings to determine and resolve any issues surrounding communication and to enable judges to give directions to counsel about the types of questions that people with communication needs may be asked. There are general statutory provisions in the *Evidence Act 2001* (Tas) that might currently be relied upon by courts to employ intermediaries/communication assistants at trial and to give directions to counsel about questioning people with communication needs. However, in the absence of more explicit legislative imprimatur, courts may be reluctant to utilise existing provisions in this way and counsel may be hesitant to encourage judges to do so or, be unsuccessful in doing so. Accordingly, the Institute makes recommendations for statutory reforms to make provision with respect to both these matters.

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

In the pre-trial context, the *Tasmania Police Manual* contains guidance for the police in managing interactions with people with physical disabilities or mental impairments. It refers police officers to the *Guidelines for Interacting with People with Disability*. It also contains guidance on interacting with children and people with complex communication needs. Both the *Tasmania Police Manual* and the *Guidelines for Interacting with People with Disability* are administrative guidelines only. They do not have the force of law. Accordingly, they provide uncertain protection for people with communication needs in interacting with the police. The *Guidelines* also suffer from the major disadvantage that they are not easily accessible to the public. They are an internal police resource. This means that as protective mechanisms it is doubtful whether they are fully compliant with human rights principles.

The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) regulates specified aspects of police conduct in relation to suspects. It does not cover witnesses or victims, nor does it make provision for communication assistance to be provided for people with communication needs.

Therefore, the regulatory framework governing police interactions with people with communication needs is currently inadequate and should be supplemented and reformed. The Institute recommends that this be

³ While the Tasmanian Government is in the process of developing a Disability Justice Plan for Tasmania, at the time of writing this Report that Plan had not been released.

done by implementing its recommendations that an intermediary/communication assistant be established in Tasmania and that that scheme operate on a mandatory but contingently opt-out basis for all people with communication needs at all stages of the criminal justice process. This will achieve certainty, clarity and sustainability for the operation of the scheme.

A register of disability service providers who may be able to assist the police in interacting with people with communication needs is accessible via Radio Dispatch Services which also has a 24-hour contact number for Disability and Respite Services. However, this provides a relatively cumbersome way for the police to access requisite service provision. Further, it does not cover all forms of communication needs that the police may encounter. Accordingly, in accordance with the Institute's primary recommendation, a specifically trained, readily identifiable pool of expert communication assistants should be established by legislation to assist the police in their interactions with people with communication needs.

There is currently no statutory or practice framework covering the provision of communication/intermediary services to assist the legal profession when interacting with people with communication needs. Additionally, there is no register or established group of experts that may be called upon to provide communication assistance for people with communication needs during interactions with lawyers. This would be remedied by the implementation of the Institute's primary recommendation — the legislative establishment of a specifically trained, readily identifiable pool of expert communication assistants to assist, not only the police but also members of the legal profession in their interactions with people with communication needs. As for the police, the legislation should contingently mandate that people with communication needs have the support of intermediaries/communication assistants during interviews and consultations with legal practitioners.

The Office of the Director of Public Prosecutions (DPP) has established the Serious Crimes Witness Assistance Service, which provides assistance to witnesses who require support, which obviously includes those with communication needs. However, this support does not include communication assistance of the kind envisaged in this Report and so it should be supplemented by the establishment of the intermediary/communication assistant scheme recommended in this Report.

A number of important measures have been enacted to ameliorate the difficulties experienced by children and special witnesses when testifying in court. These provisions are contained in the *Evidence (Children and Special Witnesses) Act 2001* (Tas). They enable children and special witnesses to have support persons with them while they are testifying, to be screened and out of view of defendants in court or to give their evidence via CCTV.⁴ These measures largely seek to ameliorate the stress of testifying in particular cases for particular witnesses and to reduce the risk of on-going trauma for them from doing so. However, they do not address the problem of inappropriate questioning of people with communication needs. Moreover, experience demonstrates that they have not resolved other problems and inequities experienced by people with communication needs when testifying in court.

Section 41 of the *Evidence Act 2001* (Tas) requires judges to disallow improper questions during cross-examination. However, it appears that this section, though necessary, has proved to be an ineffective safeguard against inappropriate questioning of people with communication needs during trials. Lawyers' and judges' perceptions of proper questioning derive from long accepted adversarial tactics. These perceptions and the conventions that drive them are often in direct conflict with research findings

⁴ *Evidence (Children and Special Witnesses) Act 2001* (Tas) pt 2; *Crimes Act 1914* (Cth) pt 1AD also applies to children and 'special witnesses' in specified cases.

concerning the type of questioning that is particularly inimical to eliciting evidence fairly from children and witnesses with cognitive impairments. This means that the logic of cross-examination itself operates against the effective use of s 41 *Evidence Act 2001* (Tas) to control cross-examination.

Research and experience in other jurisdictions shows that three additional measures are necessary if adequate control of questioning is to be achieved during trials. They are: first, the holding of pre-trial directions hearings to enable judges to set ground rules for the questioning of people with communication needs, second, the pre-trial recording (in the absence of the jury) of the entire testimony of people with communication needs, and third, the provision of skilled communication advice and assistance prior to and during trial questioning of these people. These mechanisms work together to optimise the opportunity for people with communication needs to participate in trials and to gain equal treatment before the law.

Provision is already made in ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for the pre-trial recording of witnesses' testimony. This measure clearly cannot apply to defendants. Further, it cannot by itself overcome the barriers to testifying confronting people with communication needs. While it is currently possible for judges to give pre-trial directions with respect to the appropriate questioning of people with communication needs, in the absence of expert advice and subsequent expert surveillance, there can be no guarantee that appropriate questioning will actually be achieved and inappropriate questioning eliminated.

There is no explicit legislative provision in Tasmania for the use of expert intermediaries/communication assistants during trials or pre-trial directions hearings in either advisory, interpretive or interventionist capacities. Accordingly, there is a missing link, then, in the Tasmanian measures for achieving the optimal participation of people with communication needs in trials and hearings. This problem would be remedied by the implementation of the Institute's first recommendation which would have the effect of augmenting existing measures that have been instituted in Tasmania to help in eliciting evidence from people with communication needs by the introduction of an intermediary/communication assistant scheme with a sound statutory basis and practice framework. As with earlier stages of the justice process, the Institute recommends that, to achieve certainty and sustainability in the operation of the scheme, the legislation that establishes the scheme should mandate the use of intermediaries/communication assistants on a contingently opt-out basis for people with communication needs during hearings and trials.

The discussion throughout Part 3 provides the foundation and justification for the Institute's first and primary recommendation that an intermediary/communication assistant scheme be established for Tasmania. That discussion demonstrates that the comprehension and communication problems experienced by people with communication needs when they are involved in the criminal justice system may amount to systemic discrimination. The problems facing people with communication needs when involved in the criminal justice system that were identified to the Institute by respondents to the Issues Paper, mirror those identified in other enquiries, both internationally and in Australia including the Royal

Commission into Institutional Responses to Child Sexual Abuse.⁵ Likewise, those enquiries recommended the institution of intermediary schemes to ameliorate those problems.⁶

The option of making no change to existing measures and no additions to them is also considered in Part 3 of this Report. This option is rejected in conformity with submissions received.

Part 4 of the Report 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 police, lawyers and the courts in identifying and questioning people with communication needs to assisting in the formulation of questions and intervening to prevent inappropriate questioning. The different schemes also vary in whom they prescribe may perform the role of intermediary/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, intermediary/communication assistant schemes offer significant potential for facilitating the reception of evidence from people with communication needs.

The Human Rights implications of instituting an intermediary/communication assistant scheme in Tasmania are considered in Part 4. It is noted that courts have an obligation under art 12 of the UN *Convention on the Rights of the Child*⁷ and art 13 of the UN *Convention on the Rights of Persons with Disabilities*⁸ to create the optimum circumstances for children and people with disabilities to give their accounts of events and to participate in criminal justice processes. Also relevant are several rights in the *International Covenant on Civil and Political Rights (ICCPR)*,⁹ to which Australia is a signatory, including 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. These rights are compromised where victims, witnesses, suspects and defendants cannot be heard because of communication impairments or impediments. It is the Institute's view that fundamental human rights are not compromised by the employment of intermediaries/communication assistants for people with communication needs when interacting with the police, legal counsel and courts.¹⁰ Instead, the use of intermediaries/communication assistants enhances rather than reduces the human rights of people with communication needs who become involved in the criminal justice system in whatever capacity.

Part 5 of this Report deals with the desirable characteristics of a Tasmanian intermediary/communication assistant scheme and the options for reform in this regard. As stated above, the first recommendation for

⁵ Senate Community Affairs References Committee, Commonwealth of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) [6.10]–[6.34]; Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services*, Final Report, (2016) [2.6]; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (2016) Commonwealth of Australia, 346–368; Scottish Court Service, *Evidence and Procedure Review Report* (March 2015), <www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report--publication-version-pdf.pdf?sfvrsn=2> 8, 11, 19.

⁶ Senate Community Affairs References Committee, above n 5, [6.38]–[6.62]; Family and Community Development Committee, above n 5, xvii, xxx, 85–87; Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 379–385; Scottish Court Service, above n 5, 34–37.

⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁹ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976).

¹⁰ This conclusion is an adaptation of a point made in relation to witness competence by the English Court of Appeal in *R v Barker* [2010] EWCA Crim 4, [42].

reform is set out in Part 3. Accordingly, Part 5 contains extensive recommendations about what a Tasmanian scheme should look like including at what stages of the criminal justice system and to whom the scheme should apply, what should be the role and primary duties of intermediaries/communication assistants, who should be able to perform that role, how the scheme should be established and administered and who should have responsibility for funding the scheme. The Institute makes a number of other necessary supplementary recommendations with respect to such matters as education and training, pre-trial directions hearings and matters that should be dealt with at such hearings. The Institute also recommends the development of a diagnostic tool and an integrated database to be utilised to facilitate identification of people with communication needs (and any existing communication support they may have), the development of Bench Book guidance for questioning people with communication needs, the establishment of a Code of Conduct or Practice and a Practice Manual for the intermediaries/communication assistants modelled on those developed for the NSW pilot scheme and the Witness Intermediary Scheme for England and Wales, and a bank of resources modelled on the UK Advocates Gateway for legal practitioners working on cases involving people with communication needs.

Based on submissions received and experience in other jurisdictions, the Institute recommends that a Tasmanian intermediary/communication assistant scheme should apply to witnesses, victims, suspects and defendants. Experience with the scheme operating in England and Wales demonstrates that it is a mistake to limit the application of the scheme to witnesses or to defendants. To do so is discriminatory and results in unequal access to justice. Ultimately, it forces further legislative change or action by courts to remedy gaps and flaws in the scheme. This is unsatisfactory and where courts have been forced to act, as in England and Wales, they have not been able to resolve all the flaws in the scheme. Such an outcome can be avoided if the scheme applies to witnesses, victims of crime, suspects and defendants from its inception.

The Institute is of the view that a Tasmanian intermediary/communication assistant scheme would be enhanced by the establishment of specifically dedicated physical facilities which provide a secure and non-threatening environment for interviewing and obtaining the evidence of people with communication needs under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). These facilities might usefully be based on the Barnehus in Norway, which is also to be established in England and Wales. The Institute is aware that police stations already contain special interview rooms for children which provide a non-intimidating and comfortable environment for children. The Institute recommends that such facilities should be provided more widely and that they be used not only for police interviews but also as the locales for recording pre-trial the entirety of the evidence of people with communication needs.

Finally, the Institute recommends that consideration should be given to the future establishment of the complete Norwegian-style Barnehus approach in Tasmania with judicially-supervised forensic interviews to elicit the totality of the evidence of people with communication needs. While this is the optimum model for obtaining the best evidence from people with communication needs in a manner that supports their well-being, the transition to this model is a long-term aspiration that is likely to take considerable time to gain acceptance from police officers, the legal profession and the judiciary.

The Institute acknowledges that there is scope to retain and better utilise existing measures for people with communication needs in Tasmania. Nevertheless, based on submissions received and the research it has undertaken, the Institute recommends that a Tasmanian scheme be established on a certain and clear legislative footing. A piecemeal or patchwork approach to reform should be avoided.

Our criminal justice system has not served children and other people with communication needs well. In fact, in too many cases it has manifestly failed them. The significance of the problem cannot be over-

emphasised. If we had not known before, the Royal Commission into Institutional Responses to Child Sexual Abuse has made inescapably clear that our traditional and long accepted approach to forensic interviewing and questioning has exposed people with communication needs not only to victimisation and/or re-victimisation by the criminal justice process but also to potential exclusion from criminal justice altogether. Such exclusion has enabled abusers to persist in their predatory conduct unimpeded by any arm of the law while at the same time exposing vulnerable suspects and defendants to wrongful conviction. Fundamental change is needed. It cannot be avoided or delayed in the name of fiscal concerns or, indeed, any other concerns. The reforms recommended in this Report will achieve the necessary change.

Recommendations

Recommendation 1: An intermediary/communication assistant scheme for Tasmania (p 50)

Legislation should be enacted that creates an intermediary/communication assistant scheme for Tasmania.

Recommendation 2: Scope of the scheme – when it should apply (p 74)

- (a) Under the intermediary/communication assistant scheme enacted for Tasmania, people with communication needs should have access to intermediaries/communication assistants at all stages of the criminal justice process — during the investigative, pre-trial and trial stages of that process. Accordingly, people with communication needs should have access to intermediaries/communication assistants in all their interactions with police, legal practitioners, child protection services, judicial officers and the courts.
- (b) All steps should be taken to ensure, so far as is practicable, that continuity is maintained in the use of intermediaries/communication assistants at all stages of the criminal justice process, so that different intermediaries/communication assistants are **not** used at different stages of the criminal justice process for people requiring their assistance.

Recommendation 3: Scope of the scheme – to whom it should apply (p 76)

The Tasmanian intermediary/communication assistant scheme should apply to all people with communication needs who are involved in the criminal justice system whether as witnesses, victims of crimes, people suspected of having committed crimes and defendants, and regardless of their age.

Recommendation 4: The basis on which the scheme should operate (p 79)

- (a) The Institute recommends that under an intermediary/communication assistant scheme enacted in Tasmania it should be mandatory to engage intermediaries/communication assistants in all cases involving people with communication needs, whether they be victims, suspects, defendants or witnesses and regardless of their age, at all stages of the criminal justice process.
- (b) However, the Institute recommends that the scheme should operate on an opt-out basis so that it is not necessary to engage an intermediary/communication assistant for a person with a communication need only where that person requests that an intermediary/communication assistant not be appointed and that person is assessed by an intermediary/communication assistant as not needing one. That assessment should take into account the nature of the person's communication need, the nature of the case, the nature of the person's involvement in it, at the court stage, whether the matter is being dealt with in the Youth Justice Court,¹¹ and the nature of the evidence the person may give.

¹¹ Existing accommodations in the Youth Justice Court may affect determinations about whether and what type of communication assistance may be needed.

Recommendation 5: Roles and duties of intermediaries/communication assistants (p 85)

- (a) The roles and duties of intermediaries/communication assistants should be set down in legislation.
- (b) The paramount duty of Tasmanian intermediaries/communication assistants should be to the administration of justice. It should override their duty to the people receiving their assistance. A useful precedent in this regard is provided by the *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 88(2).
- (c) Intermediaries/communication assistants should also have stated duties to act impartially, independently and to communicate accurately what is said by people with communication needs and those interacting with them. Relevant precedents are provided by the *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 88(2) and ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).
- (d) The roles of the intermediary/communication assistant should be distinguished clearly in legislation from those of advocates and of support people within the meaning of s 8 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).
- (e) An intermediary/communication assistant scheme enacted for Tasmania should enable intermediaries/communication assistants to act as advisors to the police, legal counsel, criminal justice agencies and the courts in identifying people with communication needs and the nature of their communication needs. They should also provide advice about the comprehension and communication capacities of people with communication needs and the type, style and level of sophistication of questions that are appropriate to their capacities.
- (f) In common with schemes enacted elsewhere in Australia, an intermediary/communication assistant scheme enacted for Tasmania should enable intermediaries/communication assistants to perform interpretive functions to ensure that questions asked of and answers given by people with communication needs can be understood.
- (g) An intermediary/communication assistant scheme enacted for Tasmania should give intermediaries/communication assistants the power to intervene in questioning of and interviews with people with communication needs and during hearings and trials to alert questioners and courts to problematic questions, to explain the nature of those problems and to suggest alternative questions and questioning styles.

Recommendation 6: Who should be able to be an intermediary/communication assistant? (p 89)

- (a) An intermediary/communication assistant scheme enacted in Tasmania should require intermediaries/communication assistants to have relevant expertise and/or qualifications in such areas as psychology, languages, child psychology, speech pathology, teaching, occupational therapy, mental health nursing and social work.
- (b) Appointment as an expert intermediary/communication assistant should not, however, be confined to those who have tertiary qualifications but might extend to those with relevant expertise derived from knowledge or experience. People without tertiary qualifications should be permitted to act as intermediaries/communication assistants either with the approval of the court or of the body responsible for administering the intermediary/communication assistant scheme. Such approval should be given to people who have relevant expertise based on knowledge or experience and who satisfy requirements of impartiality and independence and understanding that their paramount duty is to the administration of justice.

Recommendation 7: Appointment of intermediaries/communication assistants and administration of the scheme (p 92)

- (a) A panel of expert communication assistants/intermediaries should be established by legislation from whom intermediaries/communication assistants should be drawn and, based on their particular expertise and/or experience, matched to people with communication needs.
- (b) A government funded body that is independent of the police, the prosecution and victim support services should be created to establish, recruit, accredit and administer the panel of expert intermediaries/communication assistants. The membership of this body should, nevertheless, be representative of the various views and interests of those in the criminal justice system who have responsibility for interacting with people with communication needs, of the people with communication needs themselves, and those who might act as intermediaries/communication assistants. This body might usefully include representatives of the Defence Bar, Legal Aid, Community Legal Services, the Education Department of Tasmania, the Department of Treasury and Finance, the Tasmanian Aboriginal community and/or the Tasmanian Aboriginal Community Legal Service, the Supreme and Magistrates courts, Tasmania Police, the Director of Public Prosecutions, the Witness Assistance Service, Speech Pathology Australia, Speak Out Advocacy and any other non-government or professional organisations with expertise in interacting with people with communication needs.
- (c) Courts should have the power to order, either of their own motion or on application, that intermediaries/communication assistants be assigned from the expert panel to people with communication needs appearing before them.
- (d) Courts should also have the power to approve intermediaries/communication assistants who have not been recruited to the expert panel to assist people with communication needs appearing before them. Such approval should be given only to people who have relevant expertise, based on knowledge, training or experience, who satisfy requirements of impartiality and independence and who understand that their paramount duty is to the administration of justice. A precedent in this regard is provided by ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).

Recommendation 8: Financial responsibility for the scheme (p 94)

- (a) The financial responsibility for a Tasmanian intermediary/communication assistant scheme should be assumed by a single government source which has general oversight of the operation of the scheme. Alternatively, if more than one government agency has responsibility for funding the scheme, then there should be joint oversight of its administration in order to ensure consistency in its operation and application for all people with communication needs. Funding should cover all aspects of the scheme including education and training.
- (b) In view of the fact that the scheme will only be able to gain the trust and support of those who use it if it meets their needs, it must be adequately resourced and a sufficient number of intermediaries/communication assistants must be made available across the State. Accordingly, the Institute recommends that, no matter who has responsibility for funding the scheme, care should be taken to ensure that it is adequately resourced.

Recommendation 9: Training and education (p 100)

The Institute stresses the vital role that education and training of all those tasked with interacting with people with communication needs will play in achieving the objectives of a Tasmanian

intermediary/communication assistant scheme. Its recommendations with respect to this matter therefore extend beyond intermediaries/communication assistants to courts, the legal profession and the police. Education and training programs should cover the need for and function of the intermediary/communication assistant scheme and seek to impart an understanding of the principles relating to interviewing and questioning people with communication needs.

(a) Responsibility and content

- (i) The Institute recommends that the representative body created to establish and administer the Tasmanian intermediary/communication assistant scheme should also be responsible for approving and guiding the development of training programs for both legal practitioners and intermediaries/communication assistants.
- (ii) This body might delegate the task of investigating and making recommendations about the content of education and training programs to a sub-committee or to an expert in the area.
- (iii) Training programs developed for Tasmanian legal practitioners and intermediaries/communication assistants might be based on the curricula in other jurisdictions including England and Wales, New South Wales and South Australia and devised by institutions like the Inns of Court in the United Kingdom. Codes of Practice and Guidance Manuals developed by Professor Penny Cooper for the England and Wales scheme and the New South Wales pilot provide useful guidance as to the core components of such programs. However, all training provided should be adapted to the Tasmanian criminal justice environment.
- (iv) This body should also provide a resource on which the courts might draw to facilitate the creation of professional development programs

(b) Judicial officers

Acknowledging the key role that courts will play in the successful implementation of a Tasmanian intermediary/communication assistant scheme, the Institute recommends that courts review their professional development programs with a view to incorporating sessions on working with intermediaries/communication assistants and the optimal questioning of people with communication needs.

(c) Legal practitioners

- (i) Induction and refresher training should be provided to legal practitioners in relation to the identification of people with communication needs and the communication and comprehension barriers that impede their participation in the criminal justice process and in relation to the roles of intermediaries/communication assistants in overcoming those barriers.
- (ii) Given the gravity of the twin threats that inappropriate questioning poses to the quality of evidence and the well-being of people with communication needs, the Institute recommends that there should be a requirement for legal practitioners involved in the interviewing and questioning of these people to be 'prequalified' in the proper techniques for doing so. For the sake of clarity, this means that specialist training in the appropriate questioning of people with communication needs and the role of intermediaries/communication assistants should be compulsory for all counsel, both defence and prosecution, who work on cases involving people with communication needs.

- (iii) Specialist training programs should therefore be developed to equip and accredit legal practitioners with the necessary skills to work on cases involving people with communication needs.

(d) *The police*

- (i) Specialist training should be provided by Tasmania Police at regular intervals in relation to the identification and questioning of people with communication needs and the roles of intermediaries/communication assistants. It is desirable that such training should be compulsory for police officers who work on cases involving people with communication needs.
- (ii) In view of both the proposed revisions to police recruits' training and the specialist courses proposed to be offered at the post-recruit level, the Institute recommends that police training be subject to on-going monitoring and revision to ensure that it meets the needs of an intermediary/communication assistant scheme for Tasmania and also to ensure that both recruit training and on-going training of police officers comply with international best practice with respect to interviewing people with communication needs.

(e) *Intermediaries and communication assistants*

- (i) Intermediaries/communication assistants should receive training to prepare them to undertake their specialist roles in the criminal justice system and include instruction in their duties and responsibilities, the kinds of questions and questioning in the criminal justice arena they are likely to encounter that are inimical to obtaining the best evidence from people with communication needs and how such questioning might be reformulated, and the best way to accommodate cognitive and language limitations during the interview and questioning processes.
- (ii) The representative body created to establish and administer the Tasmanian intermediary/communication assistant scheme should be responsible for appointing the intermediary/communication assistant trainers.

Recommendation 10: Additional necessary measures (p 109)

(a) *Pre-trial directions hearings*

- (i) Legislation should be enacted or rules instituted that make detailed provision for pre-trial directions hearings to be held on a mandatory basis in any case involving people with communication needs.
- (ii) The legislation or rules should specify, as a non-exhaustive list, the matters to be dealt with and settled at directions hearings. Those matters should include, at a minimum, directions about the manner and nature of permissible questioning of people with communication needs, the duration of questioning and questions that may or may not be asked. They should also include directions about the communication assistance to be provided at trial for people with communication needs. This legislation might usefully be based on the *Criminal Procedure Rules* (UK) October 2015 as amended April 2016 and October 2016, pt 3.

(b) *Bench Book guidance, Practice Directions, intermediaries'/communication assistants' Code of Conduct or Practice and Practice Manual and other materials*

- (i) A Bench Book and Practice Directions should be developed for Tasmania to provide guidance and to stipulate matters to be dealt with in cases involving people with communication needs.

The Tasmanian Bench Book and Practice Directions might be based on relevant Bench Books and Practice Directions in other Australian and overseas jurisdictions.¹²

- (ii) A Checklist of all matters to be dealt with pre-trial for cases involving people with communication needs should be devised, based on the England and Wales *Judicial College Bench Checklist: Young Witness Cases* (January 2012).
- (iii) A Code of Conduct or Practice and a Guidance Manual should be produced for Tasmanian intermediaries/communication assistants. Useful precedents in this regard are provided by the Codes of Conduct/Practice and Guidance Manuals developed for the New South Wales pilot project and for the England and Wales witness intermediary scheme.¹³
- (iv) Resources should be developed for Tasmania of the kind provided in England and Wales by the Advocates Gateway to assist and guide legal practitioners in managing cases involving people with communication needs. While the Advocates Gateway provides a useful model in this regard, it should be adapted to the Tasmanian criminal justice environment.

(c) Identification measures

The current mechanisms available to the police and legal practitioners to identify and obtain assistance for people with communication needs and to identify any existing communication support people they may have, should be enhanced by:

- (i) developing a common diagnostic tool in consultation with experts in communicating with people with communication needs to enable early identification of people who require communication assistance;
- (ii) creating an integrated database with relevant government departments like the Department of Health and Human Services (Disability and Community Services), the Department of Corrections and the Department of Justice and allied agencies to improve the police and legal practitioners' capacity to identify people with communication needs and any existing communication assistance that may have been provided for them. Legislation should designate who should have and/or the grounds for legitimate access. In any event, both police officers and members of the legal profession who work with people with communication needs should have access to it.

(d) Physical facilities

The Institute recommends that specifically dedicated physical facilities be further developed for Tasmania, which provide a secure and non-threatening environment for police interviewing and for obtaining the evidence of people with communication needs under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). This facility might usefully be based on the Barnehus facility in Norway, which is also to be established in England and Wales.

¹² For example, Judicial College of Victoria, *Disability Access Bench Book* (2016), [5.11]. 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); the Judicial College (UK), *Equal Treatment Bench Book 2013* <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf>.

¹³ Victims Services, *Children's Champion (Witness Intermediary) Procedural Guidance Manual* (2017), NSW Department of Justice <http://www.victimsservices.justice.nsw.gov.au/Documents/child-champ_manual.pdf>; Ministry of Justice (UK), *Registered Intermediary Procedural Guidance Manual* (2015) <<https://www.zakon.co.uk/admin/resources/downloads/registered-intermediary-procedural-guidance-manual-2015.pdf>>. The Codes of Practice/Conduct are set down in the Guidance Manuals of these jurisdictions.

Recommendation 11: Aspiration for the future (p 111)

The Institute recommends that consideration be given to the future establishment of a Norwegian-style Barnehus with judicially-supervised forensic interviews to elicit the totality of the evidence of people with communication needs. While this is the optimum model for enabling people with communication needs to participate to the best of their ability in the criminal justice process, while still adequately testing their evidence, the transition to this model is a long-term project that is likely to take considerable time to gain acceptance from police officers, the legal profession and the judiciary.

Part 1

Introduction

1.1 Background to the Reference

1.1.1 This Report discusses the feasibility of instituting an intermediary/communication assistant scheme in Tasmania for people with communication needs¹⁴ 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 and improve their access to justice. It also considers what an appropriate model for such a scheme might be in Tasmania.

1.1.2 Proceeding from an understanding that people with communication needs face major hurdles in obtaining equal access to justice, this Report 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 the Issues Paper used to conduct the community consultation for this reference preparatory to writing this Report, the Institute conducted a number of discussions with key stakeholders and subsequently co-hosted with the then 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, 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, Anglicare, Tasmanian Council of Social Service (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-General and the Tasmanian Greens to obtain advice about key issues to be addressed in the Issues Paper.

1.1.4 This consultative process confirmed that key issues to be considered for this reference are:

¹⁴ Recognising that there is a diverse range of communication difficulties that people may experience, the term ‘communication needs’ is used in this Report 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 ‘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 [1.4.3] where the question of to whom a Tasmanian intermediary scheme should apply is considered.

- how might an intermediary/communication scheme facilitate access to justice for people with communication needs;
- to whom a communication assistance/intermediary scheme should 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.

1.1.5 It is uncontestedly 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 to participate in criminal trials fundamentally determines whether justice is done. Where a person has a communication need because of his or her age, mental incapacity, cognitive or physical impairment,¹⁵ his or 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.¹⁶

1.1.6 While a raft of special witness measures¹⁷ 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 communication needs. The nature and intractability of these problems are considered in Part 2 of this Report.

1.1.7 Many people with communication needs 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.¹⁸

1.1.8 The impetus for reform to tackle this problem has been generated by a growing recognition that people with communication needs have been excluded from obtaining access to justice. This understanding has been reinforced 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.¹⁹ Additionally, Australian courts have an obligation under the International Human Rights framework set out in art 12 of the UN *Convention on the Rights of the Child* and art 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

¹⁵ 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.

¹⁶ 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).

¹⁷ See, in particular, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) which provides for a support person (ss 4, 8(2)(b)(i)), admission of prior statements (ss 5, 8(2)(b)(iia)), special hearings to take and record evidence in full (ss 6A, 8(2)(b)(iib)), giving evidence by audio visual link (ss 7, 8(2)(b)(ii)).

¹⁸ 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; Hon Justice Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012).

¹⁹ 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 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>.

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.²⁰

1.1.9 It is against this background that the TLRI has undertaken an investigation 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 communication needs in Tasmania.

1.1.10 Further, as part of the Tasmanian Government's broader reform agenda, the then Attorney General the Hon Vanessa Goodwin MLC, engaged Equal Opportunity Tasmania²¹ to create a Disability Justice Strategy for Tasmania, building on the *Disability Action Plan 2014–2017*.²² The TLRI work on this reference fits within that agenda and complements the work of Equal Opportunity Tasmania.

1.2 Conduct of the reference

1.2.1 An Issues Paper and an Easy Read Summary of the Issues Paper were released for consultation in May 2016. The Institute invited responses to the Issues Paper in a number of ways:

- By completing the submission template available on the Institute's website;
- By answering one, a select number of or all of the questions in the Issues Paper;
- By responding to the Easy Read Summary and questions;
- By meeting with members of the Institute to discuss contributions; or
- By providing a more detailed response to the Issues Paper.

1.2.2 During its work with Equal Opportunity Tasmania (EOT) in developing a Disability Justice Plan for Tasmania, the Institute participated in a series of community consultations through various Neighbourhood Houses across Tasmania. The TLRI also attended meetings with EOT representatives in communities across Tasmania to discuss measures to improve access to justice for people with disabilities. In total, the Institute participated in 20 community sessions with EOT. They were held at Clarendon Vale, Chigwell, Risdon Vale, the Derwent Valley, Bridgewater, East Devonport, Devonport, West Ulverstone, Burnie, Ravenswood, Rocherlea, Gagebrook, Deloraine, Rosebery, Zeehan, Beaconsfield, Georgetown, the Fingal Valley and St Helens. During these meetings and the visits to Neighbourhood Houses, people talked about a wide range of issues affecting access to justice for people with disabilities including communication needs. They spoke of the need for assistance in surmounting these problems and consistently expressed the view that currently available mechanisms fall short of what is needed in this regard. This Report should be read with this information in mind.

²⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); *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).

²¹ Formerly the Anti-Discrimination Commission.

²² Department of Justice (Tas), *Disability Action Plan 2014–17* (October 2014) <http://www.justice.tas.gov.au/__data/assets/pdf_file/0008/327338/Final_Disability_Action_Plan_2014-2017.pdf>.

1.2.3 With EOT, the Institute was also invited to meet with the following community and legal groups:

- Advocacy Tasmania
- Autism Tasmania
- The Alzheimer's and Dementia Association of Tasmania
- Speak Out Advocacy
- Speech Pathology Australia
- Speech Pathology Tasmania
- The Law Society of Tasmania, Criminal Practitioners Group
- Members of the Judiciary and the Magistracy
- Tasmania Police Investigative Interviewing Experts/Learning Services Representatives
- The Hobart Community Legal Centre
- The Launceston Community Legal Centre
- Legal Aid Tasmania
- The North-West Community Legal Centre
- The Tasmanian Women's Legal Service

1.2.4 The Institute also co-hosted a Community Conversation event with academic researchers from the University of Melbourne and the University of Adelaide at the University of Tasmania on 23 September 2016. The event was attended by over 80 people with representatives from Disability and Advocacy Organisations, Tasmania Police, the legal profession as well as research and policy experts.

1.2.5 In addition to the EOT consultation tour, and the conversations with community groups and legal groups, 20 written submissions were received on the questions asked in the Issues Paper from: the Tasmanian Aboriginal Community Legal Service, the Tasmanian Commissioner for Children, the Communication Rights Organisation, the Director of Public Prosecutions/Witness Assistance Service, the Department of Health and Human Services (Disability and Community Services), the Tasmanian Institute of Law Enforcement Studies, the Independent Living Centre, the Acting Chief Magistrate, the National Disability Service, Joyce Plotnikoff (an expert on the Witness Intermediary service for England and Wales), the Department of Police and Emergency Management, the Education Department of Tasmania, the Sexual Assault Support Service, Speak Out Advocacy, speech pathologist, Natalie Leader, another speech pathologist who wished to remain anonymous, Speech Pathology Australia, TasCOSS, Mary Woodward (a former registered intermediary with the Witness Intermediary Service of England and Wales) and Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania. Respondents all indicated that the barriers faced by people with communication needs in the justice system require changes to current practice to ensure equal participation in justice processes across the criminal justice system. Responses were all broadly supportive of reforms to enable and embed 'communication assistant/ce' for all witnesses from the point of entry in the criminal justice process, to pre-trial interviews with the police and members of the legal profession and at trial.

1.2.6 While the recommendations made in this Report are grounded primarily in the written submissions received to the Issues Paper questions, it is important to bear in mind that the views in those submissions

about the need for reform match those expressed to the Institute during the EOT consultations and the Institute's conversations with community and legal groups.

1.3 Structure of this Report

1.3.1 Part 1 of this Report deals with the background and scope of the reference and definitions of terms used.

1.3.2 Part 2 discusses the challenges people with 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. 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: first, the difficulty in identifying people with communication problems and second, the need to adapt investigative and trial questioning styles and techniques to take account of those problems. Tackling the first problem necessitates the development and use of an effective screening device. One strategy deployed elsewhere for tackling these problems is the use of communication assistants/intermediaries during investigative questioning, pre-trial processes and trials to maximise the opportunity for and capacity of people with communication needs to give comprehensible and comprehensive accounts of relevant events.

1.3.3 Part 3 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 the provision of advice by communication assistants/intermediaries to criminal justice agencies and personnel about people with communication needs and communication assistance to people with 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 most useful in facilitating equal access to justice for people with communication needs. The focus here is on the extent to which provision is made for the involvement of communication assistants/intermediaries during the investigative process, during consultations and interviews with legal practitioners, during pre-trial proceedings like pre-trial directions hearings and during trials and hearings, including pre-recording processes. The discussion in Part 3 provides the framework and justification for the Institute's first and primary recommendation for reform that an intermediary/communication assistant scheme be established for Tasmania. The option of making no change to existing measures is also considered in Part 3. It is recommended, in conformity with submissions received, that this option not be adopted.

1.3.4 Part 4 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, Norway and Iceland. Part 4 also provides a brief evaluation of intermediary/communication assistant schemes and considers their human rights implications. The conclusion is that intermediary/communication assistant schemes, while not flawless, constitute a necessary measure in achieving equal participation for all people with communication needs who are involved in the criminal justice system, whether as victims, witnesses, suspects or defendants. With respect to their human rights implications, the Institute concludes that such schemes enhance the human rights of people with communication needs without detracting from them.

1.3.5 Part 5 considers the options and makes recommendations with regard to the characteristics of a Tasmanian intermediary scheme, including when and to whom it should apply, the basis of its application,

the roles of intermediaries/communication assistants, who should be able to perform those roles, who should have responsibility for funding the scheme and a number of necessary supplementary matters like how the scheme should be administered, pre-trial directions hearings, training and education and physical facilities for the scheme.

1.3.6 Throughout this Report, submissions received to questions asked in the Issues Paper are detailed. Those submissions informed, and are fundamental to, all recommendations for reform made in this Report.

1.4 Definitions

1.4.1 The terms, ‘**people with communication needs**’ and ‘**person with communication needs**’ have been used in this Report to denote people with communication and comprehension difficulties that impede their interactions with the police, lawyers and the courts. In the Issues Paper, the term, ‘people with *complex communication* needs’ was used to denote these people. This terminology was adopted in the Issues Paper to accord with the approach taken in the South Australian Disability Justice Plan and Communication Partner Scheme. The use of ‘people with complex communication needs’ for the Issues Paper was endorsed at a Ministerial Roundtable in October 2015, with the Tasmanian Attorney-General and key stakeholders. Nevertheless, the first question asked in the Issues Paper was whether the term ‘people with complex communication needs’ constitutes the most appropriate terminology to denote those people who would potentially benefit from the assistance of an intermediary to enhance their comprehension and communication capacities and consequently their ability to gain access to justice.

Terminology

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?²³

1.4.2 Three quarters of the 13 written responses to this question were of the view that ‘complex communication needs’ is *not* the best term to use in this instance. It is problematic on a number of grounds. These problems are occasioned primarily by the word ‘complex’. First, the inclusion of this word may complicate decisions about to whom an intermediary/communication assistant scheme should apply.²⁴ Specifically, it might be thought to require that onerous preconditions be satisfied before a person could be considered to have a communication difficulty. Second, ‘complex’ is not an appropriate term to use in relation to the communication needs of children of normal development.²⁵ Third, it may create negative connotations²⁶ about those to whom it is applied. Finally, the entire term, ‘complex communication needs’ has a specific, technical meaning in Speech Pathology where it is used to refer to people who use alternative or augmentative communication (AAC) aids, rather than speech, as their primary mode of communication.²⁷

²³ Question 1 of the Issues Paper.

²⁴ Mary Woodward (an intermediary and speech pathologist, formerly registered as an intermediary under the UK Intermediary Scheme).

²⁵ The Tasmanian Commissioner for Children; Joyce Plontikoff, an expert in the Witness Intermediary Service of England and Wales; Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

²⁶ The Tasmanian Aboriginal Community Legal Service, Speak Out Advocacy.

²⁷ Speech Pathology Australia; Mary Woodward (intermediary and speech pathologist, formerly registered as an intermediary under the UK Intermediary Scheme); Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

Further, as Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania noted, people with complex communication needs who are themselves AAC users may not identify with the term. Rosalie Martin also pointed out that in communication, relationship and allied health professions this term refers specifically to the complexities that arise from concomitant impairments/differences in multiple of an individual's systems including physical, sensory and cognitive. For these reasons, it is appropriate to use a different term in this Report.

1.4.3 The term 'people with communication needs' used in this Report is sufficiently broad to cover all those whose comprehension and communication difficulties impede their capacity to participate in the criminal justice process where those difficulties might be ameliorated through the use of communication assistants/intermediaries. It avoids the difficulties potentially created by the use of the word 'complex', and the more limited Speech Pathology connotation. It encompasses a broad range of communication problems including those that arise from cognitive and social development as well as those caused by physical, mental, intellectual and cognitive impairments including those attributable to physical and mental trauma. It is also capable of covering learning difficulties, language impairments that impede communication and dyslexia, dyspraxia, dyscalculia and attention deficit (hyperactivity) disorder (ADHD) where it affects communication.

1.4.4 A range of terminology is used for this purpose in other jurisdictions. In England, the category of person who is eligible to have the assistance of an intermediary comes under the heading, 'vulnerable and intimidated witnesses'²⁸ in the relevant legislation. The vulnerability relating to those qualifying for the assistance of intermediaries is defined as people under the age of 17 at the time of the hearing, 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.²⁹ As mentioned above, in South Australia the term used is 'communication needs'. In New South Wales, people who are entitled to the assistance of someone when giving evidence are designated differently in various legislative schemes — as witnesses who have 'difficulty communicating',³⁰ as 'vulnerable'³¹ people and as children in prescribed sexual offences cases who are complainants or prosecution witnesses and are either under 16 years of age or, where older, who have difficulty communicating.³² In Western Australia, communication assistants (communicators) may be appointed to assist children and special witnesses.

1.4.5 Given the lack of consistency across jurisdictions and to avoid the problems identified above, the terms, 'people with communication needs' and/or 'person with communication needs' are used in this Report. This terminology was suggested in submissions to the Institute by both Mary Woodward and the Tasmanian Commissioner for Children and was supported by Joyce Plotnikoff.³³ It is used in preference to 'vulnerable person' because while those with 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.

²⁸ *Youth Justice and Criminal Evidence Act 1999* (UK), pt II ch I.

²⁹ *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16(1), (2).

³⁰ *Criminal Procedure Act 1986* (NSW) s 275B.

³¹ *Ibid* s 306ZK. A 'Vulnerable person' for the purpose of this provision is a child or a cognitively impaired person (s 306M) but where the vulnerable person is a complainant in a prescribed sexual offences proceeding, s 306ZK does not apply: s 294C(7).

³² *Ibid* sch 2 pt 29, cls 82, 83, 89(3).

³³ Joyce Plotnikoff also preferred 'vulnerable' to 'complex communication needs'.

1.4.6 The terms ‘**communication assistant**’ and ‘**intermediary**’ are used interchangeably and/or together throughout this Report to designate the people mandated either by legislation or the courts to provide assistance to those with communication needs when participating in the criminal justice system. Other terms have been used elsewhere. For example, the term ‘children’s champion’ is used together with ‘intermediary’ in NSW legislation establishing a pilot communication assistance scheme for children;³⁴ ‘communication partner’ is used in the relevant South Australian legislation³⁵ and ‘communicator’ is used in Western Australia.³⁶ ‘Intermediary’ is used here because it has gained widespread use and acceptance.³⁷ ‘Communication assistant’ is used because it is a relatively neutral term, particularly in comparison to ‘communication partner’ and ‘children’s champion’, which do not have the same sense of independence and non-partisanship as ‘communication assistant’.

1.5 Scope of the reference

1.5.1 To ensure a full and informed evaluation of the issues associated with this reference, this Report deals with victims, witnesses and defendants with communication needs who may require the assistance of an intermediary/communication assistant in order to give evidence and participate in the criminal justice system. This Report covers all points in the criminal justice process where people with communication needs might require assistance in gaining equal access to justice, from their point of entry into the justice system through to, and including, trials and hearings.

1.5.2 This Report considers the use of communication assistants or intermediaries alongside other witness special measures implemented to ameliorate the difficulties experienced by people with communication needs involved 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 and/or 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.
- 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.³⁸
- Review of ‘mental capacity’ and the *Guardianship and Administration Act 1995* (Tas).

³⁴ See further the *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, with children’s champions described at cl 88 noting that the role may also be described as a witness intermediary.

³⁵ See further the *Evidence Act 1929* (SA) s 4 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.

³⁶ *Evidence Act 1906* (WA) s 106F(1).

³⁷ See for example, *Youth Justice and Criminal Evidence Act 1999* (UK) s 29(1); *Criminal Procedures Act 1977* (South Africa) s 170.

³⁸ 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>>.

- 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 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 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 for Tasmania 2017–2020*³⁹ with regard to the *Disability Action Plan 2014–2017*.⁴⁰
- 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.
- The extent to which courts, legal services and police stations may be made more accessible to people with communication needs, including through the use of Easy Read signs and resources available in print and online.

³⁹ Disability Justice Plan for Tasmania (Release date not known) copy received from Department of Justice, 25 September 2017).

⁴⁰ Department of Justice, above n 22.

Part 2

(Un)Equal Access to Justice

2.1 People with communication needs

2.1.1 This Part of the Report focuses on the problems generated by the criminal justice process for people with 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 communication needs are exacerbated by the criminal justice process itself, by pre-trial interviewing processes and by questioning conventions of criminal trials, particularly during cross-examination.⁴¹ Seventeen respondents to the Issues Paper expressed the view that people with communication needs face significant barriers when relating their accounts of events to the police, to defence and prosecution counsel and when testifying in court.⁴² Barriers to comprehension and communication identified in submissions include:

- difficulty in understanding complex questions or those phrased in complicated ways and difficulty in interpreting complex sentence structures and implied rather than explicitly stated meanings;
- lack of knowledge of concepts being presented to them or of vocabulary used and lack of understanding of idiomatic, ironic or metaphorical expressions;
- difficulty in communicating accounts of events in tense, formal and unfamiliar situations;
- difficulties in expressing emotions;
- a lack of time to process questions that are asked, then feeling pressured to answer questions quickly and being asked too many questions at once;
- feeling intimidated by the questioning/interview process even when the person asking questions is ‘on their side’;
- difficulties in recounting experiences which influence perceptions of the believability of accounts given;
- being perceived as having lower intelligence and concomitantly (and unjustifiably) less credibility, as a result of communication difficulties;
- being misinterpreted as a result of communication difficulties; and

⁴¹ Family and Community Development Committee, above n 5, 79.

⁴² Responses of the Tasmanian Director of Public Prosecutions, the Tasmanian Aboriginal Community Legal Service, the Tasmanian Commissioner for Children, the Communication Rights Organisation, the Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, the then Acting Chief Magistrate, Mr Michael Daly, the National Disability Service, Joyce Plotnikoff, the Sexual Assault Support Service Inc, Speak Out Advocacy, speech pathologist, Natalie Leader, an anonymous speech pathologist, Speech Pathology Australia, TasCOSS, Mary Woodward and Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

- compliance with leading and repetitive questions that may not have been fully understood resulting in unintentionally inaccurate accounts of events.

In their submission, Speech Pathology Australia advised the Institute of the results of a survey of its members the organisation had conducted in June 2016. That survey identified a raft of problems experienced by people with communication needs when involved in the criminal justice system, which accord with and encapsulate the findings of other research in this area.⁴³ They include:

- difficulty in providing information in a logical sequence and in recounting events clearly;
- difficulties in using the correct verb tense and pronouns and in describing feelings and motivations (leading to incomplete or confused accounts);
- lack of familiarity with formal or technical language used by police and lawyers resulting in an inability to understand what is being discussed or asked;
- vulnerability to suggestibility when questions are not understood, confusing, repetitive or leading;
- questioners' failure to adapt questioning formats to the comprehension capacities of those questioned;
- failure of those with communication needs to seek clarification of questions either because they are unaware of their confusion, because they lack the confidence to seek such clarification or because they are reluctant to expose their own limitations — this may be particularly problematic for those with expressive speech problems;
- people with social/pragmatic communication difficulties may respond to questions in a passive or aggressive manner to mask their communication problems; and
- people with communication needs may respond to questions in ways that undermine their credibility or that generate questions or doubts (sometimes based on misconceptions) about their ability to give reliable evidence at trial.

2.1.2 A major obstacle to addressing those problems and elevating the opportunity for people with 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.⁴⁴

2.1.3 Fifteen responses⁴⁵ to the Issues Paper referred to the range of problems that exist at all stages of the criminal justice system in identifying people with communication needs and/or in over-estimating their communication capacities. They also noted the implications this has both for these people and for the criminal justice process. These responses are detailed further below at [2.2].

⁴³ See discussion at [2.2.1]-[2.2.23].

⁴⁴ Family and Community Development Committee, above n 5, 77.

⁴⁵ The Tasmanian Aboriginal Community Legal Service, the Tasmanian Director of Public Prosecutions, the Communication Rights Organisation, the Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, the then Acting Chief Magistrate, Mr Michael Daly, the National Disability Service, Joyce Plotnikoff, the Sexual Assault Support Service Inc, Speak Out Advocacy, speech pathologist, Natalie Leader, an anonymous speech pathologist, Speech Pathology Australia, TasCOSS, Mary Woodward.

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 people's accounts of events, whether they are considered to be capable of testifying at trial and accordingly, in the case of victims, whether their complaints will be acted upon⁴⁶ and, in the case of suspects, whether they will be detained and/or charged. The Royal Commission into Institutional Responses to Child Sexual Abuse has noted that the barriers facing people with communication needs are often profound. Victims may not recognise that they have been abused or have the language to convey what has happened.⁴⁷ The Commission has pointed out that '[e]ven if they are able to articulate that something [has] happened, disclosing this to strangers in unfamiliar settings may not be possible. It may also be very difficult for them to disclose the abuse with a sufficient level of particularity to allow further investigation and charging.'⁴⁸

2.2.2 At this point in the justice process, it can be very difficult to screen for communication difficulties and identify those 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.⁴⁹ Where people with cognitive impairments display physical or behavioural indicators of abuse, these may be misinterpreted as bad behaviour or ascribed to their disability, so that those indicators may be disregarded or dismissed.⁵⁰ In some instances where suspects appear uncooperative or recalcitrant it may in fact be that they experience a hidden communication difficulty.⁵¹

2.2.3 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 may even determine the ultimate outcome of the case. For example, a person with communication needs who experiences difficulty in being understood may not persist in making a complaint when they have been the victim of a crime.⁵² Similarly, people with communication needs who are suspected of committing crimes may be more likely to acquiesce to accusations of wrongdoing and to make admissions that they do not fully understand or intend to make. This means that they may make unintentionally inaccurate statements to the police, which may then be used against them at trial.

⁴⁶ See, for example, Family and Community Development Committee, above n 5, 74–76 and Senate Community Affairs References Committee, above n 5, Chapter 6.

⁴⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 347.

⁴⁸ Ibid.

⁴⁹ Anecdotal feedback during consultations prior to writing the Issues Paper for this reference 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.

⁵⁰ See, in relation to children with disability, Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 347.

⁵¹ This commentary is based on anecdotal feedback and contributions to the Ministerial Roundtable, above n 49.

⁵² For comment on the significance of police responses to victims see Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 14, 85, 346–356.

2.2.4 Based on information supplied by key stakeholders at the Ministerial Roundtable (detailed at [1.1.3] above) the Issues Paper sought to explore and obtain further advice from the Tasmanian community about the problems that can arise for people with communication needs when interacting with the police.

Barriers to Interacting with the Police

In your experience do people with communication needs face barriers when interacting with the police as victims, witnesses and suspects? If so, please provide details about them.⁵³

2.2.5 Thirteen responses to the Issues Paper addressed this question. There was consensus that interactions between the police and people with communication needs can be problematic. These responses confirmed the information obtained at the Ministerial Roundtable. For example, the Department of Health and Human Services (Disability and Community Services) stated simply that in interacting with the police, people with communication needs are misinterpreted and misjudged. The Tasmanian Director of Public Prosecutions largely agreed that people with communication needs face barriers when interacting with the police but stated that it depends on the complexity of the matter and how the witnesses are dealt with by the professionals involved. To similar effect, the Sexual Assault Support Service pointed to the significance for people with communication needs of police officers' communication styles, noting that the language used by police officers can either help or hinder victims' in providing accounts of events and, additionally, may affect their individual pathways to recovery. Speak Out Advocacy stated that the police often don't understand the needs of people with communication difficulties. Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania explained that a significant barrier for people with communication needs to communicating with the police is that the police may believe they have been understood when they have not. Additionally, the police may misapprehend the linguistic capacities of people with communication needs or assume that they have a low intellectual capacity, a bad attitude or that they have actually understood what has been said.

2.2.6 Two responses provided examples of the effect of police misinterpretation and misjudgement of people with communication needs. The Tasmanian Aboriginal Community Legal Service described an interaction between the police and a woman with communication needs who was the victim of a crime. She had been abducted by an escaped prisoner. When intercepted by the police, her inability to explain that she was not involved in the escape, resulted in the police treating her as an accomplice. She was forced to remain on the ground beside the vehicle used in the escape for over an hour and was not allowed to go to her screaming child who was in the car. The police eventually realised that there was a communication problem that needed to be addressed.

2.2.7 Speak Out Advocacy told the Institute about the case of a person who, because of his communication difficulties, didn't realise that the police were trying to detain him. As a result, the police believed that he was trying to evade them. His consequent treatment by the police caused him considerable distress. While the misunderstanding was eventually resolved, this example demonstrates the difficulties that confront both people with communication needs and the police in interacting with each other. Speak Out Advocacy also detailed the experience of an assault victim whom the police couldn't understand because of his speech difficulties. This person told Speak Out Advocacy that the police lacked an understanding of his problem and that it would have helped if someone who knew him had been available to help him talk to the police. Speak Out Advocacy, additionally recounted what the victim of another

⁵³ Question 2(a) of the Issues Paper.

assault had told them: ‘the police confused me. They put too much pressure on me to answer questions quickly.’ Significantly, this person also said, ‘just as well my advocate was there.’

2.2.8 Unless properly supported, people with communication needs also experience difficulties in communicating adequately with defence and prosecution counsel. Again, there is the problem of identifying both the existence and source of communication difficulties. 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 communication needs there are insufficient sources of assistance available to respond to their clients’ needs.

2.2.9 As a result of comprehension and communication problems, defence counsel may not be able to obtain adequate instructions and so may be impeded in conducting 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.⁵⁴ Another danger is that 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 case.

2.2.10 Similarly, prosecutors may not be able to obtain an adequate account of events from people with communication needs who are insufficiently supported. At the most fundamental level, because they are determinative of people’s competence to testify,⁵⁵ communication and comprehension capacities will determine whether people who have difficulties in this regard can be heard at all. Because of its significance for assessments of prospects of conviction, victims’ communication capacities may determine whether an indictment is filed. In its Issues Paper, the Institute asked about barriers faced by people with communication needs when interacting with defence and prosecution lawyers.

Barriers to Interacting with Lawyers

In your experience do people with communication needs face barriers when interacting with the lawyers as victims, witnesses and suspects? If so, please provide details about them.⁵⁶

2.2.11 The Institute received 11 responses to this question. All stated that people with communication needs experience difficulties in communicating with lawyers. Speak Out Advocacy provided the following account of those experiences:

It takes us longer to say things. Lawyers are always in a hurry. Lawyers aren’t good at talking in a way that people understand. Lawyers need special training on how to communicate with people with intellectual disabilities. We may need to use devices. People feel nervous and frightened. It is worse if you don’t know the person who is asking you questions.

2.2.12 Speak Out Advocacy noted that it was really helpful for people with communications needs to have an independent advocate with them when speaking to lawyers. A speech pathologist advised the Institute that people with communication needs have difficulty understanding questions and complex or unfamiliar terms; that they have trouble formulating spoken language in tense situations; that they often

⁵⁴ Anecdotal evidence obtained through pre-consultation with the Law Society of Tasmania Criminal Practitioners Group (27 October 2015).

⁵⁵ Section 13(1) *Evidence Act 2001* (Tas).

⁵⁶ Question 2(b) of the Issues Paper.

need extra time to process written and spoken information; that they may struggle to recall information and events in the correct order; that they may present with unclear speech and that this may affect other people's perceptions of them and their stories. Joyce Plotnikoff, a British lawyer and social worker, who has conducted vulnerable witnesses research for over 20 years, provided expert advice to the United Kingdom Judicial College and published extensively in the area of witness intermediaries, advised the Institute that many advocates over-estimate their competence in questioning vulnerable witnesses and defendants. She said that without intermediary assistance, interviewers and questioners are unlikely to address communication problems that are not immediately apparent so that miscommunication is the inevitable result. The Sexual Assault Support Service emphasised that people mental health concerns are often misunderstood and/or misjudged during their interactions with legal representatives.

Comprehension and communication – at trial

2.2.13 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 communication needs. Beyond the trial itself, there is the problem for these witnesses of surviving the trial experience emotionally and psychologically intact.⁵⁷

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

- are frequently asked questions that sit well beyond their cognitive capacities and developmental levels;⁵⁸
- 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;⁵⁹
- rarely respond to questions by seeking clarification when confused about their meaning and so often attempt to answer questions that are ambiguous or do not make sense to them at all;⁶⁰

⁵⁷ 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.

⁵⁸ M Kebbell 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; Joyce Plotnikoff and Richard 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>; Joyce Plotnikoff and Richard Woolfson, *In their own words: The experiences of 50 young witnesses in criminal proceedings* (National Society for the Prevention of Cruelty to Children, 2004).

⁵⁹ Kebbell et al, above n 58.

⁶⁰ R Zajac, J Gross and J Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10(1) *Psychiatry, Psychology and Law* 199.

- 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;⁶¹
- are subjected to questioning that is often abusive, hostile, repetitive and overly lengthy⁶² which effectively intimidates people with communication needs into ‘silence, contradictions, or general emotional and cognitive disorganisation’.⁶³
- are subjected to the ‘not unusual’ cross-examination tactic of repeating a series of propositions until witnesses, ‘tire, lose energy’ and accede to them.⁶⁴
- are frequently asked closed, leading or complex questions which are unlikely to elicit the best evidence from witnesses with communication needs, but instead, are likely to prompt compliance with questioners’ suggestions.⁶⁵

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

2.2.14 Studies have demonstrated that adversarial questioning conventions, particularly those associated with cross-examination, which seek to expose unreliable evidence, instead simply prevent people with communication needs from giving full, accurate, and coherent accounts of their experiences and of the events in issue.⁶⁶ 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 questioning children.⁶⁷ Conventional questioning techniques, when deployed for people with communication needs, often undermine the integrity of their evidence and therefore of the court process. Further, questioning may not be designed to elicit the best evidence, but instead ‘to control a narrative, confuse the witness, and “create a hazy picture”’.⁶⁸

2.2.15 These problems do not arise only for victims and witnesses but also for those accused of having committed crimes. Defendants with communication needs who testify at trials experience the same problems as other witnesses who face communication hurdles. Their communication difficulties 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.

⁶¹ Ibid.

⁶² 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>.

⁶³ C A Carter, B L Bottoms and M Levine, ‘Linguistic and socioemotional influences on the accuracy of children’s reports’ (1996) 20 *Law & Human Behaviour* 335, 336.

⁶⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 349 (words in quotation marks quoted directly from the Consultation Paper).

⁶⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 371.

⁶⁶ 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 57.

⁶⁷ See Saskia Righarts et al, ‘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.

⁶⁸ I Randell et al, *Evaluation of the Whangarei Young Witness Pilot Protocol* (forthcoming nd) 21.

2.2.16 As in the pre-trial stages of the criminal justice process, the fact that a person participating in the trial has a communication need may not be immediately apparent and may not be recognised until the trial is underway, or, in some instances, at all.

2.2.17 In its Issues Paper the Institute sought feedback on the problems that people with communication needs face when testifying.

Barriers to Comprehension and Communication in Court

In your experience do people with 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.⁶⁹

2.2.18 Eleven responses to the Issues Paper addressed this question. All agreed that there are communication and comprehension barriers to testifying satisfactorily during trials and hearings confronting those with communication needs. One submission⁷⁰ listed a number of these obstacles:

- the use of unfamiliar legal terminology;
- not being given sufficient time to process and answer questions;
- being asked too many questions at once;
- being asked to respond to questions quickly;
- not being supported to break their stories down into manageable parts that can then be sequenced in order to provide accurate accounts;
- being required to interact with a range of people and then struggling to recall the role of each individual;
- not being given visual cues⁷¹ to help them recall all information that has been discussed previously; and
- being perceived as unintelligent because of their speech difficulties.

Implications

2.2.19 There is evidence from other jurisdictions that there are high attrition rates in cases involving people with communication needs which means that many cases do not proceed to trial. 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.⁷² Similarly, the Royal Commission into Institutional Responses to Child Sexual Abuse has noted that data collected by the NSW Ombudsman and by the Delayed Reporting Research commissioned by the Royal Commission, indicates that while children with

⁶⁹ Question 2(c) of the Issues Paper.

⁷⁰ Submission from a speech pathologist who wished to remain anonymous.

⁷¹ This respondent didn't identify what such appropriate visual cues might comprise, but they might include the use of photographs, drawings or requests to point to different parts of their bodies.

⁷² 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*, (2015) 2. See also, Senate Community Affairs References Committee, above n 5, Chapter 6.

disabilities are involved in a disproportionately high number of allegations of abuse, they are significantly under-represented in cases of abuse that are investigated and/or tried.⁷³

2.2.20 While there is limited evidence as to the discontinuation of cases where a witness has 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.⁷⁴ For example, the Department of Health and Human Services (Disability and Community Services), advised the Institute that the cases of victims with communication needs are less likely to be pursued. 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.⁷⁵ This means that they are effectively denied the right to a fair trial.⁷⁶

2.2.21 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* exposé.⁷⁷ 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 accurate or comprehensible 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.

2.2.22 A primary determinant of the decision not to prosecute in that 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,⁷⁸ the decision suggests that the law permits violators to predate upon children with mental disabilities with near impunity. This 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. As Mary Woodward⁷⁹ noted in her submission to the Institute, 'the vulnerability of children and those with disabilities can be a significant factor in their victimisation partly because it is recognised that they that they are less likely to be able to report the offence.'

⁷³ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 347 and Transcript of S Kimond, Case Study 38, 21 March 2016, T18368:24–T18369:28.

⁷⁴ While the introduction of the Witness Assistance Service in 2008 has improved the capacity of the DPP to bring matters involving witnesses with communication needs to trial, feedback from prosecutors is that difficulties in 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 49.

⁷⁵ 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*.

⁷⁶ *ICCP*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976) art 14(1).

⁷⁷ Australian Broadcasting Corporation (ABC), *'St Ann's Secret'*, *Four Corners*, 3 October 2011 (Deb Whitmont and Clay Hichens).

⁷⁸ *R v DAI* [2012] SCC 5, [67].

⁷⁹ Mary Woodward has formerly worked as a registered intermediary in England and Wales and is a specialist speech pathologist.

2.2.23 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. In its Consultation Paper published in September 2016, the Commission stated, ‘the criminal justice system is an adversarial system. However, it should be concerned to ensure that the guilty are convicted and punished and not just that the innocent are acquitted. This requires that complainants be given a good opportunity to give their best evidence.’⁸⁰

Difficulties in identifying people with communication needs

2.2.24 Amelioration of the problems encountered by people with communication needs in gaining equal access to justice cannot be achieved if their communication and comprehension incapacities remain undetected. As noted above,⁸¹ failure to identify the existence of communication and comprehension difficulties at the point people enter the justice system may have a deleterious effect on the way matters are dealt with thereafter.

2.2.25 If a person with a 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. For example, the then Acting Chief Magistrate, Mr Michael Daly noted the significance of this problem in his submission to the Institute. He stated that people with communication needs are often not identified until the day they are required to give evidence or until they have commenced giving evidence. This sometimes results in longer than anticipated or delayed proceedings. Clearly, the consequences of this problem are not only diminished access to justice for people with communication needs, but also complications and inefficiencies for the justice process.

Of major concern is the possibility that failure to recognise the existence of a communication need may result in a person progressing through the criminal justice system without having been provided with proper support to enable them to give an accurate and full account of events. This may have a material impact not only on how their evidence is perceived but also on whether courts and juries receive the maximum possible relevant evidence upon which to base their decisions.

2.2.26 In consultations held with key stakeholders and the community in the preparation of this Report, 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 communication needs and for advice on how to respond to their needs. Nevertheless, early and responsive identification remains problematic. The submissions that the Institute received in response to its question about this problem confirmed that this is the case.

Identifying People with Communication Needs

In your experience are there problems in identifying people with communication needs at different stages in the criminal justice process, for example:

- At the investigation stage for the police?

⁸⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 346.

⁸¹ See [2.2.3].

- During interactions with defence and prosecution counsel?
- For court personnel and judicial officers?

If so please provide details.⁸²

2.2.27 In addition to the response of the Acting Chief Magistrate referred to at [2.2.25] the Institute received 10 responses to this question. There was general agreement that identification of communication needs remains a critical issue at all stages of the criminal justice process. Mary Woodward encapsulated the problem:

there are problems at all stages of the criminal justice process in identifying people with communication needs, particularly 'hidden' difficulties such as communication needs associated with age (children or the elderly), trauma, mental health difficulties or mild/moderate cognitive impairments. Unless [people are] trained it is easy for them to over-estimate someone's skills as people are often very skilled at masking their difficulties and 'talking the talk' (without necessarily understanding what is being discussed). Over estimation of people's communication skills leads to confusion, frustration, inaccurate and/or inconsistent evidence, and potentially damages cases.

2.2.28 The Tasmanian Director of Public Prosecutions emphasised the critical importance within the entire criminal justice process of identifying any communication needs at the point when people make initial statements to the police. However, he also noted that even if a communication need is identified at that point, it can be hard to know the full extent of any difficulty the witness might have. This indicates the desirability of incorporating useful screening measures and appropriate expert advice into the police interview process. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, advised the Institute that situations of heightened emotional arousal, such as during interactions with the police, legal counsel and during trials can mask communication needs, because communication can be generally problematic for all individuals in such circumstances. Accordingly, special tools and skills are necessary to uncover specific communication support needs.

2.3 Conclusions

2.3.1 From the discussion in this Part of the Report and submissions received in response to the Issues Paper, it is clear that people with communication needs experience significant barriers to participating in the criminal justice process at all key points of that process — when interacting with the police and legal counsel and when testifying in court. It also appears that the problems that need to be resolved to improve the opportunity for people with communication needs to gain equal treatment before the law 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 investigative, 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 communication needs and the nature of those communication needs. Tackling the second problem requires the employment of intermediaries/communication assistants to perform a variety of functions including advising investigators, legal practitioners and courts about the communication and comprehension

⁸² Question 3(d) of the Issues Paper.

capacities of people with communication needs and appropriate questions and questioning styles for them; assisting people with communication needs in comprehending questions and communicating their answers; and intervening in inappropriate questioning and suggesting alternative questions and questioning where necessary. These matters and the recommendations that follow from them are considered and detailed further in Parts 3 and 5.

Part 3

Communication Measures in Tasmania

3.1.1 This Part first outlines measures that are considered to constitute best practice communication assistance for people with communication needs and then considers the communication assistance measures currently available in Tasmania both pre-trial and during trials. It also discusses whether those measures should be supplemented by an intermediary/communication assistant scheme. In doing so it details responses received to questions asked in the Issues Paper. The discussion here 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. Involving an intermediary/communication assistant at the earliest possible point in the criminal justice process is a critical measure in ensuring the integrity and utility of the evidence obtained and, critically, in enabling participation in the justice process.

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 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:⁸³

- the holding of ground rules hearings to give advance directives that regulate the witness examination process;
- the pre-trial video recording of the entirety of the testimony of people with communication needs in the absence of the jury; and

⁸³ There is a significant body of literature and research on and experience of these measures. For details, see Bowden, Plater, and Henning, above n 18; the Scottish Court Service, above n 5, for details of the experience of these measures in England and Wales; and Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I-X and the accompanying Factsheets* (2017).

- 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.

3.1.4 How these measures work together to optimise courts' ability to control questioning of people with communication needs and so maximise their ability to participate meaningfully in trials is detailed further below at [3.4].

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*⁸⁴ and art 13 of the *Convention on the Rights of Persons with Disabilities*,⁸⁵ 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.⁸⁶

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. The *Tasmania Police Manual* (TPM) contains instructions and operational guidance for the police in managing interactions with various classifications of people but those guidelines are not enforced by statute. Part 2.26 contains guidance for interacting with people long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others⁸⁷ and refers police officers to the *Guidelines for Interacting with People with Disability* (the *Guidelines*). TPM pt 9 contains instructions for dealing with children and youths. TPM [2.26.2] contains guidance for interacting with victims of crime who have intellectual disabilities or complex communication needs, while TPM [4.6.1(2)(r)] deals with taking witness statements from vulnerable witnesses including people with complex communication needs, children and people with intellectual disabilities. In such cases, the TPM directs that the police should seek advice and guidance from officers who have been trained in interviewing vulnerable people. TPM [4.4.10.1(3)] specifies that people with complex communication needs and children who have been the victims of sexual offences should be interviewed by officers who have training in interviewing vulnerable witnesses.

3.2.2 A significant problem for the police where people with communication or comprehension needs are concerned is identifying that those needs exist, which can be difficult. Some people with communication needs may be misunderstood as being simply recalcitrant, uncooperative or mechanically compliant.⁸⁸

⁸⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁸⁶ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976); entered into force for Australia 13 November 1980; acceded to the First Optional Protocol 25 September 1991, ratified 25 December 1991. The rights in question are contained in arts 7, 10, 14.

⁸⁷ The paragraphs of the TPM of relevance to people with disabilities include [2.26], (People with Disabilities and Impairments), [2.26.2] (Victims of crime who have cognitive disability or complex communication needs), [2.26.3] (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.

⁸⁸ There is some guidance for detecting these behaviours in the Police Guidelines for Interacting with People with Disability. See also the more detailed resources provided by 'Sentence Trouble' at <<http://www.sentencetrouble.info/>>.

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. Even in this regard, they provide a relatively blunt instrument for identifying the full range of communication problems that may impede participation in the criminal justice process.

3.2.3 Where children and youths are concerned, the TPM proceeds from the understanding that youths' intellectual development and capacities vary 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.⁸⁹ 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 TPM appears to be that a parent, guardian or other independent person should be present during interviews. This is an express requirement where youths are interviewed as suspects⁹⁰ but is not explicitly required for witnesses and complainants.

3.2.4 Where a comprehension or communication disability is detected, the TPM directs that appropriate assistance should be obtained. If possible, such assistance should be sought from the person's support person or advocate.⁹¹ Where such a person is not identified, the assistance of an independent person should be obtained.⁹² If the person has difficulty comprehending or communicating speech, an interpreter should be obtained.⁹³ The Department of Health and Human Services, Disability Services, may be contacted during business hours to assist police when dealing with people with disabilities.⁹⁴ The *Guidelines* additionally specify as sources of advice, when interacting with people with disabilities, the Tasmanian Department of Health and Human Service (DHHS), Speak out Advocacy, Advocacy Tas and the Association for Children with a Disability (Tas) Inc. A register of disability service providers who may be able to assist the police to interact 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. There is, however, no central coordinated service or registered body of experts available to assist police when interviewing or assisting people with communication needs. As noted earlier, when dealing with people who have complex communication needs, the TPM directs the police to obtain guidance from officers who have been trained in interviewing vulnerable people⁹⁵ and where victims of a sexual offences have complex communication needs, then an officer who has training in interviewing vulnerable people should be tasked with interviewing them.⁹⁶ While this is clearly a step in the right direction, the participation of people with communication needs in the criminal justice process is more likely to be maximally secured through the assistance of expert intermediaries/communication assistants.

3.2.5 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 the Department of Health and Human Services and allied agencies.⁹⁷ The ability to obtain details from such a database about witnesses'

⁸⁹ TPM [9.1.5(4)].

⁹⁰ TPM [9.1.5(1)].

⁹¹ See also TPM [2.26.1(5)&(6)].

⁹² *Guidelines for Interacting with People with Disabilities*, 1.

⁹³ TPM [2.26.1(7)].

⁹⁴ TPM [2.26.1(4)].

⁹⁵ TPM [2.26.2].

⁹⁶ TPM [4.4.10.1(3)].

⁹⁷ It is important to 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. The Tasmanian Government Justice

communication needs and who is best placed to provide communication assistance to meet those needs would expedite the provision of assistance and reduce potential delays occasioned by the need to make independent enquiries of relevant yet disconnected government departments and agencies. No relevant integrated database presently exists. However, there are plans to develop a ‘Criminal Order Repository’ (COR) through the Justice Connect initiative and Digital Transformation program, which will improve information management by justice agencies and their case management capabilities. It is not known at the date of writing this Report to what extent the information management developed under the Justice Connect initiative will seek to support the application of the TPM and *Guidelines* protocols. The Institute recommends that this objective should be a key component in its design. This matter and relevant recommendations are dealt with further in Part 5.

3.2.6 With regard to their internal records the police are encouraged to adopt a consistent approach when dealing with people who have communication needs who present on multiple occasions, thus maintaining records of their existing support mechanisms.⁹⁸ As outlined at [3.2.5], the capacity to record and access this information through the creation of linked data that is updated in real-time will assist police to obtain communication assistance efficiently for witnesses with communication needs at the earliest point in the criminal justice process.

3.2.7 The TPM also directs 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.⁹⁹ However, identifying the source of a communication difficulty and how best to respond to it may require expert knowledge. Police recruits do have training in screening for communication difficulties but specialist vulnerable witness interviewing training and equity and diversity training appears to be focused on detectives.¹⁰⁰ The Tasmanian Institute of Law Enforcement Studies, which is involved in the training of police recruits, advised the TLRI that the topic of police interaction with people living with communication difficulties is addressed across a series of topics throughout recruit training. It is dealt with specifically in the Unit that deals with vulnerable people, the Unit that deals with communication, the Law Unit, and the Operations Unit. These Units are delivered by several instructors at the Academy, as well as a University lecturer. It is a large component of recruit training, since this topic has been under scrutiny since the 1970s within international scholarly work, and because effective communication is at the crux of any ‘good’ police work.¹⁰¹ Within that framework, recruits are taught different techniques for communicating simply and clearly with people who may be experiencing communication difficulties, whether these difficulties are linked to their limited knowledge of the English language, or other communications issues (hearing or speech impairment, learning difficulties, cognitive difficulties, young age, etc). Most of the advice and learning components for the recruits revolve around simplicity of communication, oral, verbal, and

Connect program and digital transformation plans for Justice Agencies will also be a key step forward in linking people at the point of entry to the most appropriate communication assistance. See itnews, *Tasmania puts \$67m towards improving IT* (2017) <<https://www.itnews.com.au/news/tasmania-puts-67m-towards-improving-it-463079>> for details of the funding commitment by the Government to these projects. Further details regarding Justice Connect are contained in the 2017–18 Tasmanian State Budget in Budget Note 1 – Chapter 6 – Infrastructure Investment.

⁹⁸ TPM [2.26.1(8)].

⁹⁹ TPM [2.26.2(2)] & [4.6.1(2)(r)].

¹⁰⁰ Feedback obtained from discussions with Tasmania Police at the Ministerial Roundtable, above n 49, and the Disability Justice Plan Reference Group Meeting (March 2016).

¹⁰¹ See for example, Keith V Erickson et al, ‘A survey of police communication training’ (1976) 25(4) *Communication Education* 299; Marilyn J Woods, ‘Interpersonal Communication for Police Officers: Using Needs Assessment to Prepare for Skeptical Trainees’ (2000) 63(4) *Business and Professional Communication Quarterly* 40; and more recently: Brendan M O’Mahony, ‘The emerging role of the Registered Intermediary with the vulnerable witness and offender: facilitating communication with the police and members of the judiciary’ (2010) 38(3) *British Journal of Learning Disabilities* 232.

behavioural language, and reaching out for external specialised support if need be, and as soon as practicable.

3.2.8 However, the Tasmanian Institute of Law Enforcement Studies noted that because the curriculum currently offered to Tasmania Police in matters of vulnerability (which includes the topic under consideration here) approaches vulnerability according to universal precautions (as adopted in health), specific topics or examples of communication difficulties are not studied in detail. While examples are given, they are explored more as a way to illustrate points, as opposed to dissecting procedures and specific cases. Rather, recruits are trained to be competent in seeking out various communication tools, techniques and support services that can help them in a variety of situations where communication difficulties arise. In seeking to make recruits competent in reaching out for specialist help (a speech pathologist, a translator, a sign language interpreter), the technicalities and difficulties that may be encountered in doing so are also tackled, including the possible unavailability of appropriate services when they are needed.

3.2.9 The investigative interviewing component of the recruits' course for Tasmania Police is currently being revised. It is intended that the amended course will commence in 2018. It will offer a fully scaffolded investigation and interviewing professional program that progresses from police recruit through to specialist level. At post-recruit level, officers will be able to undertake investigative practice units that will contribute towards a Bachelor degree in investigative practice. The program has been developed in consultation with the Centre for Investigative Interviewing at Deakin University (CII). CII is a world leader in research on human memory and behaviour and practice-based investigative techniques that are designed to elicit the most detailed and accurate accounts from suspects and other witnesses. For present purposes, it is relevant to note that the recruits course covers policy and legislation underpinning police interviewing practices including the *Evidence (Children and Special Witnesses) Act 2001*. There is a specialist module covering overcoming language barriers and other complex communication needs in the units which comprise the professional honours course. This is not in the recruits' course. However, probationary constables will be taught skills in interviewing suspects and witnesses with language barriers and other communication needs and also to recognise when they should seek help from more qualified officers.

3.2.10 Tasmania Police is also bound by the National Police Code of Ethics¹⁰² and required to adhere to the policy mandated in the Department of Police and Emergency Management (DPEM) *Disability Action Plan 2014-2017*.¹⁰³

3.2.11 While the TPM and the *Guidelines* do not have the force of law, (being administrative guidelines) breaches of their provisions may have implications for the admissibility of evidence at trial. Courts have discretions to exclude unfairly and improperly obtained evidence, which includes evidence obtained in contravention of evidence taking procedures specified in the TPM and the *Guidelines*.¹⁰⁴

¹⁰² 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.

¹⁰³ The DPEM, *Disability Action Plan 2014–2017* is available at <<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.

¹⁰⁴ *Evidence Act 2001* (Tas) ss 90, 138, 139 deal with the discretionary exclusion of evidence on these grounds.

3.2.12 This provides an uncertain basis for regulating pre-trial processes and agency conduct¹⁰⁵ and it is, of course, non-specific as far as overcoming comprehension and communication difficulties are 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.¹⁰⁶

3.2.13 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* with respect to obtaining communication assistance for people with communication needs 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).

3.2.14 The accessibility of the *Guidelines* is also restricted by the fact that they are not part of any statutory regime and are not reproduced in the TPM. They are an internal police resource. Regulatory mechanisms that affect fundamental rights, including fair trial rights and 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 rights principle that regulatory regimes, including administrative policies and guidelines that affect people's criminal justice rights, kind should be accessible to the public.¹⁰⁷

3.2.15 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 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 –

¹⁰⁵ 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.

¹⁰⁶ Ibid.

¹⁰⁷ 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].

(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*.

3.2.16 No statutory provision is made for engaging an expert communications assistant or intermediary when a person who speaks English may have communication needs, and of course, s 5 does not cover witnesses or victims.

3.2.17 Tasmania Police is clearly alive to the problems facing people with communication needs in navigating the investigative stage of the criminal justice process and have established protocols to tackle those problems. The question is whether those protocols constitute an adequate mechanism for identifying and managing interactions with people with communication needs. More specifically, there is the question whether a specifically trained, readily identifiable cohort of expert intermediaries/communication assistants might assist the police and enhance their interactions with people with communication needs thus promoting their ability to participate in the criminal justice process. Accordingly, the Institute sought feedback in the Issues Paper about the adequacy of existing measures available to the police to identify people with communication needs, to obtain communication assistance for them and to identify existing support people for them.

Measures Available to the Police

Are the existing mechanisms available to the police for *identifying* people with communication needs and *managing* interactions with them adequate?

Are the existing measures for *obtaining* communication assistance for people with communication needs when interacting with the police adequate?¹⁰⁸

3.2.18 Responses to the Issues Paper generally expressed the view that the existing mechanisms available to the police to identify people with communication needs and to obtain appropriate communication assistance for them are inadequate. In relation to the former the Director of Public Prosecutions/Witness Assistance Service stressed the difficulty of this task but said that there is certainly room for improvement. He submitted that where there are specific, obvious needs police will obtain assistance, but that it is the marginal cases which are problematic. The Department of Health and Human Services (Disability and Community Services) stated that experience suggested that there doesn't seem to be a formal process for identifying people with communication needs, but 'rather random mechanisms' for doing so. The Department also stated that existing measures for obtaining communication assistance when needed are inadequate. People with communication needs often rely on family members or support workers and there is confusion about their role, whether it is to provide facilitation or advocacy. Similarly, the Tasmanian Aboriginal Community Legal Service said that based on their observations of outcomes for people facing criminal charges, existing mechanisms for identifying people with communication needs appear to be underutilised. The National Disability Service noted that 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 the police and lawyers.

¹⁰⁸ Question 3(b) and (c) of the Issues Paper.

3.2.19 Mary Woodward¹⁰⁹ doubted whether the existing measures described in the Issues Paper would enable the police to screen effectively for communication needs at first contact. In the same vein, Natalie Leader, a speech pathologist, said that there do not appear to be any guidelines for determining communication needs in young people. She stressed that they are particularly vulnerable to emotional dysregulation which compromises whatever communication capacity they ordinarily have. Another speech pathologist who wished to remain anonymous said that s/he had never heard of a police officer requesting a speech pathology assessment or advice from a speech pathologist about potential communication needs for an individual. While officers may know how to access specialist services if an individual has an obvious disability, many communication difficulties are 'hidden' and thus, difficult to detect without specific training in their identification.

3.2.20 The Department of Police and Emergency Management advised the Institute that, in practice, the largest proportion of police activity involves speaking with people and as such, to formally screen everyone police come into contact with in a criminal justice context would be a fundamental shift in the way policing is conducted. The Department submitted that police officers are cognisant of the communication needs of vulnerable people and currently make assessments to determine if assistance is required. Where such assistance is necessary police seek this support while responding to incidents 24 hours a day, seven days a week, State-wide.

3.2.21 The Tasmanian Children's Commissioner, Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania and the Independent Living Centre said that current mechanisms to identify communication needs and appropriate available communication assistance are inadequate.

3.2.22 The Institute agrees with the advice provided in submissions that the current mechanisms available to the police to identify and obtain assistance for people with communication needs and to identify any existing communication support people they may have, can be improved. The central concern of this reference is to determine the desirability of establishing a trained cohort of expert intermediaries/communication assistants to assist people with communication needs throughout their involvement in the criminal justice system, including at the investigative stage during their interactions with the police. Accordingly, specific feedback was sought in the Issues Paper with respect to this matter.

The Value of Intermediaries/Communication Assistants During Police Investigations/Interviews

Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist the police in identifying and interacting with people with communication needs?¹¹⁰

3.2.23 All submissions¹¹¹ that responded to this question favoured the establishment of such a body. In concert with these submissions, the Institute recommends that a body of expert intermediaries/communication assistants be established that is available to provide advice to the police and

¹⁰⁹ A registered intermediary in England and Wales.

¹¹⁰ Question 3(e) of the Issues Paper.

¹¹¹ The Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions/Witness Assistance Service, the Department of Health and Human Services (Disability and Community Services), the Education Department of Tasmania, the Independent Living Centre, Joyce Plotnikoff (an expert in the Witness Intermediary Service in England and Wales), Natalie Leader (a speech pathologist), Speech Pathology Australia, a speech pathologist who wished to remain anonymous and Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

communication assistance to people with communication needs when interacting with the police. This recommendation is incorporated into the Institute's first and primary recommendation that an intermediary/communication assistant scheme be instituted in Tasmania.¹¹² The schemes for South Australia¹¹³ and England and Wales¹¹⁴ provide precedent for intermediaries to be made available during investigative and consultative stages of the justice process. Moreover, even though the New South Wales pilot intermediary scheme is limited by legislation to court proceedings, in practice it has extended beyond trials to police interviews.¹¹⁵ This recommendation acknowledges the general consensus that what occurs during police interviews can be determinative of trial and hearing outcomes. It also incorporates suggestions that were made in submissions about other forms of communication assistance that would be beneficial for people with communication needs when interacting with the police. These suggestions included, providing access to suitable communication aids and presenting information in a suitable format,¹¹⁶ being given extra time to answer questions, being asked simple questions, removal of jargon from questions, being able to draw what has happened if this can't be communicated verbally, pre-recording a recollection, using visual cues to support understanding of interview and court processes so that people know what to expect, using short sentences and setting limits on the number of words that can be used in a question or proposition.¹¹⁷ The Department of Health and Human Services (Disability and Community Services) submitted that the type of communication assistance that would be most beneficial would depend on people's communication capacities. Accordingly, it would be appropriate for intermediaries/communication assistants to do on-the-spot assessments, where relevant, of people's capacity and the support that may be required. The Institute considers that all these suggestions are encompassed within the Institute's recommendations with respect to the establishment of an intermediary/communication assistant scheme in Tasmania because they are matters that would be dealt with by intermediaries/communication assistants.

3.2.24 Because the Institute is aware from experience in other jurisdictions that there can be initial resistance to the use of intermediaries/communication assistants during police interviews, feedback was sought on what might be some of the challenges facing the police in using intermediaries or communication assistants during their interactions with people with communication needs.

The Challenges for Police in Using Intermediaries/Communication Assistants

What might be some of the challenges for police when using an intermediary or communication assistant during their interactions with people with communication needs?¹¹⁸

3.2.25 In this regard, submissions pointed particularly to the basic difficulties for the police in actually identifying the need for an intermediary/communication assistant and then, once that is identified, matching the person with the communication need with an appropriately skilled intermediary.¹¹⁹ Obtaining an appropriately skilled intermediary in a timely fashion or at short notice throughout the State,¹²⁰ delay in

¹¹² See Recommendation 1.

¹¹³ See Part 4 at [4.2.13]–[4.2.20].

¹¹⁴ See Part 4 at [4.2.1]–[4.2.9].

¹¹⁵ See Part 4 at [4.2.21]–[4.2.35].

¹¹⁶ The Independent Living Centre.

¹¹⁷ A speech pathologist who wished to remain anonymous.

¹¹⁸ Question 3(n) of the Issues Paper.

¹¹⁹ The Tasmanian Aboriginal Community Legal Service and Speak Out Advocacy.

¹²⁰ The Tasmanian Aboriginal Community Legal Service and the Director of Public Prosecutions/Witness Assistance Service.

conducting questioning while waiting for an intermediary to arrive,¹²¹ increased length of interviews¹²² and the particular challenges in engaging intermediaries where there are time constraints upon the police, as in emergency situations,¹²³ all of which might lead to police frustration with the process,¹²⁴ were also identified as potential challenges for police when using intermediaries/communication assistants. It is critical for the scheme to gain the trust and support of the police and to ensure that the scheme achieves its objectives, that such problems are avoided as far as possible. This will only be achieved if a sufficient number of intermediaries/communication assistants is made available across the State and the entire scheme is adequately resourced.

3.2.26 Additionally, ascertaining the integrity of messages between the person with the communication need and the intermediary/communication assistant,¹²⁵ potential privacy issues for victims/defendants,¹²⁶ different parties having different understandings of their respective roles¹²⁷ and intermediaries exceeding their role, were identified as some of the challenges police may face. Pressures associated with the extra time, paperwork, equipment and resources required, at least in the short term, were nominated as potential barriers that would be outweighed by the resulting benefits of a more helpful culture and a more just system.¹²⁸

3.2.27 Based on her more than 20 years' experience of the witness intermediary service in England and Wales, Joyce Plotnikoff noted that some police interviewers and managers have a tendency to over-estimate their own skills and/or underestimate the communication needs of vulnerable witnesses which results in their under-utilisation of intermediaries/communication assistants to the detriment of people with communication needs. Similarly, Rosalie Martin, quoting the Irish playwright George Bernard Shaw noted that 'the single biggest problem in communication is the illusion that it has taken place.'

3.2.28 The Tasmanian Institute of Law Enforcement Studies encapsulated the wide range of challenges facing the police in engaging intermediaries/communication assistants when interacting with people with communication needs. The Tasmanian Institute of Law Enforcement Studies referred to overseas research on police reluctance to reach out for specialist help from such services as those offered by speech pathologists, translators and sign language interpreters, which has been ascribed to a number of factors including budget pressure, case emergencies, people's immediate safety, and the 'lengths' to which the police may have to go finally to get hold of those services. There may also be a level of distrust between the police and some translators (in the absence of verification of the translation) which may carry over to other communication assistants. Additionally, and notably, some services are often available only during usual working hours and not when the police, who work 24 hours a day seven days a week, may need them. Unfortunately, some police officers consider that responsibility for obtaining communication assistance for suspects with communication needs rests with defence lawyers.

3.2.29 The Institute is of the view that resolution of many, if not all, of the challenges that the police are likely to encounter when using intermediaries or communication assistants during their interactions with people with communication needs depends on the establishment of appropriate infrastructure to support

¹²¹ Speak Out Advocacy.

¹²² The Department of Health and Human Services (Disability and Community Services).

¹²³ The Tasmanian Aboriginal Community Legal Service and the Independent Living Centre.

¹²⁴ The Department of Health and Human Services (Disability and Community Services) and the Independent Living Centre.

¹²⁵ The Independent Living Centre.

¹²⁶ The Tasmanian Aboriginal Community Legal Service.

¹²⁷ Speak Out Advocacy and a speech pathologist who wished to remain anonymous.

¹²⁸ Natalie Leader, a speech pathologist.

a Tasmanian intermediary/communication scheme and on police receiving adequate training in accessing and using that scheme.

Defence and prosecution counsel

3.2.30 Defence and prosecution counsel may encounter similar problems to those experienced by the police when interviewing witnesses or taking instructions from clients who have 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 communication needs. While there has been some specialised training delivered by speech pathologists and forensic mental health experts, there is no formal law program either at the undergraduate or postgraduate level covering screening for or interacting with defendants or witnesses with communication needs.

3.2.31 The sources of assistance available to lawyers in private practice, at Legal Aid and at Community Legal Services when communicating with people with communication difficulties are essentially the same as those available to the police. If the client or witness already utilises communication assistance or support then, provided that 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, the question of costs would then need to be addressed and the requisite financial resources to obtain such expert professional assistance may not be available. As detailed below at [3.2.36], the TLRI has been advised that accessing such services is often precluded by a lack of adequate financial resources.

3.2.32 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),¹²⁹ 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.

3.2.33 At the Ministerial Roundtable and during consultations conducted prior to the preparation of both the Issues Paper and this Report, strong support was expressed for the establishment of readily obtainable expert advice and assistance for police and lawyers to communicate with people with communication needs.¹³⁰

3.2.34 The Office of the DPP has established the Serious Crimes Witness Assistance Service, which has four full-time staff and provides support to DPP lawyers in interacting with people with communication needs. The professional qualifications of Witness Assistance Service officers include qualifications in counselling, teaching, social work and law. The Witness Assistance Service officers have received two days training from a speech pathologist in how to interact with people with communication difficulties. The Witness Assistance Service Guidelines specify that when a witness or victim is identified as having a

¹²⁹ 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 legal settings. The TLRI understands that many of the TIS Interpreters may not have experience or accreditation to work in courts or other legal settings.

¹³⁰ In relation to legal practitioners see details below at [3.2.37].

disability they should be referred to Witness Assistance Service. In addition, relatives, support people, carers and professionals who are familiar with them may accompany people with communication needs when attending meetings with DPP officers.

3.2.35 During the consultation, preparatory to preparing this Report, the Institute sought community and stakeholder feedback on the adequacy of measures currently available to assist defence and prosecution counsel in identifying and interacting with people with communication needs. In this regard, the Institute sought advice about whether an intermediary/communication assistant scheme should be instituted to enhance counsels' capacity to interact with people with communication needs.

Adequacy of Measures Available to Legal Practitioners

Are the measures currently available to defence and prosecution counsel to identify and interact with people with communication needs adequate?¹³¹

Would a specifically trained cohort of independent, expert communication assistants/intermediaries assist defence and prosecution counsel in identifying and interacting with people with communication needs?¹³²

3.2.36 Eight responses to the Issues Paper addressed this question.¹³³ All but one response stated that current measures are inadequate. The remaining respondent, Joyce Plotnikoff, declined to comment on the Tasmanian situation for lack of specific knowledge of it. The Tasmanian Aboriginal Community Legal Service suggested that the adequacy of current measures is contingent on their availability and utilisation, but stated that there are currently no well-resourced or easily accessible measures to support people with communication needs in communicating with defence lawyers and, moreover, that funding for communication support is often precluded by legal aid restrictions or the limited financial means of people with the communication needs. The Tasmanian Aboriginal Community Legal Service also noted that, currently, mentoring by senior practitioners is of most assistance in enabling identification of people with communication needs and thereafter gaining access the necessary support for them. The Department of Health and Human Services (Disability and Community Services) stated that, in its experience, attempts to identify people with communication needs are presently dealt with in the context of determining their capacity to plead rather than with a view to facilitating their interactions with legal practitioners. However, the Department also stated that if communication is identified as an issue, then an assessment of the person's capacity in that regard can be done. The Director of Public Prosecutions/Witness Assistance Service and the Independent Living Centre indicated that there are no mechanisms available to defence and prosecution counsel to identify existing support persons and advocates for people with communication needs. Additionally, the Director of Public Prosecutions/Witness Assistance Service suggested that members of the legal professions need more detailed information if they are to be able to assess people's communication needs.

3.2.37 All these respondents to the Issues Paper were agreed that a specifically trained cohort of expert, independent intermediaries/communication assistants would assist defence and prosecution counsel in identifying and interacting with people with communication needs.

¹³¹ Question 4(a) of the Issues Paper.

¹³² Question 4(f) of the Issues Paper.

¹³³ The Director of Public Prosecutions/Witness Assistance Service, Joyce Plotnikoff, the Independent Living Centre, Natalie Leader (a speech pathologist), the Department of Health and Human Services (Disability and Community Services), the Tasmanian Aboriginal Community Legal Service, Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, and a speech pathologist who wished to remain anonymous.

3.2.38 Given the complexities that can arise and the specialised skills required to identify and interact with people with communication needs, the Institute is of the view that a specifically trained cohort of independent, expert intermediaries/communication assistants should be established to assist defence and prosecution counsel in identifying and interacting with people with communication needs in the pre-trial context of the criminal justice process (see Recommendation 1 at [3.4.46]). Such a scheme is key to securing the participation of people with communication needs in the criminal justice process. Nevertheless, the responsibility for ensuring the quality of interactions with people with communication needs should not rest solely with intermediaries/communication assistants. Therefore, legal practitioners who interact with them should also be appropriately trained and qualified and specialist training courses should be developed and made available for them (see recommendations with respect to training and education in Part 5).

3.3 Communication assistant measures in the trial

3.3.1 A number of special measures have been enacted in Tasmania which enable children and other vulnerable witnesses to have support persons with them while they are testifying, to be screened and out of view of the defendant in court or to give their evidence via CCTV and/or by pre-recorded testimony.¹³⁴ These measures largely target the stress of testifying but, with the exception of the pre-recording measure, do not focus on controlling questioning or resolve the comprehension and communication difficulties experienced by people with communication needs when testifying.

3.3.2 As noted above, if people with 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 measures¹³⁵ that best achieves this comprises:

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

3.3.3 These measures work together, complementing and supporting each other in optimising the capacity of people with 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'¹³⁶ and mandating judges to control inappropriate cross-examination.¹³⁷ There is no explicit legislative provision for the use of intermediaries or

¹³⁴ *Evidence (Children and Special Witnesses) Act 2001* (Tas) pt 2; *Crimes Act 1914* (Cth) pt 1AD also applies to children and 'special witnesses' in specified cases.

¹³⁵ Note the suite of recommendations outlined in the *Report of the Advisory Group on Video-Recorded Evidence* (Home Office, UK, 1989) ('Pigot Committee Report').

¹³⁶ *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 6, 6A, 8(2)(ii)(b).

¹³⁷ *Evidence Act 2001* (Tas) s 41.

communication assistants during trial. Nevertheless, there are general evidence and criminal procedure provisions that might be applied to make this measure available.¹³⁸

3.4 Control of cross-examination

3.4.1 Control of cross-examination is critical to enabling people with communication needs to participate fairly in the criminal justice system and to give accounts of events to the best of their ability. 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 provision¹³⁹ as a result of the necessity for judgment to be made about what is improper questioning in any given case.

3.4.2 Research suggests that, despite its mandatory nature, this provision does not displace courts' traditional reluctance to intervene in the cross-examination process.¹⁴⁰ For a raft of reasons judges may be reluctant to do so. More specifically, there is a fear of rendering the trial unfair for the accused by unduly curtailing cross-examination, which may occasion an appeal and retrial. Such a result runs counter to the interests of both the accused, victims and witnesses. Intervention is also eschewed because it may be perceived as casting the trial judge in the role of a partial advocate.¹⁴¹ 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.¹⁴²

3.4.3 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 fair trial principles demand, that they actually prevent trial judges and counsel from recognising or rejecting questioning that is unfair to people with communication needs.¹⁴³ Lawyers' and judges' perceptions of proper questioning derive from long accepted adversarial tactics.¹⁴⁴ These perceptions and the conventions that drive them are often in direct conflict with research findings concerning the types of questioning that are particularly inimical to eliciting evidence from children and witnesses with cognitive impairments fairly and to the best of their

¹³⁸ Henning, above n 57.

¹³⁹ 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.

¹⁴⁰ 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) 51–56; 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, 237–238.

¹⁴¹ See more detailed discussion in Henning, above n 57.

¹⁴² *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).

¹⁴³ 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 140.

¹⁴⁴ Boyd and Hopkins, above n 140; Davies, Henderson and Hanna, above n 143.

ability. This means that the logic of cross-examination itself operates against the effective use of s 41 *Uniform Evidence Act 2001* (Tas) to control cross-examination.¹⁴⁵

3.4.4 The entrenched nature of this problem is demonstrated by recent experience in New Zealand with the Young Witness Pilot Protocol developed by judges in the Whangarei region in 2014 and also utilised in one Auckland court. The Protocol stipulates that judges will endeavour to stop counsel asking tagged questions, questions containing a double negative, questions which contain two or more propositions and leading questions.¹⁴⁶ These types of questions are recognised as being confusing and detrimental to obtaining the best evidence from people with communication needs.¹⁴⁷ Evaluation of the operation of the Protocol indicates that while it has prompted some increase in judicial intervention and an increased awareness among counsel of inappropriate questioning, there is still judicial resistance to intervention and opposition among counsel to modifying their questioning styles.¹⁴⁸ Further, some defence counsel reject the premise of the Protocol about what constitutes inappropriate questioning and dispute the unsuitability of the proscribed questioning styles, asserting that they constitute ‘normal and easily comprehensible speech’¹⁴⁹ and a necessary means of tailoring and reducing the length of cross-examination.¹⁵⁰ However, Boyd and Hopkins make the important point that whether or not a question is inappropriate in this context is not something that should be judged by reference to the adversarial system, but by those with expert knowledge of witnesses’ comprehension and linguistic capacities and/or by the witnesses themselves, where they are able to do so.¹⁵¹

3.4.5 A further problem with s 41 is that it does not lend itself easily to use during trials.¹⁵² For example, in judging whether a question is caught by s 41, the court is 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.¹⁵³ This can only be done if the trial judge has some background information about the person.¹⁵⁴ 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 communication needs on a regular basis may not have had the opportunity to acquire. While assistance is provided by bench books¹⁵⁵

¹⁴⁵ On this point see, Davies, Henderson and Hanna, above n 143, 354–355.

¹⁴⁶ I Randell et al, above n 68, 21.

¹⁴⁷ Judge M Sexton (Judge of the County Court of Victoria) ‘Communication by Children: A Judicial Perspective’ (Paper presented at the National Judicial College of Australia/Australian National University Conference, Seen and Heard: Children and the Courts Conference, Canberra, February 2015) 2–8.

¹⁴⁸ I Randell et al, above n 68, 22–25.

¹⁴⁹ Ibid 22.

¹⁵⁰ Ibid 22–24.

¹⁵¹ Boyd and Hopkins, above n 140, 163.

¹⁵² 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.

¹⁵³ See for example s 25(4) *Evidence Act 1929* (SA) and similarly s 41(2) *Uniform Evidence Act*.

¹⁵⁴ On this point see Justice Roy Ellis above n 140, [36]–[37].

¹⁵⁵ See for example, Department of the Attorney General WA, above n 12; Judicial Commission of New South Wales, above n 12; Australian Institute of Judicial Administration Incorporated, above n 12.

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.

3.4.6 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 communication needs to maximise their comprehension and communication capacities and participation in trials.

3.4.7 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 detrimental to eliciting the best, or even, accurate wanted evidence from children and witnesses with cognitive impairments. Under s 42(3)¹⁵⁶ 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 communication needs who are susceptible to being misled by leading questions into answering as they think the questioner wishes them to.¹⁵⁷

3.4.8 Nevertheless, it is probable that courts should not assume, in the absence of evidence about a particular witness, that s 42(3) will apply.¹⁵⁸ In applying both ss 42(3) and 42(2)(d) courts are faced with similar practical problems as are posed by s 41.

3.4.9 If judges experience difficulty in intervening in court in front of juries during questioning of witnesses, measures that preclude the problems associated with in court non-intervention should be 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.¹⁵⁹

¹⁵⁶ 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.

¹⁵⁷ 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.

¹⁵⁸ *Stack v State of Western Australia* (2004) [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]).

¹⁵⁹ See for example, New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26 (1996); Australian Institute of Judicial Administration Incorporated, above n 12, [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,

Ground rules/pre-trial directions hearings

3.4.10 Good practice guidance¹⁶⁰ tells us that the pre-trial setting of ground rules with counsel for questioning people with 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 communication needs to testify. For example, the Institute is aware of a recent Supreme Court case where 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.

3.4.11 There are a number of Tasmanian statutory and regulatory provisions¹⁶¹ 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. Professor 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.’¹⁶² She further states that, ‘[i]t 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.’¹⁶³

3.4.12 Foremost among the statutory provisions in the Tasmanian *Evidence Act* that empower courts to make rules for the holding of directions hearings are ss 192A and 193(2). Section 193 gives courts the power to ‘make rules to enable its effective operation.’¹⁶⁴ Section 192A gives the court power to make advance rulings and findings.

3.4.13 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,¹⁶⁵ which clearly enables the court to prescribe the kinds of matters to be covered in the preliminary hearing. In 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 communication needs at trial of the kind developed by the Criminal Procedure

Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration, Sydney, 7–9 September 2011) 8.

¹⁶⁰ New Zealand Law Commission, above n 159; Australian Institute of Judicial Administration Incorporated, above n 12 [4.6], [5.2], [5.3]; His Hon Commr Sleight, above n 159, 8.

¹⁶¹ *Evidence Act 2001* (Tas) s 192A; *Criminal Code 1924* (Tas) s 361A; *Criminal Rules 2006* (Tas) pt 1A.

¹⁶² 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.

¹⁶³ Wendy Lacey, ‘Inherent jurisdiction, judicial power and implied guarantees under chapter III of the Constitution’ [2003] 31(1) *Federal Law Review* 57.

¹⁶⁴ *Re Z* (1996) 134 FLR 40 (Nicholson CJ and Frederico J).

¹⁶⁵ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 9(2).

Rules Committee (UK) and the Judicial College for England and Wales.¹⁶⁶ These guidelines include an extensive checklist¹⁶⁷ of matters that should be settled at different stages of the court process.

3.4.14 Courts might also deploy s 13 of the *Evidence Act 2001* (Tas) (which deals with witnesses' competence to testify) to give directives about the types and styles of permissible questions in order to enhance witnesses' communication capacities within the meaning of that section and so potentially render them competent to testify. Courts may also use this section to obtain expert advice about the comprehension and communication capacities of people with communication needs. Section 13(8) is explicit in this regard. Further, because under s 13(1) a person is incompetent to testify only if any incapacity he or she has to comprehend questions or communicate answers *cannot be overcome*, this provision also provides a mechanism for the deployment of intermediaries/communication assistants to help people with communication needs when testifying.

3.4.15 At the Ministerial Roundtable and consultations conducted prior to the preparation of the Issues Paper for this reference, support was expressed for expert advice to be available to and obtained pre-trial by courts. The responses to the Issues Paper overwhelmingly reinforced support for this position.¹⁶⁸

3.4.16 There is evidence¹⁶⁹ that in pre-trial directions hearings conducted to date concerning the pre-recording of children's testimony, judges are taking the opportunity to provide some guidance to counsel about the kinds of questions that should be asked and those that should be avoided and to direct them to relevant information in Bench Books for other jurisdictions¹⁷⁰ about questioning witnesses with communication needs. They have also actively sought information about what difficulties witnesses might experience in testifying and how these difficulties might be overcome. However, responses to the Issues Paper suggest that more needs to be done in this regard and that pre-trial directions hearings should be mandated by legislation in all cases involving people with communication needs. That legislation should also specify what should be canvassed and determined during those hearings to facilitate evidence giving by people with communication needs. In addition, it would be valuable if Bench Book guidance and a checklist of matters to be addressed and settled pre-trial were produced for the Tasmanian legal profession and judiciary. They might be based on the materials referred to at footnote 9 and [4.2.9] below. These matters are dealt with further and recommendations made in relation to them in Part 5.

3.4.17 Even with the raft of legislative possibility detailed above at [3.4.1]–[3.4.14], in the absence of explicit provision, fair trial concerns may inhibit courts from exerting the level of control of witness questioning and/or utilising communication assistants to the degree that is seen in England and Wales. This view is supported by submissions received by the Institute in response to the Issues Paper.¹⁷¹ The experience in courts in England and Wales that have implemented pre-trial recording of the entirety of witnesses' testimony¹⁷² is that ground rules hearings are the key to the successful operation of this measure.¹⁷³ Cross-examining counsel are now required to submit their proposed questions for approval at a ground rules

¹⁶⁶ *Criminal Procedure Rules* (UK) October 2015 as amended in April 2016 and October 2016, pt 3; and see fn 12 as well as [4.2.9].

¹⁶⁷ 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-wit-cases>> and see [4.2.9].

¹⁶⁸ See discussion at [3.4.39] below.

¹⁶⁹ See [5.3.3].

¹⁷⁰ The Bench Books are those developed for other Australian jurisdictions. There is not yet a Tasmanian Bench Book.

¹⁷¹ See below at [3.4.42] and [5.3.3].

¹⁷² This measure has been implemented as a pilot in Leeds, Liverpool and Kingston-upon-Thames.

¹⁷³ Scottish Court Service, above n 5.

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.¹⁷⁴ They also seek advice from intermediaries about the wording of their proposed questions.¹⁷⁵ Early indications are that this has resulted in questions being phrased appropriately and focusing only on the issues required to be addressed in cross-examination. An additional effect has been that pre-recording proceedings are much shorter than cross-examination conducted in the traditional manner, usually lasting no longer than 20 minutes.¹⁷⁶ This signifies a revolution in cross-examination practice. It also achieves a major efficiency in court time.

3.4.18 Given their significance for the control of cross-examination, optimally, the holding of pre-trial directions hearings in cases involving people with communication needs should be mandated by legislation. That legislation should require judicial officers to scrutinise the questions proposed to be asked during in court questioning sessions and to ensure that questions and questioning styles comply with expert advice about the cognitive and linguistic capacities of witnesses (see Recommendation 10(a)). There is precedent for this in the United Kingdom. In that jurisdiction, criminal procedure rules stipulate that in meeting their duty to manage cases,¹⁷⁷ courts must set ground rules for the conduct of questioning and the manner of questioning in cases where directions for appropriate treatment and questioning are required. In doing so they must invite representations from the parties and from any intermediaries.¹⁷⁸ The ground rules set by courts may include directions:

- relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,
- about the manner of questioning,
- about the duration of questioning,
- if necessary, about the questions that may or may not be asked,
- where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and
- about the use of models, plans, body maps or similar aids to help communicate a question or an answer.¹⁷⁹

In this regard, were an expert intermediary/communication assistant scheme to be enacted in Tasmania, the operation of s 9 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) could be amended to give explicit legislative imprimatur to courts to obtain expert advice pre-trial about the appropriate questioning of people with communication needs and how their comprehension and communication at trial might be facilitated. It might also mandate courts to set ground rules for the questioning of witnesses with communication needs of the kind contained in the United Kingdom *Criminal Procedure Rules* (to this effect

¹⁷⁴ The United Kingdom has developed resources for practitioners who act in cases involving children and witnesses with cognitive impairments with great enthusiasm. They can be accessed at the Advocate's 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.

¹⁷⁵ Penny Cooper, 'A Double First in Child Sexual Assault Cases in NSW: Notes from the first witness intermediary and pre-recorded cross-examination case' (2016) 41(3) *Alternative Law Journal* 194.

¹⁷⁶ Scottish Court Service, above n 5, 19.

¹⁷⁷ The *Criminal Procedure Rules* (UK) October 2015 as amended April 2016 & October 2016, r 3.2.

¹⁷⁸ *Ibid* r 3.9(7).

¹⁷⁹ *Ibid* r 3.9(7).

see Recommendation 10(a)). This provision currently provides for the holding of a preliminary hearing to deal with prescribed matters pre-trial.

Pre-recording of evidence

3.4.19 Pre-recording of evidence is conducted in Tasmania under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). In consultations with the Institute during preparation of the Issues Paper for this reference, 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 flexibly unburdened by the need to enable these witnesses to exit the trial process as early as possible. It also facilitates flexibility in case preparation and management.

3.4.20 A fundamental benefit for witnesses of pre-recording their evidence is the reduction in stress associated with the uncertainty about when they are to give evidence. Prior to the ability to pre-record their evidence, witnesses might endure repeated adjournments of trials, with the consequence that they repeatedly had to prepare to give evidence. This potentially delayed their recovery and caused on-going traumatisation.

3.4.21 Pre-recording is also 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) may help to overcome traditional judicial reluctance to intervene.¹⁸⁰ Similarly, 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,¹⁸¹ 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. Monitoring of questioning in this way during pre-recording is optimised by expert advice about the communication and linguistic capacities of witnesses with communication needs.¹⁸²

3.4.22 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-recording.¹⁸³

Intermediaries/communication assistants

3.4.23 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 is apprised of the comprehension and communication levels and needs of particular witnesses, including defendants. To this end, optimally, expert advice should be obtained from someone who has relevant experience of the particular witness or relevant expertise in the comprehension and communication capacities of people with communication needs either generally or in particular respects. Such advice should address the level of sophistication and style of questioning

¹⁸⁰ See [3.4.2].

¹⁸¹ At [3.4.13].

¹⁸² See further below at [3.4.24], [3.2.38]–[3.4.39] and the discussion of intermediary/communication assistant schemes in other jurisdictions in Part 4.

¹⁸³ 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).

appropriate for these witnesses. In recognition of this necessity, a number of jurisdictions in Australia and overseas have enacted intermediary/communication assistant schemes.

3.4.24 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 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 communication needs. This is an advisory function. Their reports make recommendations on how best to meet these people's 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 interviews 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.

3.4.25 In Australia, intermediary/communication assistant schemes have been enacted in South Australia, New South Wales and Western Australia. The Victorian Government has allocated funds in the 2017–18 budget to establish an intermediary scheme in Victoria.¹⁸⁴ In addition, the Victorian Disability Access Bench Book now deals with the desirability of appointing intermediaries to provide assistance to the court in monitoring whether questions are developmentally appropriate and, if necessary, how they might be rephrased.¹⁸⁵

3.4.26 Overseas, such schemes operate in a number of countries including and most notably in the United Kingdom, Iceland, Norway, Israel and South Africa. They have been legislated for but are not yet used extensively in New Zealand. These schemes are considered in Part 4 of this Report.

3.4.27 Tasmania has not yet instituted a statutory scheme that enables intermediaries/communication assistants to assist people with communication needs to comprehend questions and communicate 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 if inappropriate questioning occurs or to advise the court how questions should appropriately be phrased for particular people. 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.

3.4.28 However, the patchwork of Tasmanian legislative provisions considered above for the holding of pre-trial directions hearings¹⁸⁶ (none of which is directed at the issue of 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 used in the court process.

¹⁸⁴ See, Supporting Victims of Crime in the Justice System, (7 May 2017) <<http://www.premier.vic.gov.au/supporting-victims-of-crime-in-the-justice-system/>>.

¹⁸⁵ Judicial College of Victoria, above n 12, [5.11].

¹⁸⁶ See earlier commentary at [3.4.12]–[3.4.14].

3.4.29 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 communication needs. In the absence of express legislative imprimatur, courts may not be willing to do this.

3.4.30 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 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.¹⁸⁷ 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.
- (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.

¹⁸⁷ *Evidence Act 2001* (Tas) s 13(8).

- (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.

3.4.31 Questions of competence can be determined pre-trial¹⁸⁸ 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.

3.4.32 There may be some potential for using provisions relating to interpreters¹⁸⁹ and deaf and mute witnesses¹⁹⁰ 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 evidence legislation in its 1996 report, *People with an Intellectual Disability and the Criminal Justice System*. Nevertheless, the Commission acknowledges that there are major distinctions between the role of an interpreter and that of an intermediary. An intermediary may re-phrase 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.

3.4.33 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 an intermediary/communication assistant scheme. Importantly, these statutory provisions do not appear to have been used to facilitate the use of intermediaries. Notwithstanding the extensive research showing such measures indisputably improve both the evidence that witnesses give and the trial process, it is perhaps understandable that a comprehensive statutory framework would have to be implemented before courts would move to use current measures to facilitate the use of intermediaries.

3.4.34 In the Issues Paper, the Institute sought feedback on whether the existing Tasmanian legislative framework and mechanisms currently available to the courts enable adequate communication support to be provided at trial for people with communication needs. More specifically, it sought feedback on the adequacy of s 41 of the *Evidence Act 2001* (Tas), current pre-trial directions processes and the pre-recording process in ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) as mechanisms for controlling inappropriate questioning of these people. Further, the Institute asked whether there should be a legislative base for holding pre-trial directions hearings in any case involving witnesses with communication needs as is the case in England and Wales. This matter is considered further in Part 5 of this Report. Advice was also sought about whether the current legislative framework provides an adequate means for courts to obtain expert advice pre-trial about the needs of people with communication needs when testifying at trial. In this regard, the Issues Paper sought feedback on the desirability of supplementing existing measures with a legislatively mandated expert intermediary/communication assistant scheme to provide pre-trial advice to lawyers and courts about the communication and comprehension capacities and requirements of people with communication needs and, thereafter, to assist these people when testifying at

¹⁸⁸ *Evidence Act 2001* (Tas) s 189 coupled with *Criminal Code 1924* (Tas) s 361A.

¹⁸⁹ *Uniform Evidence Acts* s 30; *Evidence Act 1977* (Qd) s 131A; *Evidence Act 1929* (SA) s 14.

¹⁹⁰ *Uniform Evidence Acts* s 31.

trial. Additionally, the Institute sought information on what might be the barriers to introducing an intermediary scheme in Tasmania.

Adequacy of current legislative framework in enabling communication support at trial
(a) Does current Tasmanian legislation provide an adequate framework through which intermediary/communication assistant support can be obtained to support witnesses with communication needs at trial?
(b) Do existing pre-trial directions hearings operate as an appropriate mechanism for identifying and discussing any communication needs that witnesses may have? ...
(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 <i>Evidence Act 2001</i> (Tas) provide an adequate and sufficient mechanism for controlling cross-examination at trial to ensure that witnesses with 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 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 support people with communication needs better at trial?
(h) Should an expert intermediary or communication assistant scheme be introduced in Tasmania to assist people with 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? ¹⁹¹

3.4.35 Respondents who addressed the questions whether the existing legislative framework and mechanisms available to the courts (including s 41 *Evidence Act 2001* (Tas), pre-trial recording of evidence, and the current pre-trial directions process) provide adequate means to support and control the questioning of people with communication needs, uniformly expressed the view that more is needed. For example, the Tasmanian Aboriginal Community Legal Service said that while current legislation provides a strong starting point, it does not go far enough. The Director of Public Prosecutions/Witness Assistance Service suggested that while existing legislation may enable communication assistance and support to be provided at trial to witnesses with communication needs, this is dependent on how that legislation is interpreted and implemented, and accordingly, legislative modifications and refinements would be useful.

3.4.36 Respondents' experience of the operation of s 41 *Evidence Act 2001* (Tas), as a mechanism to control inappropriate cross-examination of people with communication needs, is that it does not provide a sufficient safeguard in this respect. The Tasmanian Aboriginal Community Legal Service said that as a protective measure, this section is dependent upon courts having a knowledge and understanding of the issues facing people with communication needs and how they might be addressed. The Director of Public Prosecutions said that the section is an important means by which courts can control cross-examination but that for this to occur in practice there needs to be a cultural change within the judiciary. The Acting

¹⁹¹ Question 6 of the Issues Paper.

Chief Magistrate, Mr Daly, was of the view that s 41 is not couched in terms that enable it to be used to ensure that witnesses with communication needs are asked questions that are suitable to their comprehension and communication capacities. These submissions accord with research and commentary on s 41 discussed above which show that s 41 does not operate to displace traditional approaches to cross-examination and judicial intervention, that it appears to offer suboptimal protection against inappropriate questioning and that it does not combat cross-examination conventions that render questioning of people with communication needs unfair.

3.4.37 The pre-trial recording process provided for in ss 6 and 6A *Evidence (Children and Special Witnesses) Act 2001* (Tas) is recognised by respondents to the Issues Paper as a significant measure in ensuring the appropriate questioning of people with communication needs. In this regard, the Tasmanian Aboriginal Community Legal Service told the Institute that pre-trial recording facilitates the monitoring of questions so that those asked are adapted to witnesses' communication and comprehension levels. This makes it easier for people with communication needs to give coherent testimony and convey the information that they wish to convey. The Director of Public Prosecutions/Witness Assistance Service said that the advantages of the pre-trial recording process are that it enables witnesses to give their evidence early and then for inappropriate questioning to be edited with minimum disruption to the trial process. However, the Director of Public Prosecutions also noted that its legislated limits mean that it is not available in all cases or for all witnesses who might benefit from its use. Further, where witnesses prefer to give evidence in court during the trial proper, this measure cannot operate as a protection against unsuitable questioning. In a similar vein, Joyce Plotnikoff said that pre-trial recording of testimony cannot of itself ensure that people with communication needs are asked questions that fit their communication capacities. It must be combined with setting ground rules and review of questions to ensure that they are developmentally appropriate.

3.4.38 In relation to whether pre-trial directions hearings currently operate as an adequate mechanism for managing the evidence giving process of people with communication needs, respondents uniformly indicated that they offer that possibility but that they do not currently serve that function to a sufficient degree. They also advised the Institute that their operation in this regard would be improved by enacting legislation that mandates the holding of pre-trial directions hearings in any case involving people with communication needs.¹⁹² These responses and the Institute's recommendations in this regard are detailed in Part 5. Similarly, respondents to the Issues Paper supported the use of the pre-trial directions process to inform courts about the comprehension and communication capacities of people with communication needs and the types of questions to avoid and use in eliciting their best evidence. These matters are also detailed in Part 5.

3.4.39 In relation to the question whether expert advice should be provided to courts pre-trial about the comprehension and communication capacities and requirements at trial of people with communication needs, respondents to the Issues Paper, uniformly favoured this measure. For example, the Acting Chief Magistrate, Mr Daly, said that it is desirable that an expert intermediary or communication assistant scheme be available to provide advice or report to magistrates about witnesses' communication and comprehension capacities. The Tasmanian Aboriginal Community Legal Service said that expert intermediaries would assist in determining what supports courts should put in place for people with communication needs during the court process. Speech Pathology Australia said that provision should be made for suitably qualified and experienced communication intermediaries to provide advice to courts, based on robust screening and/or assessment processes, about the supports required to enable people with communication needs to

¹⁹² The Acting Chief Magistrate, Mr Daly, the Tasmanian Aboriginal Community Legal Service, Speech Pathology Australia, the Director of Public Prosecutions/Witness Assistance Service, the Sexual Assault Support Service, and Joyce Plotnikoff.

participate in trials. Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania pointed out that professional recommendations for directions and ground rules can only be made by someone with necessary expertise, which is to be found in the communication assistant and communication intermediary. One respondent to the Issues Paper¹⁹³ argued that the obtaining of expert communication advice and assistance is consistent with rights to be treated as equal before the law and to have equal access to justice, which are served by the employment of intermediaries. Joyce Plotnikoff told the Institute that the giving of pre-trial advice is an essential element of intermediaries' role. Based on her experience with the intermediary regime in England and Wales, she advised the Institute that much of the significant work in the intermediary role is accomplished before trial in advising courts and counsel about appropriate questioning of people with communication needs.

3.4.40 Respondents to the Issues Paper also supported the introduction of an intermediary/communication assistant scheme to assist people with communication needs in testifying at trial.¹⁹⁴ For example, the Education Department of Tasmania said that an assistant scheme would be extremely supportive of young Tasmanians who have communication needs in the court system. Speak Out Advocacy Tasmania indicated support for an intermediary/communication assistant scheme, noting the benefits that accrued to those who accessed their advocacy services in any interactions with the justice system. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, submitted that such a scheme would make available the important set of skills by which to conduct the processes of equity and justice, when those processes must involve citizens whose disabilities and differences present particular challenges to asking and responding to questions, and giving and receiving language-based information. She said that such a scheme enables communication experts to bring their specialised knowledge about *communication processes* to the impartial facilitation of communication between those with communication needs, the police, counsel and the courts. One respondent to the Issues Paper, noting the importance of such a scheme, expressed the view that access to intermediaries should be provided on a compulsory basis for people with communication needs.¹⁹⁵ Two responses to the Issues Paper suggested that a pilot scheme and/or feasibility study should first be undertaken to determine whether an on-going scheme should be established.¹⁹⁶ In relation to which model of intermediary/communication assistant scheme might be most appropriate for Tasmania, the Director of Public Prosecutions nominated the intermediary scheme implemented in England and Wales. He noted that this model has attracted a lot of attention from the Royal Commission into Institutional Responses to Child Sexual Abuse. Since the Director of Public Prosecutions made this submission, the Royal Commission has recommended that all Australian States and Territories should work towards establishing intermediary schemes similar to the Registered Intermediary Scheme in England and Wales and that it should be available in sexual abuse cases at both the police interview and trial stages for anyone with a communication difficulty. The Commission notes that the long-term benefits of an intermediary scheme are likely to extend beyond eliciting accurate evidence in individual cases. Frequent exposure to

¹⁹³ A speech pathologist who wished to remain anonymous.

¹⁹⁴ The Tasmanian Aboriginal Community Legal Service of Tasmania, the Director of Public Prosecutions/Witness Assistance Service, Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, Joyce Plotnikoff, the Sexual Assault Support Service, Speak Out Advocacy Tasmania, the National Disability Service, speech pathologist, Natalie Leader, Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania and a speech pathologist who wished to remain anonymous and the Education Department of Tasmania.

¹⁹⁵ A speech pathologist who wished to remain anonymous.

¹⁹⁶ The Tasmanian Aboriginal Community Legal Service and the Director of Public Prosecutions/Witness Assistance Service.

intermediaries' advice is likely to generate cultural change throughout the legal profession in relation to appropriate courtroom questioning of people with communication needs.¹⁹⁷

3.4.41 With regard to the possible barriers that might impede the establishment of an intermediary/communication assistant scheme in Tasmania, respondents identified a number of matters including:

- possible increases in the length of court cases, privacy issues, a potentially detrimental impact on jurors' perceptions of witnesses' credibility;¹⁹⁸
- resource implications for courts¹⁹⁹ and, in particular, a possible increase in the cost of court proceedings;²⁰⁰
- the problem that different parties may have divergent understandings of intermediaries' roles, concern that intermediaries may exceed their designated role and/or fail to interact well with the people requiring their assistance;²⁰¹
- resistance from the legal profession.²⁰²

These matters highlight the need for intermediaries' role to be clearly defined and set down in legislation. This will avoid the problems of divergent understandings about that role, intermediaries' exceeding or indeed reluctance to perform fully, their designated role and any implications for witnesses' privacy. It would also assist in overcoming resistance to their use by the legal profession. The potential barriers identified in responses to the Issues Paper also highlight the necessity to educate the police, the legal profession and the judiciary about the role and benefits of an intermediary/communication assistant scheme. Additionally, they underline the need for proper training programs for intermediaries/communication assistants to prepare them for their work in the criminal justice system. Recommendations in relation to all these matters are dealt with in Part 5 of this Report. In relation to the resource implications of establishing an intermediary/communication assistant scheme in Tasmania, clearly there will be costs in establishing the scheme and in training intermediaries in the performance of their designated roles at different stages of the criminal justice process. As noted elsewhere,²⁰³

A fully fledged professional service such as that operating in the United Kingdom depends upon there being people with adequate training in adequate numbers, which in turn depends upon there being adequate training programs. Neither may be available in the absence of specific government provision for them. However, there are child psychologists [in Tasmania] and government and non-government advocacy service providers skilled in communicating with people with cognitive impairments. It has been suggested that the fiscal implications of providing additional tuition to prepare these people for the role of court intermediary would be negligible²⁰⁴ and that the cost of their employment in trials should be viewed in the same way as that associated with any expert witness tendered by the prosecution or interpreter appointed by

¹⁹⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I-II* (2017) 82–83.

¹⁹⁸ The Tasmanian Aboriginal Community Legal Service.

¹⁹⁹ The then Acting Chief Magistrate, Mr Michael Daly.

²⁰⁰ The Director of Public Prosecutions/Witness Assistance Service.

²⁰¹ A speech pathologist who wished to remain anonymous.

²⁰² Joyce Plotnikoff.

²⁰³ Henning, above n 57, 171.

²⁰⁴ David Caruso, 'Proposed reforms for the cross-examination of child witnesses and the reception and treatment of their evidence' (2012) 21 *Journal of Judicial Administration* 191, 216.

the court.²⁰⁵ There is also evidence that use of intermediaries and pre-recording 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 reduction in court time.²⁰⁶

In addition to the cost and time efficiencies deriving from improved case management and appraisal of the prospects of cases, the experience in England and Wales is that significant efficiencies also result from the reduction in witness questioning times during trials. This has been ascribed to the threefold impact of intermediary assistance and advice, the pre-trial recording of the entirety of witnesses' testimony and targeted pre-trial judicial directions about what questions counsel may ask at trial. Judges may now order that advocates' proposed questions be submitted to intermediaries pre-trial who will advise about their suitability in terms of witnesses' communication needs.²⁰⁷ Now, in England and Wales, advocates commonly email the proposed wording of their questions to intermediaries for advice pre-hearing, which reduces intermediary intervention during questioning.²⁰⁸ As noted above,²⁰⁹ in cases where these three measures are deployed, cross-examination times are usually no longer than 20 minutes. Accordingly, it would appear that the costs of an intermediary scheme are off-set, in the longer term, by the efficiencies it generates in trial times and case management.

3.4.42 It is clear from the submissions to the Institute that existing legislation does not provide a certain basis for implementing the totality of necessary measures to enable people with communication needs to participate in the criminal justice system. In particular, the current legislative framework does not make sufficiently explicit or detailed provision for the holding of pre-trial directions hearings and the giving of judicial directions to ensure that questioning of people with communication needs is adapted to their communication capacities. While existing legislated mechanisms have improved the position of people with communication needs in their encounters with the criminal justice system, they do not provide for the tripartite suite of measures necessary to achieve optimum results in that regard. Critically, there are no specific legislative measures dedicated to providing communication assistance to people with communication needs involved in the criminal justice process. Existing statutory provisions do not constitute a sufficiently certain basis for the employment of intermediary/communication assistants to provide pre-trial advice to counsel and courts, and communication support for people with communication needs, during trial questioning. While there are general provisions in the *Evidence Act 2001* (Tas) that might be utilised²¹⁰ 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.

3.4.43 As some respondents to the Issues Paper noted,²¹¹ in the absence of specific statutory provision, communication assistants/intermediaries may not readily be used for people with communication needs.

²⁰⁵ Ibid 231.

²⁰⁶ See for example, Davies, Henderson and Hanna, above n 143, 360; Hanna et al, *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (Institute of Public Policy, AUT University, 2010) 181, <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 and Prosecutions, *Responding to Sexual Assault: The Challenge of Change* (2005) 132.

²⁰⁷ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13, 24. See also the Advocates Gateway, *Ground Rules Hearing Checklist* (2016) <<https://www.theadvocatesgateway.org/images/toolkits/ground-rules-hearings-checklist-2016.pdf>> 4.

²⁰⁸ Cooper, above n 175, 194.

²⁰⁹ See [3.4.17].

²¹⁰ See discussion at [3.4.30]–[3.4.43].

²¹¹ The then Acting Chief Magistrate, the Director of Public Prosecutions/Witness Assistance Service, the Tasmanian Aboriginal Community Legal Service.

Alternatively, their use may occur in an ad hoc, case-by-case and, therefore, potentially inconsistent and uncertain manner.

3.4.44 Submissions to the Institute agreed that intermediary/communication assistant schemes can make a valuable contribution to ensuring that people with communication needs gain equal access to justice and equal treatment before the law. 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). These submissions confirmed the views of participants at the Ministerial Roundtable in October 2015, including representatives of Tasmania Police, the Law Society of Tasmania, the Bar Association, the Director of Public Prosecutions and the Courts, that their work would be facilitated by the availability of a communication assistant scheme in Tasmania.

3.4.45 Respondents to the Issues Paper supported the establishment of an intermediary/communication assistant regime in Tasmania, which has explicit legislative imprimatur and which is available to people with communication needs at all stages of the criminal justice process. These conclusions are confirmed by responses to the question asked in the Issues Paper about whether there should be no change to the current position in Tasmania with regard to implementing a statutory intermediary/communication assistant scheme for people with communication needs.

Should there be no change to the current provisions for people with communication needs?

Should no change be made to the current position in Tasmania with regard to implementing a statutory intermediary/communication assistant scheme for people with communication needs?²¹²

No responses to this question supported the option of not implementing any change to the current arrangements and measures for people with communication needs when involved in the criminal justice system.²¹³

3.4.46 Based on the submissions received, research and experience in other jurisdictions, the Institute is of the view that an intermediary/communication assistant scheme should be enacted for Tasmania. This recommendation accords with the research findings and understanding of what constitutes best practice for enabling people with communication needs to participate on an adequate footing in the criminal justice process. It also conforms to developments in other Australian jurisdictions and to the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Recommendation 1 – An intermediary/communication assistant scheme for Tasmania

Legislation should be enacted that creates an intermediary/communication assistant scheme for Tasmania.

Recommendations about the model for a Tasmanian intermediary/communication assistant scheme are detailed in Part 5 of this Report. Part 4 discusses the regimes established in other Australian and overseas jurisdictions. This discussion and submissions received by the Institute inform the recommendations made by the Institute in Part 5.

²¹² Question 7 of the Issues Paper.

²¹³ Respondents who addressed this question were the Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions/Witness Assistance Service, the Department of Health and Human Services (Disability and Community Services) the National Disability Service, Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, and the Sexual Assault Support Service.

Part 4

Intermediary/Communication Assistant Schemes in Other Jurisdictions

4.1 Introduction

4.1.1 This Part considers intermediary/communication assistant 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 below concentrates on these aspects of the different models.

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

4.1.3 In three Australian jurisdictions, South Australia, Western Australia and New South Wales,²¹⁴ there is statutory provision for some people with communication needs to be assisted in testifying by intermediaries/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 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 Report²¹⁵ and was implemented by the *Youth Justice and Criminal Evidence Act 1999* (UK). 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.

4.2.2 The 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

²¹⁴ *Evidence Act 1906* (WA) s 106F; *Criminal Procedure Act 1986* (NSW) ss 275B, 306ZK and sch 2 cls 88–90; *Evidence Act and Evidence Act 1929* (SA) s 14A.

²¹⁵ See Pigot Committee Report, above n 135.

functioning and adults who have a physical disorder or disability.²¹⁶ Intermediaries provide assistance at trials as well as to the police in communicating with these people during investigative interviews.²¹⁷ The Crown Prosecution Service has established procedures for the use of intermediaries for witnesses at the interview stage.²¹⁸ Additionally, a range of resources have been developed to assist the police and the legal profession in the use of intermediaries.²¹⁹ The experience with the use of intermediaries for witnesses during investigative interviews has prompted requests for its extension to defendants during such interviews.²²⁰

4.2.3 Under the *Youth Justice and Criminal Evidence Act*, a defendant is not currently eligible for the intermediary special measure. Amendments to the current regime provided in s 104 of the *Coroners and Justice Act 2009* (UK), which are yet to be implemented, will allow for defendants under 18 and those who are over 18 and suffer from a mental disorder or have a significant impairment of intelligence and social function and for that reason are unable to participate effectively in the court proceedings to give oral evidence at trial with the assistance of an intermediary.²²¹ 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 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.²²² Additionally, notwithstanding that under the *Youth Justice and Criminal Evidence Act* a defendant is not considered eligible for a Registered Intermediary, the High Court for England and Wales (Administrative Court) has ordered that the Ministry of Justice should reconsider this position and carefully consider whether intermediary assistance should be provided to defendants under the Registered Intermediary Scheme solely for the purpose of assisting defendants to give evidence in court (but not for the duration of the trial).²²³

4.2.4 A witness 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 and the provision of advice to counsel about the wording of their proposed questions.²²⁴ 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

²¹⁶ *Youth Justice and Criminal Evidence Act 1999* (UK) s 16.

²¹⁷ *Ibid* s 29.

²¹⁸ See Crown Prosecution Service (UK) (CPS), <https://www.cps.gov.uk/legal/s_to_u/special_measures/#content>.

²¹⁹ See, The Advocates Gateway, <<http://www.theadvocatesgateway.org/>>; CPS, *Guidelines on Prosecuting Cases of Child Sexual Abuse* (October 2013) <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/>.

²²⁰ 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.

²²¹ *Youth Justice and Criminal Evidence Act 1999* (UK) inserted by the *Coroners and Justice Act 2009* (UK) s 104 yet to be implemented.

²²² Note also that the CPS guide for practitioners specifies that s 104 of the *Coroners and Justice Act 2009* (UK) allows only for the provision of intermediary assistance to defendants while they are giving oral evidence at trial but not for the duration of the trial. However, *C v Senoaks* [2009] EWHC 3008 (Admin); *R v SH* [2003] EWCA Crim 1208 [CA 1-7]; *SC v United Kingdom* (2005) 40 EHRR 10; *R (P) v West London Youth Court and another* [2006] 1 WLR 1219; *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin); *R (OP) v Cheltenham MC and Others* [2014] EWHC 1944 (Admin); and *R v Walls* [2011] EWCA Crim 443 provide authority for the court to appoint a non-registered intermediary to support a defendant throughout the court process, including for the duration of the trial.

²²³ *R (OP) v Cheltenham MC and Others* [2014] EWHC 1944 (Admin) [46]–[48].

²²⁴ *Youth Justice and Criminal Evidence Act 1999* (UK) s 29; and see Cooper, above n 175, 194.

police investigative interviewing stage, at ground rules hearings and in court.²²⁵ 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.²²⁶

4.2.5 The Registered Intermediaries are a composite profession comprising speech and language therapists, psychologists, social workers, nurses, teachers or occupational therapists.²²⁷ 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.²²⁸ Witness Intermediaries in England and Wales 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 £1200.²²⁹

4.2.6 Since July 2010, there has been a steady increase in the number of advice enquiries and requests received by the Witness Intermediary Service for Registered Intermediaries. In July 2010, there were 111 and in May 2017 there were 540.²³⁰ The number per month reached 232 in October 2014. There was then a steady increase in the monthly average for referrals over the following six month blocks (230,²³¹ 288,²³² 392,²³³ 482,²³⁴ 507²³⁵ and 545²³⁶) until the six months prior to and including March 2017 (534). Referrals for April and May of 2017 were 498 and 540 respectively. There have been 2674²³⁷ requests for matching services for vulnerable witnesses received by the CPS this year, comprising 1822 children, and across the other vulnerabilities 402 with mental health disabilities, 1296 with learning disabilities and 229 with physical disabilities.²³⁸

4.2.7 As noted above, defendants are able to access unregistered intermediaries²³⁹ who are privately engaged at the discretion of the court and/or on request of defence counsel.²⁴⁰ Other than being impartial and owing a duty to the court, unregistered intermediaries have no obligation to comply with the Ministry of Justice Code of Practice and Code of Ethics or the guidance in the Registered Intermediary Procedural

²²⁵ See further the examples of the role an intermediary can play in the various case studies outlined in Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants*, (Policy Press, University of Bristol, 2015).

²²⁶ *Registered Intermediary Procedural Guidance Manual*, above n 13.

²²⁷ 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>.

²²⁸ A person skilled at supporting people with Autism for example will most likely be assigned to a witness with Autism.

²²⁹ See further Watts, above n 227.

²³⁰ Statistics received from CPS July 2017.

²³¹ October 2103–March 2014.

²³² April 2014–September 2014.

²³³ October 2014–March 2015.

²³⁴ April 2015–September 2015.

²³⁵ October 2015–March 2016.

²³⁶ April 2016–September 2016.

²³⁷ Statistics received from CPS July 2017.

²³⁸ Statistics received from CPS July 2017 (NB a witness may have had more than one vulnerability).

²³⁹ See [4.2.3].

²⁴⁰ See further instructions via the CPS <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>> and Communicourt <<http://www.communicourt.co.uk/>>.

Guidance Manual. Unregistered intermediaries are intermediaries who can be engaged for all witnesses²⁴¹ including defendants. They are not bound by the agreed fee structures for Registered Intermediaries and are able to charge whatever rate and expenses they choose.²⁴² This means that unregistered intermediaries are able to charge at a considerably higher rate than Registered Intermediaries, which may limit their availability to defendants.

4.2.8 The Witness Intermediary Service is strongly supported by the judiciary, lawyers, the police and associated professionals. An extensive range of training resources have been developed which are available through the Advocates Gateway.²⁴³ Also relevant in this regard is the Equal Treatment Bench Book.²⁴⁴

4.2.9 To support the provisions under the *Youth Justice and Criminal Evidence Act 1999* (UK), Criminal Practice Directions have been settled for courts in England and Wales covering vulnerable people in the courts, ground rules hearings to plan the questioning of vulnerable witnesses and defendants, intermediaries, vulnerable defendants, and measures to assist witnesses and defendants to give evidence.²⁴⁵ An extensive checklist²⁴⁶ has also been created 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:

- 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 compound comprehension and communication difficulties. 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;

²⁴¹ Including prosecution witnesses, although the prosecution predominantly use Registered Intermediaries.

²⁴² Plotnikoff and Woolfson, above n 225, 298.

²⁴³ See further The Advocates Gateway at <<http://www.theadvocatesgateway.org/resources>>.

²⁴⁴ The Judicial College (UK), above n 12.

²⁴⁵ Criminal Practice Directions [2015] EWCA Crim 1567 available at: <<https://www.judiciary.gov.uk/wp-content/uploads/2015/09/crim-pd-2015.pdf>>.

²⁴⁶ See *Judicial College Bench Checklist: Young Witness Cases*, above n 167.

- 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.²⁴⁷

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

4.2.10 In recognition of the specialised nature of cross examination of vulnerable witnesses, the Inns of Court College of Advocacy (ICCA), formerly the Advocacy Training Council (ATC), has devised a training course for all advocates who undertake cases involving vulnerable witnesses.²⁴⁸ This was developed in response to an announcement in September 2014 by the Lord Chancellor that all publicly funded advocates who act for the defence in child sexual offences cases would be required to attend an appropriate accredited course on cross-examining vulnerable witnesses.²⁴⁹ This had not yet been instituted at the time of the writing of this Report although it is still anticipated that it will occur.

4.2.11 Nevertheless, after stepping down from his position as DPP, Sir Keir Starmer QC suggested that more profound reform might be necessary. He expressed concern about whether the criminal justice system could ever respond adequately to victims of violence and abuse through, what he described as 'bolt-ons' to the existing arrangements and suggested that cross-examination of vulnerable witnesses should be taken over by the trial judge.²⁵⁰

4.2.12 In September 2016, the Lord Mayor of London, Sadiq Khan, announced that the City of London would launch two Child Houses in London in 2017 which will provide medical, investigative and emotional support for child victims of sexual abuse or exploitation. Criminal justice aspects of aftercare will be embedded in the service, with evidence gathering interviews to be led by child psychologists on behalf of the police, and court evidence obtained through video links to increase the speed with which cases are dealt and to reduce the trauma experienced by children involved in the criminal justice process.²⁵¹ These Houses will adopt the Barnehus model established in Norway.²⁵²

South Australia

4.2.13 Following extensive public disquiet about the St Anne's School case in 2011 (discussed at [2.2.21]), the South Australian Government implemented a suite of legislative reforms in 2015 to improve access to

²⁴⁷ For details see *R v Barker* [2010] EWCA Crim 4, [42].

²⁴⁸ See the ICCA, *National Training Programme 2016–2018* (10 March 2017) <<https://www.icca.ac.uk/advocacy-the-vulnerable/national-training-programme-2016-18>>.

²⁴⁹ The ICCA recommended that any training requirement should apply to all advocates who undertake cases involving the vulnerable, whether they act for the prosecution or the defence, and regardless of whether the cases are publically-funded or not (Judge Rook QC, 'Advocacy and the vulnerable: training for advocates this autumn' on *The Law Society* (UK) (24 April 2015) <<http://www.lawsociety.org.uk/communities/solicitor-judges-division/articles/advocacy-and-the-vulnerable/>>).

²⁵⁰ Sir Keir Starmer QC, 'Britain's criminal justice system fails the vulnerable. We need a Victims' Law', *The Guardian* (UK), 3 February 2014 reported in Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses' (2015) *Criminal Law Review* 107, 112.

²⁵¹ Mayor of London, 'UK's first Child Houses to launch for young victims of sexual abuse' (Media Release, 13 September 2016) <<https://www.london.gov.uk/press-releases/mayoral/uks-first-child-houses-to-launch>>.

²⁵² See below at [4.3.9].

justice for people with communication needs.²⁵³ A principal component of these reforms is a statutory scheme, which gives people with 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.²⁵⁴ Such assistance may be given to victims, witnesses or defendants.

4.2.14 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 communication needs. These people are designated ‘communication partners’ by the legislation.²⁵⁵ 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.²⁵⁶ Additionally, *courts* may approve people to provide communication assistance.²⁵⁷ While communication partners work on a voluntary basis, they undertake a training program prior to approval.

4.2.15 Courts may also approve the use of devices (like a speak and spell communication device) to facilitate the taking of evidence from witnesses.²⁵⁸

4.2.16 South Australia has also made provision for communication assistance to be provided during the pre-trial investigative stage of the criminal justice process (see the *Summary Offences Regulations 2016* (SA), rr 19 and 23 created under the *Summary Offences Act 1953* (SA) (s 74H) which 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 interviews). While there is no *legislative* provision in South Australia for communication assistance to be available during prosecution and defence counsel interviews, it is apparent that many agencies, including the Legal Services Commission, solicitors, members of legal teams and Child Protection Services, are able to request the assistance of communication partners.²⁵⁹

4.2.17 The South Australian model arguably constitutes one of the most far-reaching and flexible responses to providing communication assistance for people with communication needs. Section 14A of the *Evidence Act 1929* (SA) is likely to be particularly instrumental in this regard. It applies broadly to all proceedings and to all witnesses with 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;
- (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;

²⁵³ *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

²⁵⁴ The *Evidence Act 1929* (SA) s 12AB(2) (provision for communication assistants in pre-trial special hearings to record the entirety of the evidence of witnesses with complex communication needs) and ss 13A and 14A *Evidence Act 1929* (SA) (provision for communication assistance to people with complex communication needs during trials).

²⁵⁵ *Evidence Act 1929* (SA) s 4.

²⁵⁶ Section 4 of the *Evidence Act 1929* (SA) contains a definition of ‘communication partner’ in these terms.

²⁵⁷ *Evidence Act 1929* (SA) ss 12AB(5), 13A(5A), 14A(4), enable courts to approve people other than ‘communication partners’ to provide communication assistance to witnesses.

²⁵⁸ *Evidence Act 1929* (SA) ss 12AB(2)(a)(ii), 13A(2)(e)(ii), 14A(3)(b).

²⁵⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23903.

- (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.

4.2.18 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.

4.2.19 While at the time of writing this Report, communication partners had not yet been used in any court proceedings in South Australia,²⁶⁰ they had been utilised by South Australia Police during police interviews, predominantly, it appears, for witnesses, but also for at least one suspect.²⁶¹ South Australian Hansard for the House of Assembly for 20 June 2017 recorded that,

During the first six months of implementation, [from 1 July 2016] there were 24 contacts with the service to request or discuss the support of a communication partner, with the majority of these being through South Australia Police's victim management section.

From 1st January this year to 31st May, there were 55 contacts with this service [total=79 since commencement]. Since the commencement of the service, 27 volunteers have been approved and registered as communication partners and have passed a robust selection process, including a three-day training program and appropriate criminal screening checks. Volunteer interest continues to be strong, and the service has attracted people from professional backgrounds with an excellent knowledge and experience of people living with disability.²⁶²

4.2.20 A primary weakness in the South Australian scheme is that it does not mandate that intermediaries are to be used. This may result in some people in need of communication assistance falling through the cracks or the development of inconsistencies in the use of communication partners and assistants in different locations.

New South Wales²⁶³

4.2.21 In New South Wales, while there are gaps across the criminal justice system in the terms of access to justice for people with 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.²⁶⁴ The JIRT's role is to undertake joint investigations of statutory child protection matters that

²⁶⁰ Ibid 23905, 23908.

²⁶¹ Ibid 23908.

²⁶² South Australia, *Parliamentary Debates*, House of Assembly Hansard, 20 June 2017, 10072-10073 (A Piccolo).

²⁶³ 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 to 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.

²⁶⁴ 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)>).

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.

4.2.22 The JIRT team is effectively the primary gateway for receiving victims of child sex offences in NSW, with teams operating throughout most of the State. During the proceedings of the Royal Commission into Institutional Responses to Child Sex Abuse there have been criticisms of the specialist interviewing in NSW due to the exclusion of parents and support persons from that process.²⁶⁵

4.2.23 It is important to note that the JIRT team is only available as 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 justice 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.²⁶⁶

4.2.24 There has been provision for intermediaries/communication assistants during trials in New South Wales for some time. The relevant provisions are ss 275B and 306ZK of the *Criminal Procedure Act 1986* (NSW).²⁶⁷ 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 Witness Intermediary Service or of the kind stipulated²⁶⁸ for the pilot scheme instituted by the *Criminal Procedure Act 1986* (NSW) sch 2 pt 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.²⁶⁹

4.2.25 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.²⁷⁰ This suggests that there may be a misconception abroad that support people must always play a purely passive role in proceedings as

²⁶⁵ See Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 147. 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>>.

²⁶⁶ As discussed with Victims Services NSW, above n 264.

²⁶⁷ *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*.)

²⁶⁸ See *Criminal Procedure Act 1986* (NSW) sch 2 pt 29 cl 89(2).

²⁶⁹ Victoria Law Reform Commission (VLRC), *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) [8.85].

²⁷⁰ See, for example, Victims Services, Department of Justice, *Justice Journey: Information for victims of crime in NSW*, <http://www.victimsservices.justice.nsw.gov.au/Documents/bk14_justice-journey.pdf>.

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.

4.2.26 In 2015, NSW supplemented the existing measures in ss 275B and 306ZK(3)(b) of the *Criminal Procedure Act 1986* (NSW) by inserting pt 29 into sch 2 of that Act. This creates a pilot scheme which is to operate for three years²⁷¹ in two district courts incorporating a ‘children’s champion/witness intermediary’ 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 pilot operates on a mandatory basis by *mandatorily* assigning 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.²⁷² However, in specified circumstances the court is not required to appoint a witness intermediary 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.²⁷³ 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 witness intermediary.²⁷⁴

4.2.27 The pilot scheme applies only to child complainants and child witnesses in prescribed sexual offences cases and so, not to defendants²⁷⁵ or other witnesses who have communication needs.²⁷⁶

4.2.28 The scheme narrowly circumscribes the people who may perform the role of intermediary. The Victim’s Services Department of the Justice Department of New South Wales, must appoint a panel of witness intermediaries. Only people with tertiary qualifications in the fields of psychology, social work, speech pathology, occupational therapy or like fields may be appointed.²⁷⁷ The legislation specifically proscribes the appointment of a witness intermediary who is a relative, friend or acquaintance of the witness, or has assisted the witness in a professional capacity (otherwise than as an intermediary), or is a party or potential witness in the proceedings concerned.²⁷⁸ 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 communication needs may not communicate willingly or easily with people with whom they do not have an established relationship of trust.

4.2.29 In contrast to the narrowness of the new pilot scheme, s 275B *Criminal Procedure Act 1986* (NSW) applies in all proceedings and to all witnesses with communication needs. There is no requirement that the person who provides the communication assistance 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.

²⁷¹ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 81.

²⁷² *Ibid* sch 2 pt 29, cl 89(3).

²⁷³ *Ibid* sch 2 pt 29, cl 89(4).

²⁷⁴ *Ibid* sch 2 pt 29, cl 89(3)(b).

²⁷⁵ *Ibid* sch 2 pt 29, cls 82, 83, 88(1).

²⁷⁶ *Ibid* sch 2 pt 29, cls 82, 88(1).

²⁷⁷ *Ibid* sch 2 pt 29, cl 89(1)–(2).

²⁷⁸ *Ibid* sch 2 pt 29, cl 89(5).

4.2.30 Section 306ZK also has broader application than the new pilot scheme. It applies to children and people with cognitive impairments²⁷⁹ in all criminal proceedings, some civil proceedings arising from personal assaults, applications for apprehended violence orders, 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.²⁸⁰ Section 306ZK explicitly applies to defendants as well as to other witnesses²⁸¹ 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.²⁸² The court may also permit more than one support person to be present.²⁸³ The limitation of this provision is that it does not apply to complainants who are vulnerable people (children and people with cognitive impairments)²⁸⁴ in sexual offences cases.²⁸⁵ These complainants are entitled to have a support person with them when they testify including a parent, guardian, relative, or friend, or (interestingly) a person assisting the complainant in a professional capacity.²⁸⁶ However, there is no provision for these complainants to be assisted by the support person as an interpreter. Nevertheless, s 275B (with its particular limitations) continues to apply in such cases.²⁸⁷ It is unclear why complainants in sexual offences cases who are vulnerable people are distinguished in this way from vulnerable people in other criminal cases. Prima facie this distinction is discriminatory because it disentitles vulnerable complainants in sexual offences cases to the full panoply of assistance available to people with communication needs in other criminal cases. Furthermore, the discriminatory nature of this provision is magnified by the fact that defendants in sexual offences cases who qualify as vulnerable people are not excluded from the application of s 306ZK.

4.2.31 The designated role of the communication assistants under ss 275B and 306ZK is that of an interpreter.²⁸⁸ They do not have either advisory or interventionist functions.²⁸⁹ Under the pilot scheme, witness intermediaries' role is to communicate and explain to witnesses the questions asked and to explain to the court the answers given.²⁹⁰ They also have an advisory function in that they are to provide written reports to the court on the communication needs of witnesses.²⁹¹ The pilot scheme is also being utilised to provide quasi-interpretive and advisory assistance at the police investigation stage of the process.²⁹²

²⁷⁹ Ibid s 306M.

²⁸⁰ Ibid s 306ZA.

²⁸¹ Ibid s 306ZK(6).

²⁸² Ibid s 306ZK(3)(b).

²⁸³ Ibid s 306ZK(5).

²⁸⁴ Ibid s 306M.

²⁸⁵ Ibid s 294C(7).

²⁸⁶ Ibid s 294C(1), (3).

²⁸⁷ Ibid s 294C(8).

²⁸⁸ Ibid 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 with any difficulty in giving evidence associated with an impairment or disability); *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) sch 2 pt 29, cls 88–90.

²⁸⁹ VLRC, above n 269, [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) 22–23.

²⁹⁰ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 88.

²⁹¹ Ibid sch 2 pt 29, cl 89(6).

²⁹² Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23913, 23915, 23919–23923.

4.2.32 Additionally, it is apparent that, in practice, under this scheme, witness intermediaries are being accorded an interventionist role so that they are able to alert courts and the police to inappropriate questions.²⁹³ They also converse with defence and prosecution counsel about the appropriateness of questions to be asked.²⁹⁴ The scheme incorporates provisions for practice directions to be given and the making of rules of court.²⁹⁵ This enables procedures for ground rules hearings to be established.

4.2.33 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 restrictions that exclude particular cohorts from communication assistance.

4.2.34 The New South Wales pilot scheme commenced in mid-2016 in two district courts, one in Downing Centre and the other in Newcastle. The pilot incorporates training for the police and other associated parties to be provided by Professor Penny Cooper. It also involves the appointment of two additional judges to assist with the case demand.²⁹⁶ Victim's Services NSW has recruited, registered and trained a pool of 60 tertiary qualified witness intermediaries who work across the two courts.²⁹⁷ It is too early to say how these provisions are working but an interim implementation report has been sent to Parliament and the evaluation will continue for a three-year period. In November 2016, evidence was given to the Royal Commission into Institutional Responses to Child Sexual Abuse that, up to that date, eight trials had occurred under the scheme with another 40 in the pipeline and 31 preliminary hearings had occurred with 15 foreshadowed, which was described as 'quite a volume'.²⁹⁸

4.2.35 The Institute has been advised²⁹⁹ that at least one judge in New South Wales has used an intermediary in a competence hearing in relation to an elderly complainant in a sexual assault case who, in addition to her intellectual disabilities, was very difficult to understand. This process is authorised by s 13(1) & s 13(8) of the *Evidence Act 1995* (NSW).³⁰⁰ Additionally, the use of an intermediary in this way suggests a growing understanding of the important role that intermediaries can play in enabling witnesses with communication needs to participate in the criminal justice process.

Western Australia

4.2.36 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

²⁹³ Ibid 23913, 23915–23916, 23919–23923.

²⁹⁴ Ibid 23915–23916.

²⁹⁵ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cls 93, 94.

²⁹⁶ NSW Victims Services, above n 264.

²⁹⁷ Ibid.

²⁹⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23912.

²⁹⁹ Email advise from Mary Woodward, a witness intermediary working in New South Wales.

³⁰⁰ See discussion at [3.4.30]–[3.4.31].

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.

4.2.37 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 sch 7 offences,³⁰¹ 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 sch 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.

4.2.38 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, 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.³⁰²

4.2.39 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.

4.2.40 It appears that communicators have not been utilised to any great extent in Western Australia.³⁰³ A communicator does appear to have been used recently in at least one case on the initiative of the Child Witness Service of WA.³⁰⁴ 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.³⁰⁵ Notably, the scheme was enacted in 1992, so its non-use until 2011 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.³⁰⁶

4.2.41 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

³⁰¹ The *Evidence Act 1906* (WA) sch 7 also refers to children in respect of whom applications are made under pts 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’.

³⁰² Section 106R *Evidence Act 1906* (WA).

³⁰³ 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.

³⁰⁴ NSW Justice Department, above n 72, [1.55].

³⁰⁵ VLRC, above n 269, [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) 22–23.

³⁰⁶ Jackson, above n 303, 9; NSW Justice Department, above n 72, [1.55].

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 or physical 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 or constitutes the entirety of their evidence taken at a special hearing.³⁰⁷

Victoria

4.2.42 The VLRC Report, *The Role of Victims of Crime in the Criminal Trial Process*, was tabled in the Victorian Parliament on 22 November 2016. The Report contains 51 recommendations to give victims adequate information and support, improved opportunities to participate in trials, and more protection from trauma and intimidation during trials. The Commission recommends the establishment of an intermediary scheme in Victoria modelled on that in England and Wales. Intermediaries' functions should include providing communication assistance during police interviews as well as at trials.³⁰⁸ It is also recommended that the court be *required* to appoint an intermediary for all victims under the age of 16 unless the child requests that an intermediary not be appointed and is assessed as not needing one.³⁰⁹ For child victims over 16 but under 18 years of age, the Commission recommends that the court should be empowered to appoint an intermediary either on application or of its own motion.³¹⁰ Further, intermediaries should be available to adults after an assessment is made, based on whether a disability, as defined by the *Equal Opportunity Act 2010* (Vic), is likely to diminish the quality of their evidence.³¹¹

4.2.43 The Victorian Government has allocated \$2.6 million for the establishment of an intermediary scheme to support victims when giving statements to police and testifying in court. This decision was made after of a child victim, who was allegedly raped by three brothers, refused to give evidence because he didn't want to be cross examined, which meant the trial could not proceed.

4.2.44 Additionally, the Government has donated \$1 million to the Alannah & Madeline Foundation for their Cubby House program. The Cubby House program was launched at the Broadmeadows Children's Court in October 2015 and is a partnership between the Foundation, the Children's Court of Victoria and the Victorian Department of Health and Human Services. It is a purpose-built space within the court building and employs a dedicated youth worker to support children attending the court. It is also constructed to enable children's assigned DHHS support workers to supervise them via an adjoining office.³¹²

4.2.45 At the time of writing this Report, while a witness intermediary scheme was in the process of being established in Victoria, details of its parameters and characteristics were not yet in the public domain.

³⁰⁷ *Evidence Act 1906* (WA) ss 106HA, HB.

³⁰⁸ VLRC, *The Role of Victims of Crime in the Criminal Trial Process*, Report 34, 165–174.

³⁰⁹ *Ibid* 172–173.

³¹⁰ *Ibid*.

³¹¹ *Ibid*.

³¹² Alannah & Madeline Foundation, '\$1 million announced for Cubby House' (Media Release, 10 August 2017) <<https://www.amf.org.au/media/1-million-announced-for-cubby-house/>>.

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 legislate for the use of intermediaries for children and to initiate a regulation-making power to prescribe procedures for their use. However, this decision is currently on hold.³¹³

4.3.2 It has been reported that since 2012, a number of courts in New Zealand have been trialling the use of intermediaries, applying s 80 of the *Evidence Act 2006* (NZ).³¹⁴ They have been appointed for both defendants and witnesses with communication impairments.³¹⁵

4.3.3 Section 80 is a broad ranging provision enabling communication assistance to be provided in a variety of forms — oral, written or technological, to both defendants and witnesses who have a ‘communication disability’ or who lack ‘sufficient proficiency’ in English to understand proceedings or give evidence.³¹⁶ Such assistance may be ordered by courts on their own initiative or on the application of counsel. Communication assistance need not be provided to defendants if Judges consider that they can sufficiently understand the proceedings and, where they testify, if they can sufficiently understand questions and respond adequately to them. In the case of witnesses, communication assistance need not be provided if they can sufficiently understand questions and respond adequately to them.³¹⁷ Communication assistants must act impartially, in a manner akin to interpreters.³¹⁸

4.3.4 In 2015, the New Zealand Court of Appeal approved the use of a communication assistant in a sexual offences case for a young teenage complainant with Down’s syndrome and significant language impediments. The Court stated:

The accused’s right to a fair trial is a keystone of our criminal justice system. It is not the only keystone. People with intellectual difficulties and challenges should be able to come to our Courts and present their evidence in a way that is tailored to their needs to ensure that the trier of fact ... can be as confident as possible that the answers are true answers, that is as to what occurred, rather than the witness being confused and challenged by the questions being asked.³¹⁹

It is not known how extensively s 80 is used in New Zealand cases for people with ‘communication disabilities’ but it does not appear to be routinely or consistently employed. Further, there appears to be some doubt that the provision can legitimately be applied to developmentally normal children because they may not have a ‘communication disability’ within the meaning of the section.³²⁰ Accordingly, the New Zealand Law Commission has recommended that s 80 be reformed to make it clear that it applies not only

³¹³ New Zealand Law Commission, *The 2013 Review of the Evidence Act 2006*, Report No 127 (2013) <<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R127.pdf>> [1.47].

³¹⁴ Emily Henderson, *Helping communication-impaired defendants and witnesses* (2016) New Zealand Law Society <<https://www.lawsociety.org.nz/lawtalk/issue-902/helping-communication-impaired-defendants-and-witnesses>>.

³¹⁵ *Ibid.*

³¹⁶ *Evidence Act 2006* (NZ) s 4.

³¹⁷ *Ibid* s 81.

³¹⁸ Henderson, above n 314.

³¹⁹ *R v Hetherington* [2015] NZCA 248.

³²⁰ Elisabeth McDonald and Yvette Tinsley, ‘Evidence Issues’ in E McDonald and Y Tinsley (eds), *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011) 279, 312–313.

to people who have a ‘communication disability’, but also to those who may struggle to comprehend questions.³²¹

South Africa

4.3.5 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.³²² 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.³²³ Versions of the scheme have been adopted in Namibia and Zimbabwe.

Israel

4.3.6 In Israel, there is a presumption that children will not testify in court.³²⁴ 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.³²⁵ They are the only people who may question children and specified vulnerable adult witnesses.

4.3.7 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.³²⁶ The interrogators are then responsible for making unreviewable decisions about whether the witnesses will testify in court and whether further questioning should take place at any stage.³²⁷ Interrogators also assess children’s capacity 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

³²¹ New Zealand Law Commission, *Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, Report 136 (2015) [4.109].

³²² 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.

³²³ 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>.

³²⁴ 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.

³²⁵ Powell, Bowden and Mattison, above n 322.

³²⁶ Henderson, above n 324.

³²⁷ 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).

provided by interrogators. If witnesses are not permitted to testify, defence counsel can only challenge their accounts by testing interrogators' assessment of their reliability.

4.3.8 If witnesses 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.³²⁸

Norway

4.3.9 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. A number of Barnehus were created as a result of an Action Plan against domestic violence. They are financed collaboratively by the Ministry of Justice and the Police, the Ministry of Health and Care Services and the Ministry of Children, Equality and Social Inclusion. Their aim is to provide comprehensive investigative processes and support services for designated victims of abuse, including investigative interviews, forensic examinations, medical treatment and follow-up for children and families.

4.3.10 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, witnesses' lawyers and a psychologist from the Barnehus observe the interview from the court hearing room. The psychologist assesses the witness's psychological health as the interview progresses. When interviewing officers are satisfied that they have obtained comprehensive accounts of witnesses' 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.³²⁹ If the child is over 15 years of age the interview will be conducted at the courthouse, but specialist interviewers still have sole responsibility for conducting interviews.

4.3.11 Prior to interviews, relevant information is obtained about witnesses' background and the circumstances of their disclosures. There are usually two meetings prior to interviews, the first involving the interviewer, an advisor from the Children's House, a police lawyer and/or a representative from the Child Protection Service. The second meeting is held immediately prior to the interview and involves the lawyer in charge of the interview,³³⁰ the police interviewer, a psychologist or counsellor from the Children's House and other legal representatives where appropriate. During this meeting, the perceived challenges of the interview are discussed, along with the level of information to be expected from the child. The interviewer then presents a plan for the interview.

4.3.12 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

³²⁸ Henderson, above n 324.

³²⁹ See Watts, above n 227.

³³⁰ Previously a Judge was in charge of the interview.

and Human Development (NICHD) Investigative Interview Protocol. The extended forensic interview protocol splits the interview phase into seven sessions: establishing rapport, introducing narrative practice, developmental screening of the child and learning about the child, introducing topics of alleged abuse, follow up and clarification of information and closure.³³¹ The method also stresses the importance of using props like pictures, drawing materials or puzzles to encourage further verbal explanations from the child when needed. An important aspect of this structure is the separation of the interview into shorter sessions, the scheduled breaks being for the child to relax, play and get something to eat and for the interviewer and observers to share their impressions of the child's emotional levels, language skills and behaviour in the interview situation (first break) and to liaise about any areas of omission prior to the last session, which has the objective of establishing a basis for a positive end to the interview (and create an opening for a potential second interview).

4.3.13 The aim of this process is to enable interviews with children and people with mental impairments to be conducted only once. Unless witnesses make further disclosures at a later date, 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 interviewees.³³² 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.

4.3.14 An evaluation in 2012 of the Barnehus regime in Norway concluded that it is working as it was intended, and that the witnesses themselves found this process helpful and positive.³³³ Practitioners in Norway stress that the Barnehus is producing far better results, both in terms of the quality of evidence and the promotion of children's wellbeing, than police station or court-based alternatives.³³⁴

Iceland

4.3.15 The Barnehus model in Norway is based on the Barnahus model established in Iceland in 1998, which is a child- friendly, interdisciplinary and multiagency centre where interdisciplinary professional work is conducted under one roof in investigating suspected child sexual abuse cases and providing appropriate support for child victims.³³⁵

4.3.16 The main differences between the Norwegian and Icelandic models are that in Iceland investigative interviews are conducted by a psychotherapist trained in forensic interviewing and that exploratory interviews may be undertaken if children exhibit signs or symptoms of sexual abuse which they have not

³³¹ To be able to interview children over seven years of age, police must have completed a three-year bachelor degree, a master degree, and a one-year interviewing course. To qualify to interview children under seven years of age, they have to complete an additional year of training.

³³² See further K Hanna et al, '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.ZlRJMv5I.dpuf>>; T Myklebust, 'The Position in Norway' in J R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 147, 157.

³³³ *Barneshus-evalueringen*, Politihøgskolen (Norwegian Police University College) 2012.

³³⁴ Scottish Court Service, above n 5, 24.

³³⁵ The Icelandic system is based on the National Children's Advocacy Center, which was created in the United States in 1985.

yet disclosed.³³⁶ This early intervention provides the opportunity for children to disclose abuse when they otherwise might not do so, and in some cases enables information about abuse to be elicited from children who may not have been able to make a disclosure without the support and skills of the interviewer. In 2014, approximately 48 per cent of exploratory interviews resulted in disclosure of sexual abuse.³³⁷

4.3.17 Since its introduction in 1998, the Barnahus has delivered compelling results — a trebling of the number of perpetrators charged, a doubling of the number of convictions, and better therapeutic outcomes for children and their families.³³⁸

4.4 Evaluation

4.4.1 Where they are utilised, it appears that intermediary/communication assistance regimes are generally well regarded.³³⁹ 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.’³⁴⁰

4.4.2 Early indications are that the Pilot Scheme in NSW is being well received. Evidence given to the Royal Commission into Institutional Responses to Child Sexual Abuse indicates that the legal profession, including defence counsel have ‘embraced’ the intermediary scheme.³⁴¹ The hope is that the pilot will be extended beyond its initial three-year period.³⁴² One witness gave the following evaluation of defence and prosecution counsels’ views of the intermediary scheme:

Certainly, my experience has been that both parties, both defence and Crown, have been very open to the assistance of the witness intermediary. I think the use of the terminology “witness intermediary” rather than “children’s champion” is one that is encouraging defence counsel to see the witness intermediary as what they are intended to be — that tool of communication to enable the witness to give the evidence in a succinct fashion and in a way that enables that communication. So, the use of the term “witness intermediary”, which, in my experience, is what has been happening at court, is one that is very positive. Once people understand the role of the witness intermediary, they have really embraced it.³⁴³

4.4.3 Advice given to the Royal Commission into Institutional Responses to Child Sexual Abuse in November 2016 by people working with the South Australian scheme was that it will result in a ‘significant improvement’³⁴⁴ in the evidence gathering process. Evidence given to the Royal Commission also suggested that the ‘climate’ around the South Australian scheme is positive.³⁴⁵

³³⁶ *Barnahus: Improving the response to child sexual abuse in England*, Report by the Children’s Commissioner for England (13 June 2016) <<https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>>.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ 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.

³⁴⁰ *Ibid.*

³⁴¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23917.

³⁴² *Ibid* 23929.

³⁴³ *Ibid* 23917.

³⁴⁴ *Ibid* 23911.

³⁴⁵ *Ibid* 239010.

4.4.4 Having reviewed the evidence about Australian and international intermediary schemes, the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that State and Territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales.³⁴⁶

4.4.5 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.³⁴⁷

4.4.6 There is strong evidence that use of intermediaries, particularly when coupled with the pre-recording of evidence and pre-trial directions hearings, 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.³⁴⁸ As noted above at [3.4.17] and [3.4.41] the control of questioning, particularly cross-examination, achieved by the involvement of intermediaries/communication assistants and their appraisal of the wording of questions, can dramatically reduce questioning and, therefore, trial times.

4.4.7 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 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.³⁴⁹

4.4.8 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 communication needs. But there, 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.

4.4.9 Additionally, the judiciary and legal practitioners must be prepared to accord intermediaries a meaningful interventionist role. 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

³⁴⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, (2017) *Criminal Justice Report: Parts VII-X*, Recommendation 59, 101.

³⁴⁷ Ibid.

³⁴⁸ 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 et al, above n 206, 181; Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005) 132.

³⁴⁹ P Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (City University London, 2012) 13.

the intermediary.³⁵⁰ 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.³⁵¹

4.5 Human rights implications

4.5.1 A number of human rights are relevant to the matters considered in this Report. Of primary significance 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 in the *ICCPR* to which Australia is a signatory.³⁵² It is important to note that the right to a fair trial is now recognised to be a triangulation of fair trial rights comprising the rights of the accused, the victim, and the rather more amorphous rights of the community.³⁵³ The rights of all three cohorts are compromised where victims, witnesses and defendants cannot be heard because of communication impairments or impediments.

4.5.2 Moreover, as noted at [1.1.8] courts have an obligation to comply with the human rights framework set out in art 12 of the UN *Convention on the Rights of the Child* and art 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.

4.5.3 Nevertheless, there may be concern that the use of intermediaries/communication assistants in a confrontational setting may impede parties' right to undertake effective cross-examination. In this regard, the principal concern is whether the use of an intermediary/communication assistant will prevent, parties and most particularly, the defence, from bringing to bear the full forensic techniques of the advocate. This is also a concern in relation to restrictions the court might place on the way cross-examination may be conducted. The answer is that while both measures undoubtedly truncate the use that can be made of the full panoply of cross-examination techniques, this is necessary to ensure compliance with best practice principles for obtaining comprehensive accounts from people with communication needs and to enabling them to participate fully in the justice process.³⁵⁴ The use of intermediaries/communication assistants provides a greater insurance against unsuitable questioning than relying solely on counsel or the trial judge to ensure that questions are appropriately framed. Their particular expertise is not in this area. Their specialist knowledge is rather of the traditional mode of cross-examination.

4.5.4 It must be stressed that the Institute's recommendation is for intermediaries/communication assistants to be available to all participants in the criminal justice process who have communication needs

³⁵⁰ See criticism of the United Kingdom and South African processes in Hanna et al, above n 206.

³⁵¹ 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>>.

³⁵² *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered force 23 March 1976); entered into force for Australia 13 November 1980; acceded to the First Optional Protocol 25 September 1991, ratified 25 December 1991. The rights in question are contained in arts 7, 10, 14.

³⁵³ See eg *R v A (No 2)* [2002] 1 AC 45, [38] (Lord Steyn referring to 'the familiar triangulation of interests of the accused, the victim and society'); *Attorney General's Reference No 3 of 1999* [2001] 2 AC 91, 118 (Lord Steyn); *R v H* [2004] 2 AC 134, [12]; *R v Grant* [2007] 1 AC 1, [17] (Lord Bingham); *R v Mayers* [2009] 1 Cr App R 3 and see for Australian jurisprudence extending the right to a fair trial beyond the defendant, *Barton v The Queen* (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J), quoted in *Dietrich v The Queen* (1992) 177 CLR 292, 335 (Deane J); *Jago v District Court of New South Wales* (1989) 168 CLR 23, 33 (Mason CJ), 49–50, 54 (Brennan J); *R v Lodbj* (2006) 199 FLR 250, 263–4 [54]–[57] (Whealy J); *Ragg v Magistrates Court of Victoria* (2008) 18 VR 300, 319 [77] (Bell J); *R v Wilkie* (2005) 193 FLR 291, 305 [54] (Howie J).

³⁵⁴ His Hon Commr Sleight, above n 159, 3 citing J Spencer and R Flinn, *The Evidence of Children; the Law and Psychology*, (2nd edn, Blackstone Press, 1993) 307.

— suspects, defendants, victims and other witnesses. The intention is to enhance the quality of access to justice for all these groups. Accordingly, the establishment of an intermediary/communication assistant scheme in Tasmania should not be viewed as giving rise to a conflict of rights between different participants in the criminal justice process.

4.5.5 There may be concern about ensuring the integrity of interactions between the person with the communication need and the intermediary/communication assistant. This problem was mentioned by one respondent to the Issues Paper.³⁵⁵ Clearly the participation of intermediaries/communication assistants must not involve altering the substance of questions or testimony, prompting or commenting on the evidence except to explain its meaning or indicate how questions might be better phrased. In practice, this is not a difficult matter to monitor. Unlike foreign language interpreters and non-English speaking witnesses or Auslan signing, both intermediaries/communication assistants and those they are assisting are speaking English. Moreover, it is proposed that intermediaries/communication assistants will be subject to statutory duties to the administration of justice and to a Code of Conduct or Practice. Appropriate training will also reduce the risk of such conduct.³⁵⁶

4.5.6 In conclusion, it is the Institute's view that fundamental human rights are not compromised by the employment of intermediaries/communication assistants for people with communication needs when interacting with the police, legal counsel and courts.³⁵⁷ Instead, the use of intermediaries/communication assistants enhances rather than reduces the human rights of people with communication needs who become involved in the criminal justice system whether as suspects, defendants, victims or witnesses.

4.5.7 Part 5 of this Report considers the options for an intermediary scheme in Tasmania. It reviews the submissions received in this regard from those who responded the questions asked in the Issues Paper about the desirable characteristics for any Tasmanian scheme and makes recommendations for reform.

³⁵⁵ The Independent Living Centre – see [3.2.26].

³⁵⁶ See Recommendations 5(b) and 10(b).

³⁵⁷ This conclusion is an adaptation of a point made in relation to witness competence by the English Court of Appeal in *R v Barker* [2010] EWCA Crim 4, [42].

Part 5

Options for Reform

5.1.1 In this Part of the Report, possible options for a Tasmanian intermediary/communication assistant scheme are considered. If such a measure is to be instituted in Tasmania it will be necessary to determine a number of issues about what that scheme should look like. They include what its scope should be — at what points in the criminal justice process it should apply and to whom it should apply; who should perform the role of intermediary/communication assistant and what that role should be. A number of concomitant questions that must be resolved are considered in this Part including how the scheme should be established and administered, what training programs should be developed and for and by whom, and where responsibility for funding the scheme should lie. Several issues were raised in Parts 2 and 3 about requisite ancillary matters like the desirability of developing Bench Book guidance and Codes of Practice and of placing the holding of pre-trial directions hearings and the matters to be settled at them on a detailed legislative footing. This Part also discusses the question raised in Part 4 — what should be the locale, environment or structure of a Tasmanian intermediary/communication assistant scheme. The analysis of a regime for Tasmania is structured around these issues.

5.2 The model for a Tasmanian intermediary/communication assistant scheme

Scope of the scheme – when it should apply

5.2.1 The question of at what points in the criminal justice process the Tasmanian intermediary/communication assistant scheme should apply, emerged as a critical issue in pre-Issues Paper consultations and at the Ministerial Roundtable. It was made clear to the Institute then that communication assistance for people with communication needs should extend beyond trials to pre-trial phases of the criminal justice process and should be available during encounters between people with communication needs and the police and legal practitioners, during pre-trial judicial processes as well as at trial. The discussion in Part 3 of this Report also demonstrates that there is general consensus to this effect in submissions to the Institute. The 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.

5.2.2 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 communication needs when supported by an intermediary/communication assistant scheme.³⁵⁸

5.2.3 In the Issues Paper, the Institute sought feedback about the stages in the criminal justice process when communication assistance should be available to people with communication needs.

³⁵⁸ See discussion in Parts 2 and 3.

When should communication assistance be available?

Only during trials?

And/or during pre-trial pre-recording processes?

And/or during police interviews?

And/or during interviews/consultations with legal counsel including prosecution counsel?

And/or prior to police interviews?³⁵⁹

5.2.4 All responses to this question favoured providing access to intermediary/communication assistants throughout the criminal justice process, during police interviews, during consultations with legal counsel including prosecution counsel, during pre-trial directions processes, and at trial.³⁶⁰ This accords with the approach adopted in England and Wales, Norway and Iceland. It also accords with what has occurred in practice under the new schemes in New South Wales and South Australia. Those schemes have had a gravitational pull so that they have been utilised beyond their specific legislated arenas. In South Australia, communication assistance has been made available to legal counsel and criminal justice agencies,³⁶¹ and so that it is not restricted to trials and police interviews (the arenas for which it is legislated). Similarly, the New South Wales pilot is being applied beyond trials, to police interviews.³⁶² Additionally, in New South Wales, attempts have been made to extend the intermediary program to courts not within the pilot catchment zone, utilising ss 26 and 41 of the *Evidence Act 1995* (NSW)³⁶³ with the result that at least one matter was able to be prosecuted that otherwise would not have gone ahead.³⁶⁴ Joyce Plotnikoff pointed out in her submission to the Institute that the role of the intermediary in the England and Wales scheme has been so valuable, that although it applied originally only to witnesses during trials, it has been extended to all aspects of the process.

5.2.5 In view of the experience elsewhere and taking into account the views of respondents to the Issues Paper, the Institute recommends that people with communication needs should have access to intermediaries/communication assistants at all stages of the criminal justice process — during their interactions with police, legal practitioners, child protection services, judicial officers and the courts.

5.2.6 The Institute also sought feedback on whether it is appropriate for different people, perhaps with different expertise, to act as intermediaries/communication assistants at different points in the criminal justice process.

Different communication assistants/intermediaries at different points in the justice process

Might different communication assistants/intermediaries with different qualifications be employed at different stages of the criminal justice process?³⁶⁵

³⁵⁹ Question 9(a) of the Issues Paper.

³⁶⁰ Director of Public Prosecutions/Witness Assistance Scheme, Tasmanian Aboriginal Community Legal Service, the Tasmanian Commissioner for Children, Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, Joyce Plotnikoff, and Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

³⁶¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23903.

³⁶² Ibid 23919–23923.

³⁶³ Ibid 23921, 23930.

³⁶⁴ Ibid 23921.

³⁶⁵ Question 11(g) of the Issues Paper.

5.2.7 Respondents to the Issues Paper generally did not favour different intermediaries/communication assistants being employed at different points in the justice process. The principal concern respondents raised in this regard was that lack of continuity may be confusing and disturbing for people with communication needs.³⁶⁶ Continuity of intermediaries was considered to be the preferred option. For example, Joyce Plotnikoff said, ‘continuity of intermediaries throughout assessment, interview and trial is highly desirable. Assessment of the [person’s] communication abilities is the essential starting point. Time for rapport building is also vital — the witness must have confidence in the intermediary’.

5.2.8 The Department of Health and Human Services (Disability and Community Services) raised a slightly different concern, namely that the question implied that non-accredited intermediaries might be employed at different stages of the criminal justice process. The Department stressed that only accredited intermediaries should be used throughout the criminal justice process. The Tasmanian Aboriginal Community Legal Service similarly recommended that the same cohort of communication assistants should be available across the criminal justice system to the police, legal practitioners and the courts. This would ensure consistency and increase confidence in their recommendations and advice. In contrast, Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, suggested that flexibility in the use of different communication assistants/intermediaries at different stages of the criminal justice process should be planned for.

5.2.9 The Institute agrees with the majority of submissions that the best way to meet the needs of people with communication needs is to match them with a suitable communication assistant, where possible from the outset. Suitability is determined by the needs of the person in question rather than the stage of the process in which they are involved. Whilst different stages of the criminal justice process may pose different challenges for people with communication needs, continuity of communication assistance is likely to optimise their communication capacities throughout that process. The Institute’s recommendation in relation to this matter, therefore, is that continuity should be maintained, as far as possible, in the use of intermediaries/communication assistants throughout the criminal justice process.

Recommendation 2: Scope of the scheme – when it should apply

- (a) Under the intermediary/communication assistant scheme enacted in Tasmania, people with communication needs should have access to intermediaries/communication assistants at all stages of the criminal justice process — during the investigative, pre-trial and trial stages of that process. Accordingly, people with communication needs should have access to intermediaries/communication assistants in all their interactions with police, legal practitioners, child protection services, judicial officers and the courts.
- (b) All steps should be taken to ensure, so far as is practicable, that continuity is maintained in the use of intermediaries/communication assistants at all stages of the criminal justice process, so that different intermediaries/communication assistants are *not* used at different stages of the criminal justice process for people requiring their assistance.

Scope of the scheme – to whom it should apply

5.2.10 There is no uniformity in other jurisdictions in relation to the people who are entitled to receive communication assistance. Some schemes are limited to particular people, for example, child complainants

³⁶⁶ This was the view of the Director of Public Prosecutions and Joyce Plotnikoff.

of sexual offences, as in the recently enacted New South Wales pilot scheme. In contrast, the South Australian regime has general application, (see s 14A *Evidence Act 1929* (SA)). Some schemes are available to both defendants and other witnesses as is the case for the South Australian scheme,³⁶⁷ 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).

5.2.11 Those schemes that exclude defendants arguably breach fair trial principles and the right of everyone to be treated as 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 all of universal application raises the question whether a Tasmanian scheme should also be available only to particular people and if so, to whom? Accordingly, in the Issues Paper, the Institute sought feedback on who should be able to use communication assistants/intermediaries.

To whom the Tasmanian scheme should apply

Who should be able to use a communication assistant or intermediary?

Anyone with communication needs? Or:

- (a) Only children?
- (b) Anyone who is under 18? and/or
- (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?
- (d) Only victims of certain offences and if so, which offences?
- (e) Only children and special witnesses as defined in the *Evidence (Children and Special Witnesses) Act 2001* (Tas), which is cognate with s 106R of the *Evidence Act 1906* (WA)?³⁶⁸

5.2.12 The general view of respondents to this question was that anyone with a communication need should have access to intermediaries/communication assistants.³⁶⁹ This approach accords with that instituted in South Australia.

³⁶⁷ *Evidence Act 1929* (SA) ss 13A & 14A. Additionally, ss 12AB(2), (5) makes provision for communication assistants to be made available in pre-trial special hearings to record the entirety of witnesses' evidence. The *Summary Offences Regulations 2016* (SA) rr 19 & 23 make communication assistance available to defendants with complex communication needs and vulnerable witnesses during police interviews.

³⁶⁸ Question 8 of the Issues Paper.

³⁶⁹ Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions, the Department of Health and Human Services (Disability and Community Services), Joyce Plotnikoff, the Sexual Assault Support Service, Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania and a speech pathologist who wished to remain anonymous.

5.2.13 It is notable that no respondents to the Issues Paper suggested that defendants should be excluded from a Tasmanian intermediary scheme. One of the most important lessons learnt from the Witness Intermediary Scheme for England and Wales, is that defendants should be included in communication/witness regimes from the outset. Where they are not the result is differential and potentially discriminatory access to justice.³⁷⁰ The experience in England and Wales where courts have appointed intermediaries for defendants (who are not currently covered by the legislated scheme) is that while, like their counterparts who act for witnesses, court appointed intermediaries operate as neutral officers of the court, ‘they are creatures of case law, operating without a legislative foundation, official guidance, approved training or regulation.’³⁷¹ This is a highly undesirable outcome. It clearly breaches fair trial principles and the fundamental right of everyone to be treated as equal before the law.

5.2.14 There was also no support for restriction of the scheme to victims or to children and special witnesses within the meaning of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). In this regard, the Director of Public Prosecutions/Witness Assistance Service said that some crimes are not included in this Act, for example, stalking and assault. Such crimes can be traumatic and should be covered by a Tasmanian scheme. Further, in many cases, non-victim witnesses are also not covered by this Act. Many non-victim witnesses have communication needs and access to the assistance of intermediaries/communication assistants should be equally available to all people with communication needs. There was also no enthusiasm for restricting the use of intermediaries/communication assistants to cases involving particular offences, although, as noted above, the Director of Public Prosecutions did suggest limiting the use of intermediaries on a broadly discretionary basis, taking into account the type of case. It does not serve the interests of justice to create an intermediary scheme that discriminates between people with communication needs, that offers a service for some and not others and that, therefore, creates uncertainty and potentially inconsistency in its operation.

5.2.15 The Institute agrees with the views expressed in submissions that the Tasmanian intermediary/communication assistant scheme should not discriminate between people with communication needs and, therefore, recommends that it apply to all people with communication needs whether they be suspects, defendants, witnesses to or victims of crimes. This approach accords with that in South Australia.³⁷²

Recommendation 3: Scope of the scheme – to whom it should apply

The Tasmanian intermediary/communication assistant scheme should apply to all people with communication needs who are involved in the criminal justice system whether as witnesses, victims of crimes, people suspected of having committed crimes and defendants, and regardless of their age.

The basis on which the scheme should operate

5.2.16 The basis on which intermediary/communication assistant schemes operate can affect their implementation and sustainability. The New South Wales pilot scheme, for example, applies on a mandatory basis in prescribed cases to witnesses who are under 16 years of age. The Victorian Law Reform Commission has made recommendations to the same effect with respect to its proposed scheme. The South

³⁷⁰ Plotnikoff and Woolfson, above n 225, Chapter 13.

³⁷¹ Ibid 249; see also oral presentation of Her Honour, Judge Patricia Lees, ‘Criminal Justice and the Vulnerable’ (Speech delivered at the 2017 Australian Association of Crown Prosecutors Annual Conference, Hobart, 6 July 2017).

³⁷² See [4.2.13]–[4.2.20].

Australian scheme operates on a quasi-mandatory basis for vulnerable witnesses, subject to a number of provisos that essentially render it non-mandatory.³⁷³ The Western Australian scheme and the NSW schemes in s 275B and 306ZK *Criminal Procedure Act 1986* operate on a non-mandatory basis. It is notable that the mandatory scheme in New South Wales was implemented quickly upon its enactment in 2015 and has been operating since 2016. The other regimes are yet to achieve full operation. In any event, these different approaches raise questions about how such schemes should operate: should they have general mandatory application for some people with designated situational exceptions or should their application remain entirely discretionary. The Institute sought feedback on this matter in the Issues Paper.

Basis of application

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?

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?³⁷⁴

5.2.17 There were a variety of responses to this question. The Acting Chief Magistrate recommended that the availability of communication assistance should be in the discretion of the court. The difficulty with this approach is that communication assistance is not only needed at the court stage of the criminal justice process. As many respondents to the Issues paper noted,³⁷⁵ it should also be available during police interviews and to assist interactions with legal practitioners. However, if a person is not identified as having a communication need until they appear in court, then of course, the court should have the power to order that he or she have access to a communication assistant. This is reflected in Recommendation 7(c).

5.2.18 In contrast, the Sexual Assault Support Service recommended that anyone under 18 years of age should automatically qualify for communication assistance. To some extent this approach resembles the NSW pilot and that recommended for children under 16 years of age by the Victorian Law Reform Commission. The Sexual Assault Support Service further recommended that those over the age of 18 who have difficulty in communicating accounts of their experiences or comprehending questions and whom an intermediary/communication assistant is likely to assist, should be able to apply for a package of support including the assistance of intermediaries of the kind available under the Witness Intermediary Scheme of England and Wales. This approach has the advantage that, because it *mandates* the use of communication assistants/intermediaries (at least for children) it must be implemented and cannot suffer the fate of the Western Australian ‘communicator regime’ and s 275B and s 306ZK of the *Criminal Procedure Act 1986* (NSW) of never or infrequently being utilised.

5.2.19 The Director of Public Prosecutions/Witness Assistance Service expressed a different view of the need to give all children access to intermediaries/communication assistants, arguing that some children can communicate extremely well and do not necessarily need this type of assistance. For such children access to Witness Assistance Support officers will be sufficient. The Director of Public Prosecutions/Witness Assistance Service also recommended that access to intermediaries/communication assistants should be determined on a case by case basis, according to the communication capacities of the person in question, the nature of the case and the length and importance of their testimony. While this broadly discretionary approach has the advantage of not limiting access to intermediaries to particular classes of people with

³⁷³ See *Evidence Act 1929* (SA) ss 13A, 14A.

³⁷⁴ Question 9(b)&(c) of the Issues Paper.

³⁷⁵ See Part 3.

communication needs or to particular types of cases, it is not without problems. These arise from the fact that it limits access to intermediaries/communication assistants according to broadly but vaguely stated restrictive and determinative considerations beyond the fact that the people in question have communication needs. The inherent danger of such a model is that it may result in a continuation of the status quo or differential access to justice for people with communication needs. Because it contains no compulsion or direction for change it may inherently incorporate the means to avoid change. It may also result in inconsistent utilisation of communication assistants, with decisions about who should have access to intermediaries potentially being made on an ad hoc basis or even on extraneous grounds like cost or over-estimation (where expert advice is not sought) of people's communication capacities. This would result in unequal treatment for some people with communication needs. Accordingly, the Institute does not favour this approach. Nevertheless, this does not mean that people with communication needs might not opt out of the scheme where they are assessed by an expert as not needing assistance. This is the approach preferred by the Institute. The Institute agrees with the Director of Public Prosecutions that such assessments should take into account such matters as the nature of the person's communication needs, the nature of the case and his/her level of involvement in it, the nature of the evidence he or she will give and the Court in which the matter will be heard. The last matter is relevant where the case is to be dealt with in the Youth Justice Court. Existing accommodations made in that court may reduce the need for communication assistance to be provided.

5.2.20 The Institute is mindful of the experience with non-mandatory schemes in Western Australia and New South Wales. While the Institute is also cognisant of the fact that the England and Wales Witness Intermediary Scheme does not operate on a mandatory basis and has, nevertheless, been implemented according to its legislative intent, there remains the concern that without some level of compulsion, a Tasmania scheme may not be instituted systematically and consistently, or, even at all. If an intermediary/communication assistant scheme is to fulfil its aim of improving access to justice for people with communication needs it must become an accepted and structurally embedded component of the criminal justice system in all its phases including during the investigative, pre-trial and trial stages of that system. This will be facilitated by placing it on a mandatory footing. Nevertheless, the Institute recommends that an opt-out approach, similar to that suggested by the VLRC, should be implemented in Tasmania.³⁷⁶ However, the Institute departs the VLRC's proposals in recommending that the opt-out approach be extended to all people with communication needs, that it not be limited to children under the age of 16 years.³⁷⁷ Given the relatively small population of Tasmania compared with Victoria, this approach should be able to be accommodated. Accordingly, the Institute recommends that under the scheme enacted in Tasmania, it should be mandatory to engage intermediaries/communication assistants in all cases involving people with communication needs, whether they be defendants, suspects, victims or witnesses and regardless of their age. However, following the example set by the VLRC, the Institute recommends that the Tasmanian scheme should operate on an opt-out basis so that it is not necessary to engage an intermediary where the person with the communication need requests that an intermediary/communication assistant not be appointed and that person is assessed by an intermediary/communication assistant as not needing one. That assessment should take into account identified factors that affect the need for communication assistance (see Recommendation 4(b)).

This proposal is not dissimilar to that recommended by the Independent Living Centre, which suggested that a person-centred approach should be adopted with suitable supports and strategies put in place based

³⁷⁶ This approach was supported by the Independent Living Centre, the Sexual Assault Support Service, an anonymous speech pathologist and the Department of health and Human Services (Disability and Community Services).

³⁷⁷ Clearly, the TLRI also differs from that of the VLRC in that its recommendations are not limited to victims.

on clinical assessments and screening by specifically trained police, members of the legal profession and speech pathologists in consultation with the people concerned. Similarly, Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania recommended that communication assistance should be mandatory for individuals with known communication impairments in the moderate to severe ranges and for individuals who are assessed as having spoken language skills in the moderate to severe ranges of impairment.

Recommendation 4: The basis on which the scheme should operate

- (a) The Institute recommends that under an intermediary/communication assistant scheme enacted in Tasmania it should be mandatory to engage intermediaries/communication assistants in all cases involving people with communication needs, whether they be victims, suspects, defendants or witnesses and regardless of their age, at all stages of the criminal justice process.
- (b) However, the Institute recommends that the scheme should operate on an opt-out basis so that it is not necessary to engage an intermediary/communication assistant for a person with a communication need only where that person requests that an intermediary/communication assistant not be appointed and that person is assessed by an intermediary/communication assistant as not needing one. That assessment should take into account the nature of the person's communication need, the nature of the case, the nature of the person's involvement in it, at the court stage, whether the matter is being dealt with in the Youth Justice Court,³⁷⁸ and the nature of the evidence the person may give.

What should be the role(s) and duties of communication assistants/intermediaries?

5.2.21 The discussion in Parts 3 and 4 reveals that communication assistants are able to play a number of different roles in assisting people with communication needs to gain equal access to justice. Under all existing Australian schemes they are able to act as quasi-interpreters.³⁷⁹ 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 communication needs as in the New South Wales pilot scheme³⁸⁰ and the South Australian scheme.³⁸¹ 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 apparently a role accorded to witness

³⁷⁸ Existing accommodations in the Youth Justice Court may affect determinations about whether and what type of communication assistance may be needed.

³⁷⁹ Sections 306F and 306R *Evidence Act 1906* (WA); pt 29, cl 88, Schedule 2 of the *Criminal Procedure Act 1986* (NSW) and s 4(1) *Evidence Act 1929* (SA).

³⁸⁰ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89(6) makes provision for pre-trial advice to be provided to courts. Additionally, it appears that they play advisory and interpretative roles pre-trial at the police investigation stage (Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23913, 23915–23916, 23919–23923).

³⁸¹ *Summary Offences Regulations 2016* (SA) rr 19, 23 (made under the *Summary Offences Act 1953* (SA) s 74H) 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 interviews. Section 13A(9) *Evidence Act 1929* (SA) provides that where courts are of the opinion that expert evidence would assist the court to determine the special arrangements that should be made for taking the evidence of the vulnerable witness, receive such evidence and, if the native language of the witness is not English and the witness is not reasonably fluent in English, evidence about any additional difficulty that may be caused by the witness giving evidence through an interpreter. It is also apparent that they are able to provide advisory and quasi-interpretive service for prosecution and defence counsel: Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23903.

intermediaries under the New South Wales pilot scheme.³⁸² Additionally, they confer with defence and prosecution counsel about the appropriateness of questions to be asked.³⁸³ This is also the case in England and Wales.³⁸⁴ The most interventionist of the schemes considered in this Report is that operating in Norway where intermediaries have sole responsibility for questioning vulnerable witnesses.

5.2.22 In England and Wales, registered intermediaries are routinely enlisted to provide preliminary reports to police prior to an interview to assist with planning the interview. This input into the planning of the interview is one of the most important functions of an intermediary. Planning discussions with the interviewing officer may include:

- How to check that the witness understands what is going to happen/is happening in the interview;
- Provision of advice about language: vocabulary, complexity of sentences, style of questioning, what forms of questions to avoid;
- Setting up the room in the most appropriate way — the position and nature of seating;
- Advice about how best to explain the cameras and the recording equipment;
- Advice about how to use any communication aids, visual aids, or props if necessary, eg, drawing tools;
- Advice about the frequency and duration of breaks;
- Consideration of how the registered intermediary might intervene if necessary;
- Any other circumstances relating to the communication abilities and needs of the witness.³⁸⁵

5.2.23 Following the interview, the registered intermediary writes a report³⁸⁶ for the court setting out the witness's background, what was ascertained during the assessment and the interview, and details about the witness's communication needs and abilities, with practical suggestions about how the witness can best be questioned in court. The recommendations of a ground rules hearing will often be demonstrably based on the registered intermediary's assessment of the witness's communication needs and abilities.³⁸⁷

5.2.24 The capacity to provide advice to questioners, both police and legal counsel, enables intermediaries to promote their understanding of the individual capacities of people with communication needs and to ensure that questioning is appropriate. It is essential that this advice is provided prior to the commencement of questioning to ensure that the questioner is properly equipped from the outset.

5.2.25 The introduction of intermediary schemes in Australia was considered during the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse.³⁸⁸ There was discussion about the England and Wales model and the improvement it has generated in the participation rates of people with communication needs in the justice system, as well as the cultural change it has fostered at the Bar. It was noted that it is now recognised that examining evidence from vulnerable witnesses requires skill

³⁸² Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23913, 23915–23916, 23919–23923.

³⁸³ Ibid 23915–23916.

³⁸⁴ See above at [3.4.41].

³⁸⁵ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13, 3.42.

³⁸⁶ A similar report is provided in respect of defence witnesses.

³⁸⁷ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13, 3.51.

³⁸⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, Chapter 9.

and planning and that traditional approaches have prevented these witnesses from giving evidence at all. Further, intermediaries' interactions with the police, counsel and the judiciary not only provides assistance to individual witnesses but also provides 'on the job' training for those practitioners and access to expert advice about the techniques that can be used to meet different communication needs.³⁸⁹

5.2.26 During the hearings before the Royal Commission, Dr Michelle Mattison, a Registered Intermediary in England and Wales, outlined her role in the investigative interview:

My role is passive in the sense that I'm not there as a second interviewer. I'm there to listen and to monitor the questions put to the child carefully to ensure that they are appropriate for that person's communication needs. I also monitor and carefully watch the child or the vulnerable adult's anxiety and concentration and, where appropriate, I may suggest that the person needs a break or we need to think about strategies to help that person remain calm and focused.

In terms of intervening, Dr Mattison stated that:

I try to pre-empt, as much as possible, whether or not that child — that person will understand that question before they answer the question. So, for example, if a police officer uses a very big word that I believe a five-year-old may not understand, I'll intervene and I might say, 'Mr Policeman, what does that word mean?' That's my way of alerting the police officer to think perhaps about reframing that question, or rewording that question, rather than me interjecting and doing that myself.³⁹⁰

5.2.27 Dr Mattison explained that under the scheme in the England and Wales intermediaries do not question witnesses. The intervention is limited to alerting questioners and courts to problematic questions and prompting their rephrasing. In her view, if intermediaries were to rephrase or ask the questions themselves this would risk misunderstanding or reinterpretation of the evidence. For instance, in relation to intervening during trials, Dr Mattison gave the following example:

I alert the judge to the terribly worded question usually by saying 'your Honour' and then I explain what the problem is with the question, such as saying, 'That's a tagged question.' It's then up to the judge to decide what to do with that information. If the judge agrees with what I've highlighted, they may say something like, 'Counsel, please rephrase the question.' If counsel tries to rephrase the question and then unfortunately there is still a tag or there is still an issue with the question, on some occasions the judge may seek my assistance with rephrasing. My assistance with rephrasing questions is extended only to me giving suggestions to the judge and then counsel taking them upon him or herself to then put the question to the witness, but³⁹¹ at no point do I actually communicate the question to the witness myself.

5.2.28 In the Issues Paper the Institute stated that its preliminary view was 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. It sought feedback on the most appropriate role for intermediaries/communication assistants in any Tasmanian scheme.

³⁸⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 5, 381.

³⁹⁰ Ibid 377.

³⁹¹ Ibid.

What should the role(s) of intermediaries/communication assistants be?

Should intermediaries/communication assistants act:

- As interpreters only?
- And/or as advisors to courts, counsel and the police?
- And/or be able to intervene in inappropriate questioning and if so what type of intervention should be permitted?³⁹²

5.2.29 The majority of the responses to this question expressed the view that the role of intermediaries/communication assistants should be broad enough to include advisory and interventionist functions.³⁹³ However, a range of views was expressed about the nature of the interventionist role they should be accorded. For example, the Tasmanian Aboriginal Community Legal Service suggested that intervention should only occur with the leave of the court.³⁹⁴ The Service did not indicate how this might be implemented procedurally, whether such leave should be obtained pre-trial or during the trial prior to the commencement of questioning.

5.2.30 The Sexual Assault Support Service submitted that intermediaries should be able to provide advice to the police, legal representatives and the courts and that they should also be able to intervene to indicate to judges that a line of questioning is inappropriate. However, the Sexual Assault Support Service stated that it should then be for the judge to make the ultimate determination as to whether the question should be allowed, disallowed or rephrased. This means that the intermediary would not have the determinative role in the style of questioning permitted.

5.2.31 The Independent Living Centre submitted that intermediaries should have the capacity to intervene because ‘they (the intermediaries) need to ensure information (including questions) presented to the individual is presented in a manner appropriate to the individual’s needs’.

5.2.32 Speak Out Advocacy said that communication assistants should perform an advisory role with the police, lawyers and the courts. It is not entirely clear from the organisation’s response whether this advisory function was envisaged as incorporating interventionist functions.

5.2.33 In relation to intermediaries’ advisory functions, Joyce Plontikoff recommended that, after initial assessment of a person’s communication needs, (the intermediary) should provide written recommendations to the Court about the nature and style of questioning. This is done in England and Wales prior to the ground rules hearing to give the parties an understanding of the scope of the needs of witnesses.³⁹⁵

5.2.34 Respondents identified a range of communication assistance that should be provided by intermediaries/communication assistants to facilitate interactions between lawyers and people with communication needs. They include translation of questions and answers, interventionist monitoring of

³⁹² Question 10 of the Issues Paper.

³⁹³ The Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions/Witness Assistance Service, the Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, Joyce Plontikoff, the Sexual Assault Support Service, Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania and a speech pathologist who wished to remain anonymous.

³⁹⁴ The Tasmanian Aboriginal Community Legal Service.

³⁹⁵ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13.

language used and questioning styles to eliminate miscommunication,³⁹⁶ provision of advice about appropriate questions and styles of questioning, removal of jargon from questions, suggestion of alternative mechanisms for communicating accounts of events such as drawing what has happened if this can't be communicated verbally, using a variety of communication aids to enable people with communication difficulties to tell their stories effectively, including timelines, anatomical dolls, charts and photographs,³⁹⁷ encouraging use of short sentences and other styles of questioning adapted to the linguistic capacities of those being interviewed and questioned, and ensuring that people with communication needs are given sufficient time to answer questions.³⁹⁸

5.2.35 Based on the experience in other jurisdictions and on the submissions received it is the Institute's view that intermediary/communication assistant schemes are able to fulfil their intended purpose only if they equip intermediaries with advisory, interpretive and interventionist powers. The primary purpose of intermediary/communication assistant schemes is to enable, through a collaborative approach, people with communication needs to participate in the criminal justice system and in this way to promote and protect their right to equality before the law. Intermediaries will only be able to play a real role in the achievement of this goal if they are armed with advisory, interpretive and interventionist functions. It is not sufficient that they play only an interpretive role. They must be able to provide advice that is respected to police, legal counsel and judicial officers, at each point in the criminal justice process when people with communication needs are questioned or give accounts of events. This advice should extend to the comprehension and communication capacities and the types of questioning and questions that will optimise or detract from the ability of people with communication needs to give accounts of events. Such advice should address the level of sophistication and style of questioning appropriate for these people. Intermediaries/communication assistants must also have the power to intervene in all interview and questioning sessions where necessary. The ability of expert intermediaries to intervene during questioning processes provides a necessary safeguard of the right to be treated as equal before the law for people with communication needs. Intermediaries can act as a major bulwark against unsuitable questioning and the mismanagement of the evidence giving process because they are independent experts whose primary focus is on the parameters of questioning.

5.2.36 It is also important that the functions of intermediaries be set down in legislation. This will help to ensure that the role of the intermediary is clearly defined and understood by all involved. The most appropriate vehicle for this is the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

5.2.37 An important issue that emerged during the consultation, about which a specific question was not asked in the Issues Paper, was to whom intermediaries/communication assistants should owe their primary duty. In some submissions, this issue was couched by respondents as a need for intermediaries/communication assistants to be independent and impartial. For example, the Acting Chief Magistrate said that intermediaries/communication assistants should have a legislated, paramount duty to assist the court impartially and in the interests of justice, a duty which must override their duty to the person whom they are assisting. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania stated that the critical characteristic of communication assistants/intermediaries is skilled impartiality. The Institute agrees that it should be a fundamental principle of a Tasmanian intermediary/communication assistant scheme that intermediaries/communication assistants should have

³⁹⁶ The Tasmanian Aboriginal Community Legal Service.

³⁹⁷ A speech pathologist who wished to remain anonymous.

³⁹⁸ Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, a speech pathologist who wished to remain anonymous and the Tasmanian Aboriginal Community Legal Service.

a paramount duty to the administration of justice, a duty which must override the duty they have to the person receiving their assistance. They should also have duties to act impartially, independently and to communicate what is said accurately. These duties should be set down in legislation. Useful precedents in this regard are contained the legislative regimes establishing the New South Wales pilot scheme and the South Australian scheme which make provision to the effect that witness intermediaries and communication partners are officers of the court and have a duty to act impartially and independently.³⁹⁹ Similarly, both schemes impose duties on intermediaries/communication assistants to communicate accurately what is said. For example, ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA) provide that a

person may only provide communication assistance to a witness if the person ... takes an oath or makes an affirmation that he or she will communicate accurately with both the witness and the court; and in a case where a party to the proceedings disputes the person's ability or impartiality in providing communication assistance—if the judge is satisfied as to the person's ability and impartiality.

The New South Wales pilot project legislation provides that witness intermediaries are officers of the court and have 'a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.'⁴⁰⁰ Section 29(5) of the *Youth Justice and Criminal Evidence Act 1999* (UK) is also relevant in this context. It provides that a 'person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.'⁴⁰¹ The Code of Practice⁴⁰¹ that applies to Registered Intermediaries under the England and Wales regime requires them to act independently, in the public interest and in the full understanding of their primary responsibility to the court. They must raise any conflict of interest they may have in any particular case with the co-ordinator of the scheme.

The Institute is also of the view that the independence and impartiality of intermediaries/communication assistants should be reinforced by their training for work in the criminal justice system and by a Code of Conduct or Practice and a Guidance Manual of the kind produced for the New South Wales pilot project and for the England and Wales regime.

5.2.38 It also became clear during consultations and from submissions that it is necessary to distinguish clearly the roles of intermediaries/communication assistants from those support people within the meaning of the *Evidence (Children and Special Witnesses Act 2001* (Tas) and advocates. For example, the Sexual Assault Support Service suggested a Tasmanian scheme should be able to accommodate the use of both independent intermediaries/communication assistants and support people known to those with communication needs. They suggested that where it is likely to be beneficial, a support person or family member should be granted permission to provide communication assistance in coordination with a trained intermediary but stressed that only trained intermediaries should be able to provide advice to the police, legal counsel and courts and to intervene during inappropriate questioning. Provision is already made for children and special witnesses to have a court approved support person with them when they testify.⁴⁰² The Institute is of the view that this scheme should continue to operate alongside but distinct from an intermediary/communication assistant scheme.

³⁹⁹ *Criminal Procedure Act 1986*(NSW) sch 2 pt 29, cl 88(2) and ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).

⁴⁰⁰ *Criminal Procedure Act 1989* (NSW) sch 2 pt 29, cl 88(2).

⁴⁰¹ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13.

⁴⁰² *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(2)(b)(i).

5.2.39 The Institute agrees with the Sexual Assault Support Service that the role of the intermediary/communication assistant should be distinguished clearly from that of a support person within the meaning of s 8 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). Unless this clear distinction is manifest in the legislation establishing a Tasmanian intermediary/communication assistant scheme, there is a danger that the roles of intermediaries might become conflated and confused with those of a support person as appears to have happened in relation to the communication assistant scheme established in New South Wales by s 306ZK *Criminal Procedure Act 1986* (NSW).⁴⁰³ There is clearly a place in the criminal justice system for both roles to be maintained as serving clearly distinct functions.

Recommendation 5: Roles and duties of intermediaries/communication assistants

- (a) The roles and duties of intermediaries/communication assistants should be set down in legislation.
- (b) The paramount duty of Tasmanian intermediaries/communication assistants should be to the administration of justice. It should override their duty to the people receiving their assistance. A useful precedent in this regard is provided by the *Criminal Procedure Act 1986* (NSW), sch 2 pt 29, cl 88(2).
- (c) Intermediaries/communication assistants should also have stated duties to act impartially, independently and to communicate accurately what is said by people with communication needs and those interacting with them. Relevant precedents are provided by the *Criminal Procedure Act 1986* (NSW), sch 2 pt 29, cl 88(2) and ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).
- (d) The roles of the intermediary/communication assistant should be distinguished clearly in legislation from those of advocates and of support people within the meaning of s 8 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).
- (e) An intermediary/communication assistant scheme enacted for Tasmania should enable intermediaries/communication assistants to act as advisors to the police, legal counsel, criminal justice agencies and the courts in identifying people with communication needs and the nature of their communication needs. They should also provide advice about the comprehension and communication capacities of people with communication needs and the type, style and level of sophistication of questions that are appropriate to their capacities.
- (f) In common with schemes enacted elsewhere in Australia, an intermediary/communication assistant scheme enacted for Tasmania should enable intermediaries/communication assistants to perform interpretive functions to ensure that questions asked of and answers given by people with communication needs can be understood.
- (g) An intermediary/communication assistant scheme enacted for Tasmania should give intermediaries/communication assistants the power to intervene in questioning of and interviews with people with communication needs and during hearings and trials to alert questioners and courts to problematic questions, to explain the nature of those problems and to suggest alternative questions and questioning styles.

Who should be permitted to perform the role of intermediary/communication assistant?

5.2.40 There is variation across different statutory regimes in relation to who is able to perform the role of intermediaries/communication assistants and what their qualifications should be. The New South Wales pilot scheme provides for a panel of intermediaries to be established by Victims Services in the Department

⁴⁰³ See analysis at [4.2.25].

of Justice. The members of that panel must have tertiary qualifications in a relevant field like psychology, social work, speech pathology, teaching or occupational therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).⁴⁰⁴ The Western Australian scheme enables courts to approve anyone whom they consider suitable and competent to act as a ‘communicator’.⁴⁰⁵ 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 the Western Australian and New South Wales models enabling courts to approve communication assistants and also providing for the constitution of a panel of trained ‘communication partners’ approved by the Minister. This means that courts are able to 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.⁴⁰⁶ The South Australian model has been controversial because communication assistants work on a voluntary basis. This does not, of course, mean that do not have relevant expertise and training. As detailed in Part 4 of this Report,⁴⁰⁷ nearly 30 volunteers from a range of professional backgrounds have been approved and registered as communication partners in South Australia and have undertaken training for work as communication partners.⁴⁰⁸ The England and Wales regime does not require intermediaries/communication assistants to have specific qualifications.⁴⁰⁹ However, the majority of registered intermediaries do have relevant expertise, most notably in speech pathology. Nevertheless, they come from a wide range of backgrounds, professional roles and occupations including occupational therapy, psychology, mental health nursing, social work and teaching.⁴¹⁰ In Norway, under the Barnehus model, children and people with intellectual disabilities who have been exposed to violence or sexual abuse are questioned by a specially trained police officer. Intermediaries in this scheme are police officers who have received extensive training in interviewing children and vulnerable adults. They are the only people who are permitted to question children or vulnerable adults. Their interview comprises their evidence if the case goes to trial. The role of questioning vulnerable witnesses has also been taken out of the hands of lawyers in South Africa where intermediaries, who are generally social workers, translate questions that lawyers wish to ask into suitable language for vulnerable witnesses.⁴¹¹

5.2.41 There is also the question whether certain people should be excluded from acting as intermediaries/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.⁴¹² 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.

⁴⁰⁴ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89.

⁴⁰⁵ *Evidence Act 1906* (WA) s 106F.

⁴⁰⁶ See details at [4.2.14].

⁴⁰⁷ At [4.2.19].

⁴⁰⁸ South Australia, *Parliamentary Debates* House of Assembly Hansard, 20 June 2017, 10072-10073 (A Piccolo).

⁴⁰⁹ Section 29 of the *Youth Justice and Criminal Evidence Act 1999* (UK); Plotnikoff and Woolfson, above n 225, 11.

⁴¹⁰ Plotnikoff and Woolfson, above n 225, 11.

⁴¹¹ Penny Cooper and David Wurtzel, ‘Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales’ (2014) 65(1) *Northern Ireland Legal Quarterly* 39–61.

⁴¹² *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89(5).

5.2.42 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 enshrining in legislation their primary duty to the court act and the requirement that they act independently and impartially (see Recommendation 5). Training programs should also encompass the critical components of ethical practice and duties to the administration of justice. An additional safeguard would be provided by instituting a court approval process in cases where there is an existing relationship between the intermediary and the witness or where one party objects to an intermediary on that basis that he or she is not impartial. There is precedent for these measures in existing regimes. An example, is provided by s 13A(5a)(b) of the *Evidence Act 1929* (SA) which is quoted above at [5.2.37].

5.2.43 In the Issues Paper the Institute sought feedback on these matters.

Who should be able to be an intermediary/communication assistant?

- (a) Should communication assistants/intermediaries be required to have any particular qualifications and if so what qualifications should they have?
- (b) Should any person deemed suitable and competent be able to act as a intermediary/communication assistant?⁴¹³

5.2.44 Ten responses to the Issues Paper addressed the question of what qualifications or expertise intermediaries/communication assistants should have.⁴¹⁴ All were of the view that an intermediary should have suitable training and experience, but expressed a range of views about the particular qualifications and level of training intermediaries should have. Qualifications that were suggested as fitting people for the role of intermediary/communication assistant included speech pathology/speech therapy,⁴¹⁵ psychology,⁴¹⁶ social work, teaching and occupational therapy.⁴¹⁷ Three respondents emphasised the importance of ensuring that intermediaries/communication assistance have adequate skills and experience.⁴¹⁸ The Director of Public Prosecutions/Witness Assistance Service encapsulated this approach recommending that intermediaries/communication assistants should have tertiary qualifications in such areas as speech therapy, counselling, psychology and teaching as well as training in courtroom procedures. Similarly, the Acting Chief magistrate said that it would be highly desirable for communication assistants to have expertise in the sense that they should possess suitable qualifications to provide the required assistance. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania submitted that speech pathologists (who are communication specialists) are the logical choice to engage as communication assistants/intermediaries. She also considered that other professionals such as psychologists and social workers could also be trained to undertake this role. The Education Department of Tasmania advised the

⁴¹³ Questions 11(a) and (b) of the Issues Paper

⁴¹⁴ The Tasmanian Aboriginal Community Legal Service, Commissioner for Children, Director of Public Prosecutions, the Department of Health and Human Services (Disability and Community Services), Sexual Assault Support Service, Natalie Leader (speech pathologist), Speech Pathology Australia, an anonymous speech pathologist and Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

⁴¹⁵ Commissioner for Children, the Director of Public Prosecutions, the Department of Health and Human Services (Disability and Community Services), the Sexual Assault Support Service, Natalie Leader (speech pathologist), an anonymous speech pathologist and Speech Pathology Australia.

⁴¹⁶ Director of Public Prosecutions/Witness Assistance Service, Department of Health and Human Services (Disability and Community Services) and the Sexual Assault Support Service.

⁴¹⁷ The Sexual Assault Support Service.

⁴¹⁸ Director of Public Prosecutions/Witness Assistance Service, Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania and Speech Pathology Australia.

Institute that the majority of young people identified as having communication needs would be very likely to have accommodations and adjustments already made for them as part of their educational programs. This means that those involved in their education are well placed to provide advice about necessary adjustments and accommodations to enable them to participate in the justice process. The Independent Living Centre recommended that because communication difficulties are many and varied this should be reflected in the skill sets of intermediaries appointed to work as intermediaries/communication assistants in a Tasmanian scheme.

5.2.45 The Sexual Assault Support Service suggested that a pool of communication assistants/intermediaries drawn from a variety of professions should be created. They pointed to the composite profession of registered intermediaries constituting the England and Wales Witness Intermediary Scheme as being suitable for Tasmania. As detailed above, in that model registered intermediaries include speech and language therapists, psychologists, social workers, nurses, teachers, and occupational therapists. Similarly, the Tasmanian Aboriginal Community Legal Service favoured the establishment of a register of intermediaries who should have expertise in languages, working with children and mental health. Speech Pathology Australia was of the view that a specific skill set is required and noted that speech pathologists, by reason of their training in the assessment and management of people's communication difficulties are well placed to be employed as communication assistants/intermediaries. An anonymous speech pathologist recommended that, as a minimum, intermediaries/communication assistants should hold TAFE level certificates similar to those that apply to many teachers' assistants in the Department of Education. These views accord with the approach adopted for the New South Wales pilot scheme.⁴¹⁹

5.2.46 In relation to the issue whether anyone should be excluded from acting as an intermediary/communication assistant, the Tasmanian Aboriginal Community Legal Service recommended the exclusion of anyone who has had a prior relationship with the witness to be assisted. The National Disability Service⁴²⁰ cautioned against using family members and carers as intermediaries. These opinions reflect, in different ways, the approaches in South Australia and the New South Wales pilot scheme.⁴²¹ In contrast, Speak Out Advocacy Tasmania said that it can be important that the intermediary is someone whom the person with the communication need knows. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania submitted that communication assistants could be drawn from those who have familiarity with particular individuals' communication needs because of their involvement in their lives. Such people might include their parents, siblings, other family members, teachers, teachers' assistants, friends and sports coaches. With targeted support and training and with the consultative presence of a professional intermediary these people might be able to undertake the role of a communication assistant/intermediary. She suggested that their employment might provide a nuanced and potentially cost-effective response to individual needs. However, the Institute takes a more cautious view of this matter and considers that this should only be permitted if these people's independence and impartiality is not compromised. Rosalie Martin also recognised the importance of impartiality. Where this cannot be guaranteed she suggested that these people might become assistants to professional intermediaries or those intermediaries would simply perform the work. The Tasmanian Children's Commissioner stressed the importance of intermediaries being independent of the police and the

⁴¹⁹ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89(5).

⁴²⁰ The National Disability Service.

⁴²¹ These views reflect the New South Wales pilot scheme's rejection of people who have or have had a familial or professional relationship with the person requiring communication assistance (*Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89(5)). They reflect the New South Wales pilot scheme and the South Australian position with respect to the legislatively mandated independence of intermediaries/communication assistants seen in ss 13A(5a) & 14A(4) of the *Evidence Act 1929* (SA) and in the *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 88(2).

prosecution. The Commissioner also indicated that he did not support the use of volunteers as intermediaries/communication assistants.

5.2.47 The Department of Health and Human Services (Disability and Community Services) recommended that guidelines and accreditation standards be established. Another suggestion was that a registration system should be instituted so that only people who have relevant qualifications and have been registered to work as intermediaries/communication assistants are able to do so.⁴²² This proposal is in line with the system in operation in South Australia,⁴²³ the New South Wales pilot scheme⁴²⁴ and the witness intermediary service in England and Wales.

5.2.48 Based on the responses received to the Issues Paper, the Institute is of the view that if a Tasmanian intermediary scheme is to be accepted as both robust, trustworthy and valuable it should employ people who have relevant qualifications and/or expertise. Such expertise need not be limited to areas of tertiary study but might extend to expertise derived from knowledge or experience. The Institute acknowledges that people who do not have tertiary qualifications may, in particular cases, be able to provide optimum assistance to the court and to people with communication needs. Such people should be able to act as intermediaries/communication assistants where they have requisite skills based on knowledge or experience and provided that they meet desired standards of independence and impartiality, and accept that their paramount responsibility is to the administration of justice. The South Australian approach established by ss 13A(5a) and 14A(4) *Evidence Act 1929* (SA) provides a useful precedent in this regard.

Recommendation 6: Who should be able to be an intermediary/communication assistant?

- (a) An intermediary/communication assistant scheme enacted in Tasmania should require intermediaries/communication assistants to have relevant expertise and/or qualifications in such areas as psychology, languages, child psychology, speech pathology, teaching, occupational therapy, mental health nursing and social work.
- (b) Appointment as an expert intermediary/communication assistant should not, however, be confined to those who have tertiary qualifications but might extend to those with relevant expertise derived from knowledge or experience. People without tertiary qualifications should be permitted to act as intermediaries/communication assistants either with the approval of the court or of the body responsible for administering the intermediary/communication assistant scheme. Such approval should be given to people who have relevant expertise based on knowledge or experience and who satisfy requirements of impartiality and independence and understanding that their paramount duty is to the administration of justice.

Administration of the proposed Tasmanian scheme and appointment of intermediaries/communication assistants

5.2.49 Since 2008, the Ministry of Justice (UK) has had responsibility for the England and Wales Witness Intermediary Scheme. The Ministry of Justice's Registration Board oversees intermediary recruitment, training, assessment and professional compliance.⁴²⁵ However, the matching service is outsourced and

⁴²² The Tasmanian Aboriginal Community Legal Service.

⁴²³ *Evidence Act 1929* (SA) s 4(1).

⁴²⁴ *Criminal Procedure Act 1986*(NSW) sch 2 pt 29, cl 89.

⁴²⁵ Plotnikoff and Woolfson, above n 225, 18.

currently administered by the National Crime Agency, a non-ministerial government department. The National Crime Agency receives requests from either the police or the Crown Prosecution Service depending on the stage at which the need for an intermediary is identified. Defence solicitors, (for defence witnesses, but not defendants), and the courts may also use the service.⁴²⁶ A registration system has been established for England and Wales with registered intermediaries working primarily for the prosecution and the police. They may also provide assistance to defendants while they testify in court. Otherwise, defendants rely on non-registered intermediaries.

5.2.50 In New South Wales, Victims Services in the New South Wales Department of Justice administers the New South Wales pilot scheme has been tasked with establishing a panel of people who are suitable to act as witness intermediaries.⁴²⁷ In South Australia, appointment of communication partners is a Ministerial responsibility⁴²⁸ although courts may appoint communication assistants.⁴²⁹

5.2.51 The Institute sought feedback on how a Tasmanian intermediary/communication assistant should be constituted and managed and how intermediaries/communication assistants should be appointed. It also sought specific feedback on whether courts should be able to appoint intermediaries/communication assistants.

Administration of the scheme and who should appoint intermediaries/communication assistants

- (a) 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?
- (b) Who/what agency is best placed to assess the suitability of people to act as communication assistants/intermediaries?
- (c) Should courts have the power to appoint anyone considered suitable and competent to act as an intermediary/ communication assistant?⁴³⁰

5.2.52 Eight responses to the Issues Paper agreed that a panel of expert communication assistants/intermediaries should be established for a Tasmanian intermediary/communication assistant scheme.⁴³¹ In this regard, the Sexual Assault Support Service suggested that the England and Wales Witness Intermediary Scheme provides an appropriate model to be implemented in Tasmania. The Tasmanian Aboriginal Community Legal Service favoured the establishment of a panel of expert communication assistants along the lines of the system in England and Wales and the New South Wales pilot. Speak Out Advocacy said that a specifically trained cohort of independent, expert communication assistants should be available to identify and interact with people with communication needs. This would ensure that there is confidence that those providing the assistance have the necessary expertise (as noted above at [5.2.44] – [5.2.47]).

⁴²⁶ Ibid 16.

⁴²⁷ *Criminal Procedure Act 1986* (NSW) sch 2 pt 29, cl 89(1).

⁴²⁸ *Evidence Act 1929* (SA) s 4(1).

⁴²⁹ Ibid ss 13A(5a), 14A(4).

⁴³⁰ Question 11(c), (d) and (e) of the Issues Paper.

⁴³¹ Tasmanian Aboriginal Community Legal Service, the Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, Joyce Plotnikoff, the Sexual Assault Support Service, an anonymous speech pathologist, Speak Out Advocacy and Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

5.2.53 A variety of views was expressed about who should have responsibility for establishing and maintaining such a panel. Their general tenor, however, was that this should be done by the government and preferably by a body that is clearly independent of the police, the prosecution and victim support agencies. Joyce Plontikoff advised the Institute that in England and Wales, those involved in managing the Witness Intermediary Scheme have been drawn from the police, the Crown Prosecution Service and children's and victims' charities but that primarily they are speech and language therapists. She suggested that there are dangers in assigning the management of intermediary schemes to Victims' Services (as has happened with the New South Wales pilot scheme) because this may result in intermediaries' role being confused with that of a support person. The Director of Public Prosecutions/Witness Assistance Service suggested that this responsibility should lie with the courts. The Sexual Assault Support Service and the Department of Health and Human Services (Disability and Community Services) suggested that the Department of Justice should have this responsibility while the Independent Living Centre recommended giving this responsibility to the courts and the Department of Health and Human Services. The Tasmanian Aboriginal Community Legal Service proposed that a registration system might be established for intermediaries to work in the criminal justice system and that the panel of experts could be maintained by the Law Society or another professional organisation according to the criteria set for its membership. An anonymous speech pathologist suggested the establishment of an independent body comprising representatives of the police, the Department of Justice, the Law Society, the Tasmania Law Reform Institute and Disability Services and including members with expertise in speech pathology, psychology, health and education. The Education Department of Tasmania said that it is well placed to contribute to the development and management of the scheme given the skills and knowledge of existing employees, not just teaching staff but allied health professionals. These people have the greatest understanding of children and young people and their capacity to engage in court proceedings with intermediary assistance.

5.2.54 There was a similar variety of views about whether courts should have the power to appoint people considered suitable and competent to act as intermediaries/communication assistants. The Director of Public Prosecutions/Witness Assistance Service having supported giving responsibility to the courts to establish and maintain a panel of expert intermediaries/communication assistants was, of course, in favour of allowing courts to appoint intermediaries in individual cases.⁴³² The Tasmanian Aboriginal Community Legal Service and the Department of Health and Human Services (Disability and Community Services) agreed with this view conditional on the people appointed in this way meeting prescribed criteria for expert accreditation. The Independent Learning Centre also supported giving courts this power, provided that those who are to receive assistance consent to this being done. The Sexual Assault Support Service was reluctant to give courts this power. It was concerned that if 'a relatively informal option'⁴³³ is available it may be over-used, which may be detrimental to people with communication needs. A speech pathologist who asked to remain anonymous queried whether it would be possible to ensure that courts have the requisite expertise to identify people with communication needs, particularly where they have a hidden disability like a language impairment or a learning disability. This problem would be overcome, however, if there is a service available, which matches intermediaries with people with communication needs of the kind instituted for the intermediary scheme in England and Wales.

5.2.55 The Institute agrees with the responses to the Issues Paper that support the legislated establishment of a panel of expert intermediaries/communication assistants in Tasmania. It also agrees that members of the panel should be drawn from a variety of areas of expertise of the kind discussed above at [5.2.44]–

⁴³² The Director of Public Prosecutions/Witness Assistance Service.

⁴³³ The Sexual Assault Support Service.

[5.2.47]. This will help to ensure that the scheme is able to cater to a wide range of people with communication needs. The Institute recognises that the most relevant areas of expertise are speech pathology, languages, psychology, child psychology, mental health, social work, teaching, child development, and occupational therapy.

5.2.56 The Institute accepts the general tenor of the various submissions about who should have responsibility for establishing, recruiting and administering a Tasmanian panel of expert intermediaries/communication assistants to the effect that this is a government responsibility but that it should be undertaken by a body that is independent of the police, prosecution and victim support services. Nevertheless, the Institute also understands that there is a need for such an administrative body to be representative of the various views and interests of those in the criminal justice system who have responsibility for interacting with people with communication needs as well as of the people with communication needs themselves and those who might perform the role of intermediary/communication assistant. Such a body might usefully include representatives of the Defence Bar, Legal Aid, Community Legal Services, the Education Department of Tasmania, the Department of Treasury and Finance, the Tasmanian Aboriginal community and/or the Tasmanian Aboriginal Community Legal Service, the Supreme and Magistrates courts, Tasmania Police, the Director of Public Prosecutions, the Witness Assistance Service, Speech Pathology Australia, Speak Out Advocacy, and any other non-government or professional organisations with expertise in interacting with people with communication needs.

5.2.57 The Institute agrees that it is preferable that intermediaries/communication assistants become involved in cases at the earliest possible opportunity, that is at the first point of people's contact with the criminal justice system and, therefore, prior to their cases being listed in court. Therefore, the Institute agrees that courts are not the most appropriate body to establish or manage an intermediary/communication assistant scheme for Tasmania. Further, the appointment of intermediaries/communication assistants is essentially an administrative task and, therefore, not one in which the courts should frequently be involved.

5.2.58 However, this does not mean that courts should not be empowered to order, either on their own motion or on application, that communication assistants/intermediaries be provided for people with communication needs who are appearing before them and who may not previously have been identified as requiring such assistance. The Institute is of the view that courts should have this power.

5.2.59 The Institute is also of the view that courts should have the power to approve intermediaries/communication assistants who have not been recruited to the expert panel to assist people with communication needs appearing before them. Such approval should be given only to people who have relevant expertise and who satisfy requirements of impartiality and independence and who understand that their paramount duty is to the administration of justice. A precedent in this regard is provided by ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).

Recommendation 7: Appointment of intermediaries/communication assistants and administration of the scheme

- (a) A panel of expert communication assistants/intermediaries should be established by legislation from whom intermediaries/communication assistants should be drawn and, based on their particular expertise and/or experience, matched to people with communication needs.
- (b) A government funded body that is independent of the police, the prosecution and victim support services should be created to establish, recruit and administer the panel of expert

intermediaries/communication assistants. The membership of this body should, nevertheless, be representative of the various views and interests of those in the criminal justice system who have responsibility for interacting with people with communication needs, of the people with communication needs themselves, and those who might act as intermediaries/communication assistants. This body might usefully include representatives of the Defence Bar, Legal Aid, Community Legal Services, the Education Department of Tasmania, the Department of Treasury and Finance, the Tasmanian Aboriginal community and/or the Tasmanian Aboriginal Community Legal Service, the Supreme and Magistrates courts, Tasmania Police, the Director of Public Prosecutions, the Witness Assistance Service, Speech Pathology Australia, Speak Out Advocacy and any other non-government or professional organisations with expertise in interacting with people with communication needs.

- (c) Courts should have the power to order, either of their own motion or on application, that intermediaries/communication assistants be assigned from the expert panel to people with communication needs appearing before them.
- (d) Courts should also have the power to approve intermediaries/communication assistants who have not been recruited to the expert panel to assist people with communication needs appearing before them. Such approval should be given only to people who have relevant expertise, based on knowledge, training or experience, who satisfy requirements of impartiality and independence and who understand that their paramount duty is to the administration of justice. A precedent in this regard is provided by ss 13A(5a) and 14A(4) of the *Evidence Act 1929* (SA).

Financial responsibility for the scheme

5.2.60 The implementation of an intermediary/communication assistant scheme will necessarily involve investment in infrastructure, training, education, administration and monitoring. Accordingly, the Institute sought feedback on who should bear financial responsibility for the Tasmanian scheme.

Financial responsibility

Who should have financial responsibility for a Tasmanian intermediary scheme?

- The agency/institution that uses the intermediary/communication assistant?
- The State Government?⁴³⁴

5.2.61 The general tenor of submissions received in response to this question was that the government should have responsibility for financing an expert intermediary/communication assistant scheme. However, opinions differed about who should fund utilisation of the scheme by different agencies. The Tasmanian Aboriginal Community Legal Service suggested that if such a service is for police use only, it should be financed through the police budget allocations and that consideration of this expense would need to be included in government deliberations for budget allocation. The Director of Public Prosecutions recommended that Tasmania Police should be financially responsible for their use of intermediaries/communication assistants. Three submissions⁴³⁵ nominated the Department of Justice, with the Independent Living Centre suggesting that both the Justice System and police should bear the financial responsibility to ensure equal access to the Justice System and police service. Based on her experience with the system for England and Wales, Joyce Plotnikoff emphasised the importance of centrally allocated

⁴³⁴ Question 12(a) of the Issues Paper.

⁴³⁵ The Department of Health and Human Services (Disability and Community) Services, a speech pathologist who wished to remain anonymous, and the Independent Living Centre.

funding for the scheme. She pointed out that in England and Wales delegation and separation of financial responsibility between local police and prosecution authorities had proved problematic and had resulted in uneven access to the service.⁴³⁶

5.2.62 With respect to the question of who should fund any intermediary/communication assistance used by defence and prosecution counsel when interacting with people with communication needs, recommendations fell into three categories. First, it was suggested that this matter might best be determined on a case by case basis depending on the situation and the client's financial position. Options might include charging the client either a set fee or a fee by use, payment of a subscription fee by private firms or funding through government rebate or Legal Aid.⁴³⁷ The second suggestion was that the cost of the scheme should be borne by whichever court is to deal with the matter⁴³⁸ and the third suggestion was that it should be funded by the Department of Justice.⁴³⁹ Again, Joyce Plotnikoff stressed the necessity for the funding for an intermediary scheme to be clearly delineated and maintained from the outset. She referred to the problems that have resulted in the United Kingdom from splitting costs between the police and Crown Prosecution Service. This has caused administrative complexities for intermediaries and uneven provision of services and support to people with communication needs. Where costs are borne by those requiring the communication assistance or at the local agency level they may be reluctant to request the services of an intermediary. Experience in England and Wales has also shown that where sources of funding differ for different people (for example, for prosecution witnesses compared to defendants), different fee scales may apply to the intermediaries with the result that the recruitment and retention of intermediaries may become problematic.⁴⁴⁰ This would result in inequities in access to justice.

5.2.63 Based on the experience in England and Wales, the Institute is of the view that, to ensure equal access to the scheme and consistency in its application and administration, the financial responsibility for a Tasmanian intermediary/communication assistant scheme should be assumed by the government and by a single source within government which has general oversight of the operation of the scheme. If more than one agency has responsibility for funding the scheme, then there should be joint oversight of its administration in order to ensure consistency in its operation and application for all people with communication needs. Also, based on the experience in England and Wales and following the example in South Australia, funding should cover all aspects of the scheme including education and training. Clearly, the scheme will only be able to gain the trust and support of all those who use it, if it meets their needs which means that it must be adequately resourced and a sufficient number of intermediaries/communication assistants must be made available across the State. Accordingly, the Institute recommends that, no matter who has responsibility for funding the scheme, care should be taken to ensure that it is adequately resourced.

Recommendation 8: Financial responsibility for the scheme

- (a) The financial responsibility for a Tasmanian intermediary/communication assistant scheme should be assumed by a single government source which has general oversight of the operation of the scheme. Alternatively, if more than one government agency has responsibility for funding the scheme, then there should be joint oversight of its administration in order to ensure consistency in its operation

⁴³⁶ See also Plotnikoff and Woolfson, above n 225, 297–298.

⁴³⁷ Tasmanian Aboriginal Community Legal Service.

⁴³⁸ Director of Public Prosecutions/Witness Assistance Service.

⁴³⁹ The Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, a speech pathologist who wished to remain anonymous.

⁴⁴⁰ See also Plotnikoff and Woolfson, above n 225, 297–298.

and application for all people with communication needs. Funding should cover all aspects of the scheme, including education and training.

- (b) In view of the fact that the scheme will only be able to gain the trust and support of those who use it if it meets their needs, it must be adequately resourced and a sufficient number of intermediaries/communication assistants must be made available across the State. Accordingly, the Institute recommends that, no matter who has responsibility for funding the scheme, care should be taken to ensure that it is adequately resourced.

Training and education

5.2.64 Experience in other jurisdictions demonstrates that the success of intermediary/communication assistant schemes depends very much on their becoming part of the fabric of the criminal justice system. This necessitates achieving a cultural shift at all levels of the criminal justice system in approaches and attitudes to questioning people with communication needs. The key to securing such change is the quality of the training and on-going education of those who interact with people with communication needs.

5.2.65 As is clear from the discussion throughout this paper, the need for training is not limited to intermediaries/communication assistants. If the intermediary/communication scheme is to become an accepted component of the criminal justice process, it must be embraced by everyone who has a role in facilitating access to justice for people with communication needs. This requires education about the function and need for the scheme. Moreover, proper interviewing and questioning of people with communication needs is not the responsibility solely of intermediaries/communication assistants. To achieve genuine change, all those who interact with people with communication needs should have an understanding of the principles involved in how and how not to conduct such interactions. As has been pointed out by the Scottish Court Service, this is not ‘something that can be achieved peremptorily — it [is] no coincidence that training for interviewers in Norway [lasts] for six months.’⁴⁴¹ The significance of this matter cannot be over-emphasised. If we had not known before, the Royal Commission into Institutional Responses to Child Sexual Abuse has made inescapably clear that our traditional and long accepted approach to forensic interviewing and questioning has exposed people with communication needs not only to re-victimisation by the criminal justice process but also to potential exclusion from criminal justice altogether.

5.2.66 In the Issues Paper the Institute asked a series of questions about current training and education programs for those tasked with interacting with people with communication needs. The focus in this regard was on the legal practitioners and the police. Nevertheless, the Institute also makes recommendations in relation to courts’ development of and participation in educational programs about the role of intermediaries/communication assistants and the questioning of people with communication needs to optimise their participation in hearings and trials.

Education and training for the police, the legal profession and intermediaries/communication assistants

- (a) Is the current training received by police recruits in identifying and interacting with people with communication needs adequate? If not, how might it be improved?

⁴⁴¹ Scottish Court Service, above n 5, 31.

- (b) Is the on-going training available to police officers in identifying and interacting with people with communication needs adequate? If not, how might it be improved?
- (c) Does undergraduate and postgraduate legal training adequately equip lawyers to identify and interact with people with communication needs? If it doesn't how might it be improved?
- (d) Do continuing legal education programs provide adequate on-going training to the legal profession in identifying and interacting with people with communication needs? If they do not, how might they be improved?
- (e) What training should communication assistants/intermediaries undertake?
- (f) What organisation(s) are best placed to develop training programs for a Tasmanian intermediary scheme?
 - i. The agency/institution that uses the intermediary/communication assistant?
 - ii. The State Government?⁴⁴²

The judiciary

5.2.67 In England and Wales, the judiciary has played a leading role in fostering understanding of the need for and role of witness intermediaries. The Institute therefore recognises the significance of courts' own professional development programs for the success of a Tasmanian intermediary scheme and recommends that courts review their programs with a view to incorporating sessions about the role of intermediaries/communication assistants and the questioning of people with communication needs.

Legal practitioners

5.2.68 Of some concern is the fact that none of the respondents to the Issues Paper consider that existing educational programs, either at the undergraduate or post-graduate levels, equip legal practitioners with the necessary skills to identify people with communication needs, to communicate with them or to gain appropriate support for them. The Tasmanian Aboriginal Community Legal Service stated that undergraduate legal training is of no assistance in enabling practitioners to deal with people with communication needs and that post-graduate programs provide only the most basic assistance in this regard. Natalie Leader, a speech pathologist, commented that training by those with specialist expertise, like speech pathologists, should be provided to legal practitioners incorporating information about support networks available for people with communication needs. The Independent Living Centre suggested that hands on experience during training would be beneficial for legal practitioners with access to resources to support them in dealing with a range of communication issues.

5.2.69 With respect to CPD, the Tasmanian Aboriginal Community Legal Service said that its focus is on people with mental health issues and that because attendance at relevant CPD events is optional, they may not, in any event, be well attended. Accordingly, the Tasmanian Aboriginal Community Legal Service suggested that CPD programs could be improved by incorporating training with respect to a broader range of people with communication needs including people with intellectual disabilities, children and people with physical impairments. Also in relation to CPD, the Director of Public Prosecutions/Witness Assistance Service suggested that more emphasis should be placed on seminars of specific relevance to this area. Based on her experience with the Witness Intermediary Service in England and Wales, Joyce Plotnikoff

⁴⁴² Questions 3(j) & (k) and 4(a) & (b) of the Issues Paper.

said that training of the legal profession is an important adjunct to any intermediary scheme. She noted that, in England and Wales, the lead is being taken by the judiciary. Judge Rook is developing the required training for the Bar and solicitors. It is anticipated that this training will be compulsory for all advocates acting in cases involving children or people whose ability to give evidence is likely to be diminished because they suffer from a mental disorder or a significant impairment of intelligence or social functioning. However, Joyce Plotnikoff also pointed out that even after training, judicial recognition of inappropriate questioning and willingness to intervene varies. This suggests that while education of the legal profession is necessary, it does not constitute a sufficient measure to overcome the problems facing people with communication needs in gaining access to justice. It must be accompanied by expert advice for practitioners and communication assistance for those with communication needs.

5.2.70 Given the twin threats that inappropriate questioning poses to the quality of evidence and the well-being of people with communication needs, the question should now be considered whether there should be a requirement for those involved in the questioning of these people to be ‘prequalified’ in the proper techniques for doing so. It is acknowledged that pre-qualification of legal practitioners in this way may meet with resistance. But as pointed out by the Scottish Court Service, it is also essential that practitioners are properly equipped to perform their duties, particularly where the wellbeing of witnesses and the quality of evidence is at stake.⁴⁴³ One respondent to the Issues Paper⁴⁴⁴ recommended that compulsory training should be undertaken by all defence and prosecution counsel regarding the identification of and appropriate support for people with communication needs. This respondent said that practitioners require practical training to facilitate development of a deep understanding of how to manage situations where people present with communication needs.

5.2.71 Given our understanding of the significant barriers faced by people with communication needs in participating in the criminal justice process and our awareness of the implications of their exclusion from that process by reason of their communication capacities, it is crucial that there be a body of expertly trained legal practitioners available to work on cases involving such people. The Institute is therefore of the view that specialist induction and refresher training should be made available to members of the legal profession in relation to the identification and questioning of people with communication needs and the roles of intermediaries/communication assistants.⁴⁴⁵ Further, specialist training in the appropriate questioning of people with communication needs should be compulsory for all counsel, both defence and prosecution, who work on cases involving people with communication needs. Such training should include and be grounded on the knowledge of those with specialist expertise in this area, including speech pathologists and specialist psychologists. Accordingly, specialist formal training courses should be developed to equip and accredit practitioners with the necessary skills to work in these cases. This view is in line with that set down in 2015 by the Ministry of Justice (UK) for the specialist training of advocates working with vulnerable witnesses and victims.⁴⁴⁶

5.2.72 Moreover, it is necessary that all those involved in the questioning and interviewing of people with communication needs have a thorough understanding of the role of intermediaries/communication assistants. Therefore, instruction with respect to these matters should be widely available. In this regard, the Tasmanian Aboriginal Community Legal Service recommended that training programs be conducted

⁴⁴³ Ibid 31.

⁴⁴⁴ A speech pathologist who wished to remain anonymous.

⁴⁴⁵ See Recommendation 9.

⁴⁴⁶ Ministry of Justice, United Kingdom, *Our Commitment to Victims* (2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/354723/commitment-to-victims.pdf>.

by the Law Society of Tasmania in conjunction with the courts and that training programs be monitored by the relevant training and accreditation authority established to manage the intermediary/communication assistant scheme.

The police

5.2.73 In its submission, the Department of Police and Emergency Management advised the Institute that it has developed courses for interviewing vulnerable people and extended the concepts from those courses to general police training. Nevertheless, the Tasmanian Institute of Law Enforcement Studies, which has undertaken extensive research in policing (including policing vulnerabilities) and which is involved in the training of police recruits, advised the TLRI that a recent case in Oklahoma where the police shot a person with a hearing disability⁴⁴⁷ demonstrates that there needs to be more emphasis in police training on communication issues other than basic language issues (that is languages other than English) which is where the current emphasis seems to be. However, the Tasmanian Institute of Law Enforcement Studies also acknowledged the constraints imposed by the limited teaching time available to recruits. The TLRI also notes the proposed revisions to the investigative interviewing component of the police recruits' course and at post-recruit level for serving officers to commence in 2018, which are detailed at [3.2.9].

5.2.74 Other submissions made suggestions about how current police training might be enhanced. The Communication Rights Organisation recommended the development of a step by step guide for police on how to respond when a person with communication needs reports a crime and suggested that, in such cases, a local specialist advocacy service with suitable expertise or an Augmentative and Alternative Communication expert should be contacted to assist the police. Additionally, the Communication Rights Organisation recommended that training should be provided to the police in how to adjust their behaviour and language when communicating with a person who uses alternative or augmentative methods of communication, pointing to resources available from the Australian Human Rights Commission as possibly useful for this purpose. Similarly, The Independent Living Centre suggested that the police would benefit from 'hands on experience' as well as training in the use of alternative and augmented communication strategies. The Centre also submitted that there is also a need for police officers to have access to training in basic communication strategies, such as keyword signing.

5.2.75 The National Disability Service identified a number of matters that should be addressed in police training including familiarisation with problems associated with recall of information, the propensity of some people to be led by those in authority and difficulties that may be generated by particular circumstances such as those arising from reduced social networks and a fear of retribution in situations of carer abuse. The Department of Health and Human Services (Disability and Community Services) offered to prepare a training package for the police. This might usefully be borne in mind in the development of future education and training. Natalie Leader, suggested that police training should be subject to on-going review. She and a speech pathologist who wished to remain anonymous further recommended that police training should include compulsory practical training to instil a deep understanding of their professional obligations in managing situations in which people present with communication needs. Speech Pathology Australia noted that the exact information and skills police will require will be dependent on the overall system that is established to support justice in Tasmania. As an example, they said that if the system does allow for communication intermediaries to be present to support police during questioning, the most critical knowledge for police will be how to 'screen' for communication difficulties and/or access a database of

⁴⁴⁷ See further: 'US police fatally shoot deaf man despite neighbours' warnings' *The Telegraph* (online) 21 September 2017 <<http://www.telegraph.co.uk/news/2017/09/21/us-police-fatally-shoot-deaf-man-despite-neighbours-warnings/>>.

expert support. A speech pathologist who wished to remain anonymous submitted that police should have training in alternative strategies to enable people with communication difficulties to tell their story effectively.

5.2.76 Because police interviews can have a determinative impact upon the outcomes of cases, the Institute recommends that specialist induction and on-going training should be provided by Tasmania Police at regular intervals in relation to the identification and questioning of people with communication needs and the roles of intermediaries/communication assistants. It is desirable that such training should be compulsory for police officers who are tasked with working on cases involving people with communication needs. In view of the proposed revisions to police recruits' training and the specialist courses proposed to be offered at the post-recruit level, the Institute recommends that police training be subject to on-going monitoring and revision to ensure that it meets the needs of an intermediary/communication assistant scheme for Tasmania and also to ensure that both recruit training and on-going training of police officers comply with international best practice with respect to interviewing people with communication needs.

Intermediaries/communication assistants

5.2.77 Among the most critical matters to be settled and put in train are questions about the type of training that should be undertaken by intermediaries/communication assistants to equip them to work in the criminal justice system, and who (what organisation(s)) should have responsibility for developing and providing such training.

5.2.78 All intermediaries in England and Wales undertake a week-long training course including tuition on court and police practice and on report writing for the court about their assessments of witnesses' communication needs. They are also taught about the necessity for ground rules hearings.⁴⁴⁸ At the conclusion of the course they undergo rigorous assessment and accreditation consisting of a written examination and a role play carried out before a retired judge. They are taught that they must be impartial, that their paramount duty is to the court and that they are bound by a Code of Ethics and a Code of Practice. Training has largely been conducted by two barristers, David Wurzel of the City Law School, City University and Professor Penny Cooper, visiting professor at City University and co-founder and chair of the Advocates Gateway (UK).⁴⁴⁹

5.2.79 Professor Cooper, with the assistance of Professor Michelle Mattison, also trained intermediaries for the New South Wales pilot scheme. In New South Wales, witness intermediaries undertake five days training.⁴⁵⁰ Their assessment comprises a written exam and an oral exam. They must also undertake 14 hours continuing professional development per annum which may include peer support group meetings and post-accreditation training provided by Victims Services.

5.2.80 In South Australia, United Communities has partnered with the South Australian Government (specifically, the Attorney General's Department) to deliver the 'communication partner' service.⁴⁵¹ At the time of writing this Report training for communication partners was being provided by Deakin University's

⁴⁴⁸ Penny Cooper, *Ten Years of Registered Intermediaries in England and Wales* (2012) City Law School <https://www.city.ac.uk/__data/assets/pdf_file/0010/150688/Ten-years-of-Registered-Intermediaries-in-England-and-Wales-Jun-2012.pdf>.

⁴⁴⁹ Plotnikoff and Woolfson, above n 225, 18.

⁴⁵⁰ Cooper, above n 175, 191–194.

⁴⁵¹ Attorney-General's Department of South Australia, *Communication partner service* <<https://www.agd.sa.gov.au/projects-and-consultations/disability-justice-plan/communication-partner-service>>.

Centre for Investigative Interviewing which is headed by Professor Martine Powell. E-learning materials were being prepared which will provide an overview of key developmental milestones and how they affect communication in the court arena, and the best way to accommodate cognitive and language limitations during the trial process.⁴⁵²

5.2.81 To qualify for work in the Barnehus in Norway as a forensic interviewer of children and vulnerable witnesses, an intensive, six-month training program must be undertaken. Trainees receive face-to-face tuition, workplace training and coaching and rigorous assessment.⁴⁵³ This is the most rigorous training program instituted by any of the intermediary/communication assistant schemes considered by the Institute.

5.2.82 Submissions to the Institute on the training that Tasmanian intermediaries/communication assistants should receive to work in the criminal justice system suggested that the following key areas should be covered: disability and communication,⁴⁵⁴ court processes and rules of evidence,⁴⁵⁵ intermediaries'/communication assistants' duties and responsibilities, and the use of augmented and alternative communication strategies.⁴⁵⁶ Specific mention was made of the courses developed by Professor Penny Cooper for the witness intermediary scheme in England and Wales and the pilot scheme in New South Wales as providing useful precedents for a Tasmanian scheme.⁴⁵⁷

5.2.83 The suggestions that the Institute received on the content of an intermediary training program largely accord with core components of programs and guidance material including Codes of Practice and Guidance Manuals developed by Professor Penny Cooper for the England and Wales scheme and the New South Wales pilot.⁴⁵⁸

5.2.84 Respondents' views about the organisations best placed to develop training programs for Tasmanian intermediaries were diverse and reflect an implicit understanding that the success of a Tasmanian intermediary scheme will depend upon its training and governance being seen as independent yet fulfilling the needs of those in the criminal justice system responsible for dealing with people with communication needs. This is foundational to the scheme gaining widespread support. One submission suggested that a tender process might be implemented to enable organisations to apply for funding to develop training programs.⁴⁵⁹ Other submissions recommended that training might be developed variously by the Department of Justice,⁴⁶⁰ the Law Society of Tasmania in conjunction with the Courts,⁴⁶¹ the Department of Police and Emergency Management,⁴⁶² Speak Out Advocacy,⁴⁶³ the Education Department of Tasmania,⁴⁶⁴ and specialist professional bodies that are responsible for accrediting members of their

⁴⁵² Deakin University, Centre for Investigative Interviewing, *Our Courses* (2017) <<http://investigativecentre.com/our-courses/>>.

⁴⁵³ Scottish Court Service, above n 5, 25.

⁴⁵⁴ Speak Out Advocacy.

⁴⁵⁵ The Tasmanian Aboriginal Community Legal Service.

⁴⁵⁶ The Independent Living Centre.

⁴⁵⁷ Joyce Plontikoff.

⁴⁵⁸ *Registered Intermediary Procedural Guidance Manual* (2015), above n 13 8-9; Victims Services, above n 13.

⁴⁵⁹ The Sexual Assault Support Service.

⁴⁶⁰ The Department of Health and Human Services (Disability and Community Services) and a speech pathologist who wished to remain anonymous.

⁴⁶¹ The Tasmanian Aboriginal Community Legal Service.

⁴⁶² A speech pathologist who wished to remain anonymous.

⁴⁶³ Speak Out Advocacy.

⁴⁶⁴ The Education Department of Tasmania and a speech pathologist who wished to remain anonymous.

professions and from which intermediaries/communication assistants might be drawn.⁴⁶⁵ One respondent recommended that TAFE should be tasked with developing programs which might be incorporated into its existing Community Service courses.⁴⁶⁶

5.2.85 The Institute understands that it is critical for the success of a Tasmanian scheme that its intermediaries/communication assistants have the respect and confidence of all criminal justice professionals, organisations and institutions. It is only if the scheme has such support that it will be able to become an integral part of the criminal justice process. Further, a cultural change must be forged within the criminal justice system if the involvement of intermediaries/communication assistants in the interviewing and questioning of people with communication needs, is to fulfil its intent of enabling these people to give their best evidence. This will not be possible unless the scheme is considered to be a Tasmanian institution developed specifically for the Tasmanian criminal justice environment. Accordingly, the training program for intermediaries should also be developed for that environment.

5.2.86 Cognisant of the experience in other jurisdictions and of the foundational change in current criminal justice practices that the implementation of a Tasmanian intermediary/communication assistant scheme will require, the Institute recommends that the representative body created to establish and administer the Tasmanian intermediary scheme should also be responsible for approving and guiding the development of its training programs for both intermediaries/communication assistants and for the legal profession. This body should also be responsible for appointing the trainers. However, it might delegate the task of investigating and making recommendations about the content of such teaching programs to a sub-committee or to a single expert in the area. In devising the content of Tasmanian training programs, members of the administrative body or its delegates might visit other jurisdictions and hold discussions with trainers and academics who have developed such training programs for those jurisdictions. Specifically, they might examine the curricula for intermediary/communication assistant training in England and Wales, New South Wales and South Australia and speak to those responsible for their development and delivery. They should also investigate the training offered by the Inns of Court in the United Kingdom for advocates who work in cases involving vulnerable witnesses.⁴⁶⁷ This body would also provide a resource on which the courts might draw to facilitate professional development opportunities.

5.2.87 While the training provided might be based on that offered elsewhere, the Institute stresses that it should be adapted to the Tasmanian criminal justice environment. This is also true for the education provided to the police and the legal profession about the Tasmanian intermediary/communication assistant scheme and the principles behind the approach to and questioning of people with communication needs.

Recommendation 9: Training and education

The Institute stresses the vital role that education and training of all those tasked with interacting with people with communication needs will play in achieving the objectives of a Tasmanian intermediary/communication assistant scheme. Its recommendations with respect to this matter therefore extend beyond intermediaries/communication assistants to courts, the legal profession and the police. Education and training programs should cover the need for and function of the

⁴⁶⁵ The Tasmanian Aboriginal Community Legal Service and Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania.

⁴⁶⁶ Speak Out Advocacy.

⁴⁶⁷ See ICCA, above n 248.

intermediary/communication assistant scheme and seek to impart an understanding of the principles relating to interviewing and questioning people with communication needs.

(a) Responsibility and content

- (i) The Institute recommends that the representative body created to establish and administer the Tasmanian intermediary/communication assistant scheme should also be responsible for approving and guiding the development of training programs for both legal practitioners and intermediaries/communication assistants.
- (ii) This body might delegate the task of investigating and making recommendations about the content of education and training programs to a sub-committee or to an expert in the area.
- (iii) Training programs developed for Tasmanian legal practitioners and intermediaries/communication assistants might be based on the curricula in other jurisdictions including England and Wales, New South Wales and South Australia and devised by institutions like the Inns of Court in the United Kingdom. Codes of Practice and Guidance Manuals developed by Professor Penny Cooper for the England and Wales scheme and the New South Wales pilot provide useful guidance as to the core components of such programs. However, all training provided should be adapted to the Tasmanian criminal justice environment.
- (iv) This body would also provide a resource on which the courts might draw to facilitate the creation of professional development programs.

(b) Judicial officers

Acknowledging the key role that courts will play in the successful implementation of a Tasmanian intermediary/communication assistant scheme, the Institute recommends that courts review their professional development programs with a view to incorporating sessions on working with intermediaries/communication assistants and the optimal questioning of people with communication needs.

(c) Legal practitioners

- (i) Induction and refresher training should be provided to legal practitioners in relation to the identification of people with communication needs and the communication and comprehension barriers that impede their participation in the criminal justice process and in relation to the roles of intermediaries/communication assistants in overcoming those barriers.
- (ii) Given the gravity of the twin threats that inappropriate questioning poses to the quality of evidence and the well-being of people with communication needs, the Institute recommends that there should be a requirement for legal practitioners involved in the interviewing and questioning of these people to be 'prequalified' in the proper techniques for doing so. For the sake of clarity, this means that specialist training in the appropriate questioning of people with communication needs and the role of intermediaries/communication assistants should be compulsory for all counsel, both defence and prosecution, who work on cases involving people with communication needs.
- (iii) Specialist training programs should therefore be developed to equip and accredit legal practitioners with the necessary skills to work on cases involving people with communication needs.

(d) *The police*

- (i) Specialist training should be provided by Tasmania Police at regular intervals in relation to the identification and questioning of people with communication needs and the roles of intermediaries/communication assistants. It is desirable that such training should be compulsory for police officers who work on cases involving people with communication needs.
- (ii) In view of both the proposed revisions to police recruits' training and the specialist courses proposed to be offered at the post-recruit level, the Institute recommends that police training be subject to on-going monitoring and revision to ensure that it meets the needs of an intermediary/communication assistant scheme for Tasmania and also to ensure that both recruit training and on-going training of police officers comply with international best practice with respect to interviewing people with communication needs.

(e) *Intermediaries and communication assistants*

- (i) Intermediaries/communication assistants should receive training to prepare them to undertake their specialist roles in the criminal justice system and include instruction in their duties and responsibilities, the kinds of questions and questioning in the criminal justice arena they are likely to encounter that are inimical to obtaining the best evidence from people with communication needs and how such questioning might be reformulated, and the best way to accommodate cognitive and language limitations during the interview and questioning processes.
- (ii) The representative body created to establish and administer the Tasmanian intermediary/communication assistant scheme should be responsible for appointing the intermediary/communication assistant trainers.

5.3 Additional requisite measures

5.3.1 The discussion in Parts 2 and 3 makes it clear that the establishment of a Tasmanian intermediary/communication assistant scheme should be accompanied by a number of additional measures to clarify and strengthen existing arrangements for people with communication needs and to ensure that the scheme operates according to its legislative intent. These measures seek to support the police, the legal profession and the judiciary in implementing and utilising the scheme. They are, legislative or rules based provision for pre-trial directions hearings, the preparation of Tasmanian Bench Book guidance for the judiciary and the legal profession, formulation of Practice Directions and Codes of Practice, the publication of professional materials of the kind provided in the United Kingdom by the Advocates Gateway, the development of protocols and data resources to assist in the identification of people with communication needs and the establishment of dedicated physical facilities and environments for interviewing and pre-recording the evidence of people with communication needs. Feedback was sought on these measures in the Issues Paper.

Pre-trial directions hearings

5.3.2 As shown by the discussion in Part 3, pre-trial directions hearings are an essential component in the triumvirate of measures that are necessary to control inappropriate questioning and thereby to secure the best evidence of people with communication needs during hearings and trials. The discussion there also indicated that although there are existing legislative provisions that might be deployed to conduct pre-trial

directions to this effect, more explicit and detailed provision in this regard is desirable. The Institute asked two questions about this matter in then Issues Paper.

Pre-trial directions hearings

Should there be a legislative base for pre-trial directions or ground rules hearings to be held in any case involving witnesses with communication needs as is the case in England and Wales for children and youths?

Should a ground rules hearing be held in every case involving a person with communication needs to determine the need for and role to be performed by an intermediary/communication assistant and the type and style of questions that the person with communication needs may be asked?⁴⁶⁸

5.3.3 As noted in Part 3, respondents to the Issues Paper agreed that pre-trial judicial directions can be critical in enabling people with communication needs to participate in hearings and trials. They doubted whether current legislative provisions are sufficiently detailed in conduct of pre-trial directions hearings to this end. Therefore, they supported legislative reform in this regard. For example, the Tasmanian Aboriginal Community Legal Service said that judges may remain reluctant to give pre-trial directions controlling questioning in the absence of *specific* statutory provision. This view is supported by comments from the Acting Chief Magistrate, Mr Daly, that any intermediary and pre-trial directions schemes should be underpinned by legislation. Speech Pathology Australia indicated strong support for the creation of a legislative base for pre-trial directions hearings to define the support to be provided to people with communication needs to enable them to participate in the trial process and improve their access to justice. The Director of Public Prosecutions stated that there have been positive signs in relation to the use of pre-trial directions to identify and manage witnesses' communication needs, particularly in cases involving the pre-recording of evidence under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas), where judges have taken a proactive role in giving pre-trial directions about witness questioning. Nevertheless, he said that more work is needed in this area. The Sexual Assault Support Service believes that there is no evidence that Tasmanian courts have exerted the level of control of questioning via ground rules hearings that is achieved under the legislated regime in England and Wales. These responses indicate the desirability of enacting legislation mandating the holding of pre-trial directions hearings in cases involving witnesses with communication needs to enable information to be obtained and appropriate directions to be given about their questioning and the provision of any necessary communication assistance at trial. Research and experience elsewhere⁴⁶⁹ also support the legislative definition of the matters that should be dealt with during pre-trial directions hearings. They include obtaining advice about the communication capacities and possible support needed for people with communication needs and the type and style of permissible questions.

5.3.4 Respondents also supported the holding of ground rules hearings in every case involving people with communication needs,⁴⁷⁰ although the Director of Public Prosecutions/Witness Assistance Service suggested that this would depend to some extent on the amount and significance of the evidence to be given by the person with communication needs.

⁴⁶⁸ Questions 6(c) and 11(f) of the Issues Paper.

⁴⁶⁹ See discussion at [3.4.16]–[3.4.18].

⁴⁷⁰ The Department of Health and Human Services (Disability and Community Services), the Independent Living Centre, Joyce Plotnikoff, the Tasmanian Aboriginal Community Legal Service, the Sexual Assault Support Service, Speak Out Advocacy, a speech therapist who wished to remain anonymous, Speech Pathology Australia, TasCOSS.

5.3.5 The Institute's view in relation to pre-trial directions hearings are set out in detail at [3.4.17]–[3.4.18] and [3.4.28]. Based on responses to the Issues Paper and research and experience in other jurisdictions, the Institute recommends that legislation should be enacted or rules created that make detailed provision for pre-trial directions hearings to be held in any case involving people with communication needs. In such cases, the holding of a directions hearing should be mandatory. The legislation/rules should also detail the matters to be canvassed at the hearing. They should, as a minimum, include directions about the manner and nature of questioning, its duration, and any questions that may or may not be asked. The rules should also make provision for intermediaries/communication assistants to be involved in pre-trial hearing in an advisory capacity (see Recommendation 10(a)). A useful precedent is provided by the United Kingdom Criminal Procedure Rules, specifically r 3.9(7) of those rules.⁴⁷¹

Bench Book guidance, Practice Directions, a Code of Conduct or Practice and a Practice Manual for intermediaries/communication assistants

5.3.6 Additionally, to support the scheme, to ensure consistency across cases and to foster cultural change in relation to the questioning of people with communication needs, Practice Directions should be devised and Bench Book materials created containing questioning guidance and a detailed checklist of matters to be dealt with at the pre-trial directions hearings. In relation to Bench Book guidance, there are useful Australian precedents⁴⁷² as well as the Equal Treatment Bench Book for England and Wales,⁴⁷³ the Advocates Gateway materials and the checklist developed for managing cases involving children and vulnerable witnesses in England and Wales.⁴⁷⁴

5.3.7 As noted above, a number of respondents to the Issues Paper stressed that intermediaries'/communication assistants' primary duty should be to the administration of justice and that they should act independently and impartially. The Institute shares this view and has recommended these matters should constitute a key component of their training. Additionally, as happens in other jurisdictions, such training should be reinforced by a Code of Conduct or Practice and a Practice Manual. The Codes of Practice/Conduct⁴⁷⁵ that apply to Registered Intermediaries under the England and Wales regime and the NSW pilot provide useful precedents for this purpose. The Code of Conduct that has been developed for NSW witness intermediaries is published in the Procedural Guidance Manual produced by Victims Services in the New South Wales Department of Justice⁴⁷⁶ (see Recommendation 10(b)).

Identification measures

5.3.8 Identification of people with communication needs is one of the most enduring problems for those tasked with interacting with them. This is a problem that is experienced throughout the criminal justice system but is particularly burdensome for the police who are often their first point of contact in the criminal justice process. Accordingly, in the Issues Paper, the Institute asked whether specific mechanisms should be developed to support the police in tackling this problem, including a common diagnostic tool and an

⁴⁷¹ The *Criminal Procedure Rules* (UK) October 2015 as amended April 2016 & October 2016, r 3.9(7).

⁴⁷² For example, Judicial College of Victoria, above n 12, [5.11]; the Department of the Attorney General WA, above n 12; Judicial Commission of New South Wales, above n 12; Australian Institute of Judicial Administration Incorporated, above n 12.

⁴⁷³ The Judicial College (UK), above n 12.

⁴⁷⁴ See the *Judicial College Bench Checklist: Young Witness Cases*, above n 167.

⁴⁷⁵ *Registered Intermediary Procedural Guidance Manual*, above n 13.

⁴⁷⁶ Victims Services, above n 13.

integrated database, which unites relevant data platforms across relevant government agencies and departments. Both these mechanisms may also be useful at later stages of the criminal justice process.

Need for a common diagnostic tool and an integrated database

Should a common assessment tool be developed in consultation with experts in communicating with people with communication needs to enable early identification of people with communication and comprehension problems?

Are the mechanisms currently available to enable identification of existing support persons and advocates for people with communication needs adequate?

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 Department of Health and Human Services (Disability Services), the Justice Department, the Department of Corrections, the Department of Police and Emergency Management and allied agencies?

5.3.9 A variety of responses was received to the question whether a common assessment tool should be developed in consultation with experts to enable early identification of people with communication and comprehension problems. Three submissions⁴⁷⁷ simply answered yes to this question.

5.3.10 Joyce Plotnikoff referenced the Advocate's Gateway Toolkit used in England and Wales as an example of an established resource to assist police, counsel and judges in assessing the requirements of people with communication needs in the justice system.⁴⁷⁸

5.3.11 Speech Pathology Australia submitted that there needs to be a consistent process for identifying people with communication needs early in the criminal justice process. Similarly, the Sexual Assault Support Service submitted that there is merit in developing a common assessment tool of this kind. The Director of Public Prosecutions/Witness Assistance Service said a diagnostic tool is a sensible approach but cautioned that it might introduce unnecessary procedures if applied in all cases.

5.3.12 The Independent Living Centre noted that communication needs can vary significantly and accordingly, a single assessment tool may not be able to detect a diverse range of needs. Nevertheless, the Centre was of the view that a screening tool should be developed. Likewise, the Tasmanian Aboriginal Community Legal Service submitted that one assessment tool would not be sufficient to identify all categories of communication need. Rosalie Martin a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, advised the Institute that tools for screening a range of communication needs already exist (most notably in the United Kingdom) and could be adapted and further developed for Tasmania. She pointed out that in the hands of front-line practitioners who have received training in their use, such instruments introduce a systematic, objective and fair means by which to make judgments about the need for communication support.

5.3.13 A speech pathologist who wished to remain anonymous submitted that the successful introduction of a diagnostic tool would depend on providing adequate training for people tasked with its implementation.

⁴⁷⁷ The Tasmanian Commissioner for Children, the Department of Health and Human Services (Disability and Community Services), Natalie Leader (a speech pathologist).

⁴⁷⁸ Advocates' Gateway website <<http://www.theadvocatesgateway.org/>>.

Moreover, this submission suggested that a more appropriate approach may be to develop different diagnostic devices for use in different contexts for different people — children, adolescents and adults.

5.3.14 A number of respondents⁴⁷⁹ to the Issues Paper were of the view that an integrated database would enhance the ability of the police to identify existing communication assistants and support people for people with communication needs. In fact, the Tasmanian Aboriginal Community Legal Service said that it would be of ‘immeasurable assistance to all relevant agencies’. Speech Pathology Australia supported appropriate data collection in relation to communication as part of an integrated database across all government and other agencies that provide support to people with communication needs (along with appropriate consent and confidentiality protocols). The Sexual Assault Support Service supported the development of such a database as a matter of priority, regardless of whether an intermediary/communication assistant scheme is established, saying that an integrated database containing information about existing advocacy and support mechanisms and contact people is a great idea and should be implemented as soon as possible, given that the implementation of any intermediary/communication assistant scheme in Tasmania is likely to take time. The database could then be developed further when a Tasmanian intermediary scheme commences. Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, pointed out that access to an integrated database that provides information about former assessments will avert the cost and indignity occasioned by the doubling up of assessments. The Department of Health and Human Services (Disability and Community Services) were of the view that such a database would enhance the process of identifying communication assistants and support people for people with communication needs but doubted whether it would be possible to establish due to ethical dilemmas around who would have access to it. In a similar though less pessimistic vein, Rosalie Martin stressed that appropriate constraints on who would have access to the data would, of course, be essential. Given that such databases have been established in other Australian jurisdictions, the Institute does not consider that such ethical considerations will constitute an insurmountable problem. It is, moreover, a concern that can be resolved by the creation of appropriate statutory protections.

5.3.15 In line with these submissions the Institute recommends that a common diagnostic tool be developed in consultation with experts in communicating with people with communication needs to enable early identification of people with communication and comprehension problems. The Institute also recommends that an integrated database be created with relevant government departments (like the Department of Health and Human Services (Disability and Community Services)) and allied agencies to enhance the police capability to identify people with communication needs and any existing communication assistance that may have been provided for them.

5.3.16 Six responses⁴⁸⁰ to the Issues Paper also agreed that an integrated database would help the defence and prosecution counsel to obtain support for people with communication needs. The Independent Living Centre suggested that its value in this regard may be limited if the only information provided were a list of advocates and support people. Additionally, the database should match intermediaries’ skill sets with people’s particular communication needs. This is likely to have occurred where people have already been allocated a support person or advocate and this is the information sought from the database. The

⁴⁷⁹ The Director of Public Prosecutions/Witness Assistance Service, the Independent Living Centre, Natalie Leader (a speech pathologist), an anonymous speech pathologist, the Tasmanian Aboriginal Community Legal Service, the Department of Health and Human Services (Disability and Community Services), the Sexual Assault Support Service, and Speech Pathology Australia.

⁴⁸⁰ The Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions/Witness Assistance Service, Joyce Plotnikoff, Speech Pathology Australia, the Independent Living Centre, the Department of health and Human Services (Disability and Community Services).

Independent Living Centre expressed concern that ethical issues might arise around who should have access to such a database. Such issues might be resolved by designating in legislation who might have, or the grounds for, legitimate access.

5.3.17 The Institute recommends that the current mechanisms to identify and obtain communication assistance for people with communication needs should be enhanced by developing a common diagnostic tool in consultation with communication experts and by developing an integrated database with relevant government departments and agencies, which can be accessed by the police and members of the legal profession who work on cases involving people with communication needs.

Physical facilities

5.3.18 Another matter for consideration is the environment in which intermediaries should ideally work. In this regard, there are currently two main approaches adopted in other jurisdictions. First there is the model in operation in England and Wales and in the pilot scheme in New South Wales, where intermediaries work in the existing physical environments of the criminal justice system, that is, in police interview rooms, legal practitioners' offices and courts. Second, there is the Barnehus/Barnahus model adopted in Norway and Iceland, where intermediaries work in specifically dedicated and custom designed locations. The latter, which incorporates a multidisciplinary approach to interviewing and supporting people with communication needs during interviews and evidence taking processes, arguably provides the optimum environment for eliciting the best evidence from them and for minimising risks of their systemic traumatisation. This is certainly the view of the Scottish Court Service, which has recommended the establishment of Barnehus style facilities in Scotland.⁴⁸¹ The institution of a pilot for dedicated facilities modelled on the Norwegian Barnehus is also foreshadowed for England and Wales.

Accordingly, the Institute sought feedback on whether a specifically dedicated facility (like the Norwegian Barnehus) should be investigated for Tasmania. Such a facility provides a secure and non-threatening environment for interviewing and obtaining the evidence of people with communication needs. The Norwegian Barnehus is described in Part 4 at [4.3.9]–[4.3.14].

Physical facilities

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 communication needs be investigated for Tasmania?

5.3.19 All submissions⁴⁸² to the Issues Paper that addressed this issue were in favour of this model being implemented in Tasmania. A number of those submissions made further comments in this regard. Based on the information in the Issues Paper, the Tasmanian Aboriginal Community Legal Service said that such a resource would be likely greatly to assist people with communication needs, especially children and those with mental health problems that cause communication barriers. It would, however, be less necessary for people whose communication needs are caused by physical disability or a language barrier where simple steps can be taken to ameliorate the problem. Such steps might include access to interpreters or electronic communication support systems. The Sexual Assault Support Service, while expressing support for such

⁴⁸¹ Scottish Court Service, above n 5, 35–37.

⁴⁸² The Tasmanian Aboriginal Community Legal Service, the Director of Public Prosecutions/Witness Assistance Service, the Department of Health and Human Services (Disability and Community Services), Joyce Plotnikoff the Sexual Assault Support Service, Natalie Leader (a speech pathologist), Rosalie Martin, a Tasmanian speech pathologist with Chatter Matters and Speech Pathology Tasmania, and a speech pathologist who wished to remain anonymous.

facilities, suggested that, given the relatively small population of Tasmania, it may be more cost-effective to locate them within an existing organisation or government department, rather than to create a stand-alone facility.

5.3.20 Joyce Plotnikoff, an expert in the Witness Intermediary Service in England and Wales, referred to the recent recommendation of the Scottish Court Service, that consideration should be given to investing resources in the development of vulnerable witness interview centres in Scotland. The Scottish Court Service is of the opinion that the provision of a secure and non-threatening environment which helps witnesses to feel able to give their account freely would be a major contribution both to the administration of justice in Scotland and to the promotion of the well-being of some of the most vulnerable members of society. The Service has recommended that the physical environment of a Barnehus style facility be created for Scotland even if the entire Barnehus approach to questioning witnesses is not adopted on the ground that such a facility is equally applicable to the England and Wales Witness Intermediary Scheme. Nevertheless, the Scottish Court Service recommended that the full Barnehus model should be seen as the ideal to which to aspire.⁴⁸³ Joyce Plotnikoff also referred to the Barnehus pilots planned for London to be operational from the Spring of 2017.⁴⁸⁴ Judge Patricia Lees of the UK South Eastern Circuit Court, confirmed these plans in her address to the Association of Crown Prosecutors' Conference in Hobart in July 2017.

5.3.21 Currently, special rooms for interviewing children and other vulnerable witnesses have been created in police stations. They provide an informal location equipped with toys and comfortable furniture which are conducive de-escalating the stress of interacting with the police. Such facilities provide the basis for further developing specifically dedicated facilities along the lines of the Barnehus in Norway to provide secure and non-threatening locations for interviewing and obtaining the evidence of people with communication needs. The Institute recommends that such facilities be further developed in Tasmania and that they provide the locale not only for police interviewing to take place but also for obtaining the entirety of the evidence of people with communication needs under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). This facility might usefully be based on the Barnehus facility in Norway, which is also to be established in England and Wales.

Recommendation 10: Additional necessary measures

(a) Pre-trial directions hearings

- (i) Legislation should be enacted or rules instituted that make detailed provision for pre-trial directions hearings to be held on a mandatory basis in any case involving people with communication needs.
- (ii) The legislation or rules should specify, as a non-exhaustive list, the matters to be dealt with and settled at directions hearings. Those matters should include, at a minimum, directions about the manner and nature of permissible questioning of people with communication needs, the duration of questioning and questions that may or may not be asked. They should also include directions about the communication assistance to be provided at trial for people with communication needs. This legislation might usefully be based on the *Criminal Procedure Rules* (UK) October 2015 as amended April 2016 & October 2016, pt 3.

⁴⁸³ Scottish Court Service, above n 5, 27, 35–37.

⁴⁸⁴ See announcement of first Children's Houses in London at: <<https://www.london.gov.uk/press-releases/mayoral/uks-first-child-houses-to-launch>>.

(b) Bench Book guidance, Practice Directions, intermediaries'/communication assistants' Code of Conduct or Practice and Practice Manual and other materials

- (i) A Bench Book and Practice Directions should be developed for Tasmania to provide guidance and to stipulate matters to be dealt with in cases involving people with communication needs. The Tasmanian Bench Book and Practice Directions might be based on relevant Bench Books and Practice Directions in other Australian and overseas jurisdictions.⁴⁸⁵
- (ii) A Checklist of all matters to be dealt with pre-trial for cases involving people with communication needs should be devised, based on the England and Wales *Judicial College Bench Checklist: Young Witness Cases* (January 2012).
- (iii) A Code of Conduct or Practice and a Guidance Manual should be produced for Tasmanian intermediaries'/communication assistants. Useful precedents in this regard are provided by the Codes of Practice and Guidance Manuals developed for the New South Wales pilot project and for the England and Wales witness intermediary scheme.⁴⁸⁶
- (iv) Resources should be developed for Tasmania of the kind provided in England and Wales by the Advocates Gateway to assist and guide legal practitioners in managing cases involving people with communication needs. While the Advocates Gateway provides a useful model in this regard, it should be adapted to the Tasmanian criminal justice environment.

(c) Identification measures

The current mechanisms available to the police and legal practitioners to identify and obtain assistance for people with communication needs and to identify any existing communication support people they may have, should be enhanced by:

- (i) developing a common diagnostic tool in consultation with experts in communicating with people with communication needs to enable early identification of people who require communication assistance;
- (ii) creating an integrated database with relevant government departments like the Department of Health and Human Services (Disability and Community Services), the Department of Corrections and the Department of Justice and allied agencies to improve the police and legal practitioners' capacity to identify people with communication needs and any existing communication assistance that may have been provided for them. Legislation should designate who should have and/or the grounds for legitimate access. In any event, both police officers and members of the legal profession who work with people with communication needs should have access to it.

(d) Physical facilities

The Institute recommends that specifically dedicated physical facilities be further developed for Tasmania, which provide a secure and non-threatening environment for police interviewing and for obtaining the evidence of people with communication needs under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). This facility might usefully be based on the Barnehus facility in Norway, which is also to be established in England and Wales.

⁴⁸⁵ For example, Judicial College of Victoria, above n 12, [5.11]; Department of the Attorney General WA, above n 9; Judicial Commission of New South Wales, above n 12; Australian Institute of Judicial Administration Incorporated, above n 12; the *Equal Treatment Bench Book*, above n 12.

⁴⁸⁶ Victims Services, above n 13; *Registered Intermediary Procedural Guidance Manual*, above n 13.

Aspirations for the Future

5.3.22 There was some support in submissions to the Institute for the implementation of the entire Barnehus model of intermediary scheme in Tasmania. The National Disability Service favoured the introduction of the ‘Children’s House’ or Barnehus model operating in Norway.⁴⁸⁷ Similarly, an amalgamation of the Barnehus and Registered Intermediary Scheme of England and Wales was advocated by the Sexual Assault Support Service. The Norwegian Barnehus model probably represents the optimum approach to enabling people with communication needs to participate to the best of their ability in the criminal justice process, yet enabling their evidence to be tested fully. However, to implement that approach in Tasmania would require a major transformation to our current practices and culture. In particular, taking the direct examination of witnesses entirely out of the hands of counsel is unlikely to gain ready acceptance. Nevertheless, such a system should not be rejected out of hand but should be considered for the future. Moreover, aspects of that system might be instituted immediately in Tasmania, specifically, the provision of a dedicated physical facility that provides a secure and non-threatening environment for police interviewing and for obtaining and recording the evidence of people with communication needs under ss 6 and 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). In this regard see Recommendation 10(d). This two-step approach to introducing a Barnehus style approach has been recommended for Scotland by the Scottish Court Service.⁴⁸⁸ The Institute considers that it has merit and might be followed in Tasmania.

Recommendation 11 – Aspiration for the Future

The Institute recommends that consideration be given to the future establishment of a Norwegian-style Barnehus with judicially-supervised forensic interviews to elicit the totality of the evidence of people with communication needs. While this is the optimum model for enabling people with communication needs to participate to the best of their ability in the criminal justice process, while still adequately testing their evidence, the transition to this model is a long-term project that is likely to take considerable time to gain acceptance from police officers, the legal profession and the judiciary.

⁴⁸⁷ See details at [4.3.9]–[4.3.14].

⁴⁸⁸ Scottish Court Service, above n 5, 35–37.