



Department of Justice
Child Abuse Royal Commission Response Unit
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Hobart 7000

By email: haveyoursay@justice.tas.gov.au

10 April 2020

Dear Sir/Madam

The draft *Evidence (Children and Special Witnesses) Amendment Bill 2020*

Speech Pathology Australia welcomes the opportunity to comment on the Tasmanian Government's draft Evidence (Children and Special Witnesses) Amendment Bill 2020. Speech Pathology Australia is the national peak body for speech pathologists in Australia, representing over 10,000 members, including 138 in Tasmania. Speech pathologists are university-trained allied health professionals with expertise in the diagnosis, assessment, and treatment of speech, language and communication disabilities, and swallowing disorders. Speech pathology is a self-regulated health profession through Certified Practising Speech Pathologist (CPSP) membership of Speech Pathology Australia. Speech Pathology Australia has been actively involved in advocacy for, and implementation of, intermediary schemes in other Australian jurisdictions and we are keen to support the development of an intermediary scheme in Tasmania in any way we can.

It is clear from the draft legislation, and the comprehensive 2018 report from the Tasmania Law Reform Institute *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* that the Tasmanian Government is already well-versed with the need for, and potential role of, intermediaries in the Tasmanian justice system. We therefore feel it is unnecessary to provide any additional information regarding the role in this instance, other than to highlight the suitability of speech pathologists to act as intermediaries. As to specific areas of the draft legislation our response is as follows:

Eligibility for intermediary provision

We support the proposal that the scheme be open to individuals of **all** ages with communication needs, and that the legislation is sufficiently broad as to provide for intermediaries in all types of offence. However, we strongly recommend that consideration is given to extending the scheme to include provision for suspects and defendants. It is Speech Pathology Australia's position that individuals' speech, language and communication needs should be recognised and supported regardless of the capacity in which they are interacting with the justice system, whether they are a witness, complainant or the accused, as is current practice in other countries such as New Zealand. Indeed, the Tasmania Law Reform Institute's report was clear in its recommendation that:

"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.” (page xii).¹

We appreciate that the provision of special measures for defendants may fall under a different Act, if this is the case, we would strongly recommend that that Act is also amended to include the use of intermediaries and ground rules hearings in line with the Evidence (Children and Special Witnesses) Amendment Act 2020. This will ensure that legislation, planning and operationalisation for the intermediary scheme encompasses both witnesses and defendants from the outset.

Witness competency and fitness to plead during trial hearings

Communication needs can also negatively affect an individual's ability to demonstrate fitness to plead or witness competency. There are significant consequences associated with a witness being found not competent to give evidence, or the accused being found not fit to plead or stand trial, and therefore it is desirable for an individual to be supported to participate as fully as possible.² In some cases, the issues preventing full participation in justice processes may be able to be overcome if communication needs are appropriately recognised and addressed.³ It is essential therefore that assessment of communication need is undertaken (ideally by a speech pathologist) as early as possible to ensure timely support, if appropriate, is provided by an intermediary during witness competency and fitness to plead/stand trial hearings.

To clarify, assessment and support of communication needs can contribute pertinent information to the decision-making process as to an individual's fitness to plead/stand trial or witness competence; it is not within the scope of practice of a speech pathologist or an intermediary to offer an opinion or make decisions regarding an individual's fitness to plead/witness competency.

Other comments

Speech Pathology Australia also supports the proposal for:

- the provision of a ground rules hearing in all eligible hearings, however we recommend that this is mandatory rather than at the discretion of the judge as in our first-hand and observational experience, this is often one of the most important parts of the process in ensuring the smooth-running of the subsequent trial.
- a panel of intermediaries from relevant clinical backgrounds. The legislation does not include mention of specific training/accreditation of intermediaries, however the Association strongly recommends that the intermediaries be specifically recruited and trained, given the role of an intermediary differs significantly from clinicians' usual therapeutic roles. As well as there being an intermediary panel, we also strongly recommend that consideration be given to the model now adopted in Victoria and the ACT, in which there are permanently employed intermediaries as well as a panel of contracted intermediaries. This enables more rigorous governance, as well as enhanced support/supervision and availability for referrals at short notice.

¹ Tasmanian Law Reform (2018) Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?

² Gooding, P., McSherry, B., Arstein-Kerslake, A., & Andrews, L. (2017). Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: Human rights challenges and proposals for change. *Melbourne University Law Review*, 40 (3), 816-866.

³ Hepner, I., Woodward, M., and Stewart, J. (2015) 'Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries with individuals with Intellectual Disability', *Psychiatry, Psychology and Law*, 22:3, pp453-464

We hope the Department of Justice finds our feedback and recommendations useful. If we can be of any further assistance or if you require additional information please contact Ms Mary Woodward, Senior Advisor Justice and Mental Health, by email at mwoodward@speechpathologyaustralia.org.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tim Kittel', with a stylized flourish at the end.

Tim Kittel
National President