



Building on Solid Foundations

The 2024 Review of Tasmania's Witness Intermediary Scheme Pilot

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for the Tasmanian Department of Justice

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Introduction and Summary

This is the review of the Witness Intermediary Scheme Pilot in Tasmania ('Scheme') after three years of its operation. The Scheme has been running since 1 March 2021¹ against the backdrop of long-established intermediary schemes in England and Wales and Northern Ireland. Within the last ten years similar schemes have also been launched in New South Wales, Victoria, the Australian Capital Territory and Queensland.

This report provides advice on issues relevant to policy, scope and eligibility criteria for intermediaries in Tasmania. It provides an opinion on the general quality of operations of the running of the Scheme, particularly in reference to the relevant recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

Tasmania's Witness Intermediary Scheme Pilot has been a successful pathfinder; the three-year pilot has created solid foundations upon which to expand intermediary provision and further increase access to justice for those with a communication need. Recommendations of this report include, growing the pool of intermediaries, making them available not only for children under 18 years of age and victims and witnesses with a communication need, but also for accused people with a communication need. The goal should be to expand the Scheme to include all matter types within the criminal justice system. Expansion will require fresh guidance and training for intermediaries and stakeholders which will be overseen by the Intermediary Liaison Team, a team which already exhibits a strong culture of continuous improvement.

Now is the time for Tasmania to make wider use of intermediaries in the criminal justice system in order to support witnesses and accused people with communication needs. There is wide stakeholder support for this, and what is more it is a necessary aspect of access to justice for vulnerable people, access to which they are entitled.

¹ The pilot concluded at the end of February 2024. Pending this review and in line with legislation, at the time of writing the Scheme continues as it did during the pilot stage.

About the author

Professor Penny Cooper PhD qualified as a barrister (England and Wales) in 1990. In 2002, she designed the path-breaking course for registered intermediaries in England and Wales. In the twenty years since then, she has designed and delivered training for intermediaries in the Australian Capital Territory, Chile, New South Wales, Northern Ireland and the Republic of Ireland. She devised and taught the 'ground rules' approach (now used by judges around the world) and her 2014 research gave rise to the first criminal procedure rules mandating ground rules discussions. She co-founded and for ten years chaired The Advocate's Gateway. Penny is a visiting Professor at the University of London, and an academic associate at 39 Essex Chambers, London.

Acknowledgements

Thank you to all those who took time to share their expertise and opinions via the face-to-face consultations, the online survey and the public consultation.

My work would not have been possible without the support of Tasmania's Intermediary Liaison Team, and particularly my principal contact Marita O'Connell, Assistant Director – Client Liaison, Child Abuse Royal Commission Response Unit, Department of Justice.

My thanks to those at HMCTS, England and Wales and the Department of Justice, Northern Ireland, who shared their most recent data about the intermediary schemes that they oversee.

Thank you to Dr John Taggart, Queen's University, Belfast, who made very helpful comments and suggestions on an earlier draft of this report.

Finally, I am grateful to all the intermediaries in Tasmania who, like their colleagues in other jurisdictions around the world, continually strive to improve communication in the justice system.

Background

International Context

The very first Registered Intermediary pilot scheme was started in 2003 in England and Wales in accordance with a 'special measure'² aimed at supporting vulnerable witnesses to communicate their evidence. The intermediary role was one of a range of special measures designed to enhance the quality of evidence of vulnerable and intimidated witnesses in criminal cases. In 2007, after a successful pilot scheme, the Registered Intermediary scheme was rolled out by the Ministry of Justice across the criminal justice system.³ Soon 'unregistered', and unregulated, intermediaries also began providing communication support to defendants in criminal trials. In the intervening years the work of unregistered witness intermediaries in England and Wales spread to an even wider range of courts and tribunals. In 2022 HM Courts & Tribunal Service⁴ ('HMCTS') launched HMCTS intermediary services⁵ to provide communication support to defendants in criminal cases and all parties in family, civil and tribunal cases. HMCTS provides this support via managed and approved service providers (larger organisations supplying intermediaries) and approved service providers (individual self-employed intermediaries).

In 2011, when Northern Ireland began planning its own Registered Intermediary scheme under similarly drafted special measures legislation, a high-level policy decision was taken to include the accused in the scheme and the legislation was amended accordingly.⁶ The Northern Ireland scheme launched in 2013 covers not only vulnerable witnesses but also suspects in police interviews and vulnerable defendants who elect to give evidence at trial; Northern Ireland has led the way with the first intermediary scheme of its kind.⁷

In 2016 in New South Wales, a three-year pilot began for witness intermediaries and for pre-recording the cross-examination of child complainants. The legislation describing the function of the intermediary used wording virtually identical to that in England and Wales and Northern Ireland.⁸ In 2016 in Sydney, whilst training the first intermediaries in New South Wales, the author and colleagues gave written and oral evidence to The Royal Commission into Institutional Responses to Child Sexual Abuse about the role of intermediaries in the criminal justice system. That evidence helped shape a key recommendation about intermediaries in Australia.

² Section 29 of the *Youth Justice and Criminal Evidence Act 1999*

³ Cooper, P., & Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model. *The International Journal of Evidence & Proof*, 21(4), 351-370.

⁴ In 2022, 'Her Majesty's Courts and Tribunal Service', now 'His Majesty's Courts and Tribunal Service'

⁵ For more information see <https://www.gov.uk/guidance/hmcts-intermediary-services>. HMCTS is an executive agency sponsored by the Ministry of Justice for England and Wales. It is responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

⁶ For witness intermediaries see articles 17 and 21BA of the Criminal Evidence (Northern Ireland) Order 1999, as amended by the Justice Act (Northern Ireland) 2011. For defendant intermediary support when giving oral evidence see Article 21BA.

⁷ Cooper, P., Wurtzel, D. (2014). Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. *Northern Ireland Legal Quarterly*, 65(1): 39-61

⁸ The original wording was amended slightly to better reflect the role of witness intermediaries. See Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023 No 32, Subdivision 3, 294L, 1(b).

Intermediaries in Australia

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') was established in 2013 by the Australian Government to inquire into and report upon responses by institutions to child sexual abuse in Australia. A key recommendation of the Royal Commission was for all state and territory governments to establish witness intermediary schemes for any prosecution witness with a communication difficulty in child sexual abuse cases.

The relevant recommendations can be found in the Criminal Justice Report.⁹

Intermediaries

9j. Intermediaries should be available to assist in police investigative interviews of children and other vulnerable witnesses...

59. State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution. Governments should ensure that the scheme:
- a. requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses
 - b. provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial
 - c. makes intermediaries available at both the police interview stage and trial stage
 - d. enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.
60. State and territory governments should work with their courts administration to ensure that ground rules hearings are able to be held – and are in fact held – in child sexual abuse prosecutions to discuss the questioning of prosecution witnesses with specific communication needs, whether the questioning is to take place via a pre-recorded hearing or during the trial. This should be essential where a witness intermediary scheme is in place and should allow, at a minimum, a report from an intermediary to be considered.

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (Report, 2017) <https://www.royalcommission.gov.au/child-abuse/criminal-justice>

Intermediaries are still in their infancy in Australia. The Royal Commission recommended Australian jurisdictions establish intermediary schemes like the Registered Intermediary Scheme in England and Wales.

As of 2024, witness intermediary schemes operate in the Australian jurisdictions of New South Wales, Victoria, the Australian Capital Territory, Queensland and Tasmania. South Australia has legislation which provides for the use of intermediaries but has no panel or supporting scheme. There are plans to introduce legislation and recruit and train a panel of witness intermediaries in Western Australia.

Jurisdictional differences are based on the eligibility criteria for witnesses and offence types, geographical restrictions and who can act in the role of intermediary.

Intermediaries in Tasmania¹⁰

Tasmania is a small island state in the south of Australia and is located 240 kilometres to the south of mainland Australia. With a population of just 571,013 people, it is the least populous state.

The criminal justice system in Tasmania has two tiers of court: the Magistrates Court, and the Supreme Court. The Magistrates Court typically hears summary matters, whereas the Supreme Court hears indictable matters. Magistrates hear cases in the Magistrates Court whereas cases in the Supreme Court are almost always heard by a judge and jury.

Youth defendants are prosecuted in the Youth Justice Division of the Magistrates Court. That court will hear all charges against youths unless the youth has been charged with a prescribed offence or has been jointly charged with an adult in some circumstances. If a youth has been charged with a prescribed offence, they will be tried as an adult. One example of a prescribed offence is the crime of rape if the defendant is 14 years or older.

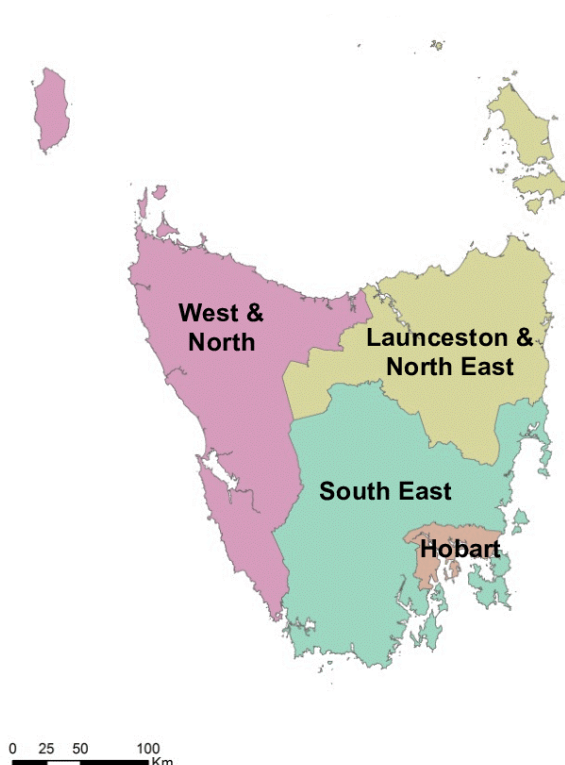


Image 1-Map of Tasmania showing the approximate boundaries of Tasmania's regions.

¹⁰ The information in this section was adopted from text and graphics created by the Intermediary Liaison Team

There are several special measures available to children and/or vulnerable adults in Tasmania, many of which are found in legislation. These measures apply to matters involving homicide, some serious assaults, sexual violence, and family violence matters. Special measures currently available in Tasmania include:

- The prior statement (i.e. the recorded police interview) of a child witness or vulnerable adult can be admitted into evidence in certain proceedings to form part or all of the witness' examination in chief (see sections 5 and 5A of the Evidence (Children and Special Witnesses) Act 2001).
- 'Special hearings' have been introduced (often also referred to as 'pre-recorded hearings'), in which vulnerable witnesses can give the entirety of their evidence at a hearing ahead of the trial in the absence of a jury. The evidence is audio-visually recorded and will then be played to the jury at the trial (see section 6 and 6A of the Evidence (Children and Special Witnesses) Act 2001).
- Evidence of a child witness and/or vulnerable adult can be given remotely via audio-visual link (see section 6B of the Evidence (Children and Special Witnesses) Act 2001). The witness can elect to give evidence from the courtroom if they are willing and able to do so.
- 'Improper questions' (such as questions that are misleading, harassing, humiliating etc.) are prohibited during cross-examination (see section 41 of the Evidence Act 2001 (Tas)). This prohibition applies to all types of criminal matters.
- Children and prescribed witnesses can be accompanied by a support person whilst they give their evidence (see section 4 of the Evidence (Children and Special Witnesses) Act 2001).
- Screens that shield the defendant from a witness' view are available.

Parliament has recognised the vulnerability of child witnesses, and section 3A of the Evidence (Children and Special Witnesses) Act 2001 sets out the principles that apply when a child witness is to be questioned.

In 2018, the Tasmania Law Reform Institute ('TLRI') released a report entitled *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania*.¹¹ The TLRI recommended the introduction of a witness intermediary scheme in Tasmania.

The work of the Royal Commission and the TLRI identified that children and other vulnerable people in the criminal justice system can have communication needs that fundamentally impede their interactions with police, lawyers, and the courts. The introduction of witness intermediary schemes aims to ensure that children and vulnerable people have the best opportunity to effectively participate in investigations and criminal proceedings while reducing the risk of additional trauma.

¹¹ Tasmanian Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (Report No 23, January 2018).

On 20 June 2018, the Tasmanian Government committed to implementing a pilot witness intermediary scheme in response to the recommendations of the Royal Commission.

The Witness Intermediary Scheme Pilot in Tasmania commenced on 1 March 2021 and operated for three years. The Scheme has now moved from pilot stage to program status and continues to operate within the same parameters and scope as the pilot. The Scheme established the use of witness intermediaries and ground rules hearings in Tasmania and applies to:

- all children under the age of 18 years participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters;
- adults with a communication need participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters;
- all Tasmanian courts; and
- all Tasmanian police districts.

Since the commencement of the Scheme, a number of referrals have been received for out-of-scope matters including:

- three defendants where the Supreme Court exercised its inherent jurisdiction to order the use of an intermediary;
- one suspect at their police interview;
- a small number of witnesses in matters outside the identified scope (e.g. in matters involving family violence); and
- three youth witnesses giving evidence at the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

Amendments to the *Evidence (Children and Special Witnesses) Act 2001* (Tas) established the use of witness intermediaries in Tasmanian Courts. The use of witness intermediaries at the investigative stage is governed by policy and is codified in the Tasmania Police Manual.

The Scheme commenced with 21 witness intermediaries on the intermediaries panel and has since expanded to 28 intermediaries. The intermediaries are drawn from the professions of speech pathology, psychology, occupational therapy and psychiatric nursing.

An evaluation of the first 12 months of the Scheme was undertaken by an independent researcher and found that there is a high level of support for the purpose of the Scheme among evaluation participants and its potential to contribute positively to the criminal justice process in Tasmania. The evaluation focused on the activity and quality of the implementation of the Scheme with the view that learnings could be incorporated into improving the service. The evaluation did not provide an analysis of the overall scope and policy of the Scheme.

The Scheme operates 24 hours a day, 7 days a week, every day of the year. The following graphs provide an overview of the first three years of operation (1 March 2021 to 29 February 2024). In this time, the Scheme has received 1060 requests for an intermediary from Tasmania Police (Figure 1) and 150 requests for an assessment report by the Courts (Figure 2). The total number of requests received from those stakeholders in that period is 1210 (noting that there were also 3 referrals received from the Commission of Inquiry during the pilot, taking the total number of referrals received to 1213). The majority of the referrals were for children (Figure 3) and a disproportionate number of referrals were received in the North West region of Tasmania which is the least populous region (Figures 1 and 4).

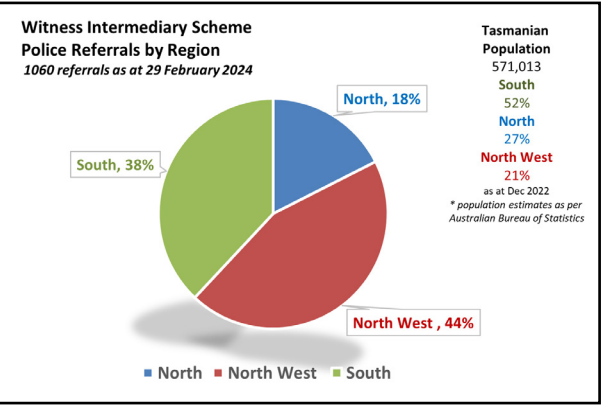


Figure 1 Breakdown of police referrals to the Witness Intermediary Scheme by region.

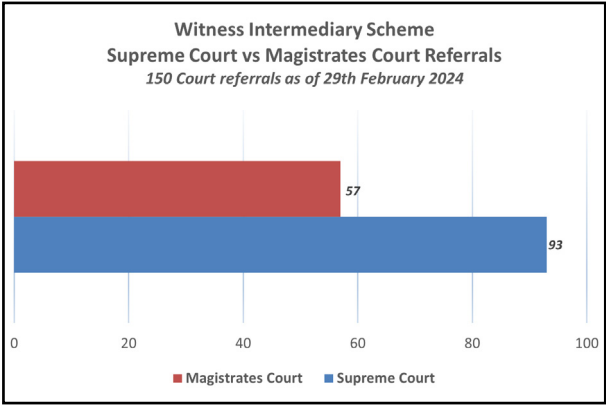


Figure 2 Bar graph showing the number of court referrals received from the Magistrates Court and the Supreme Court.

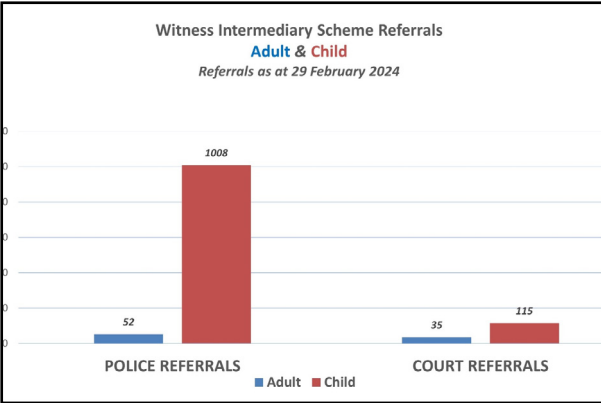


Figure 3 Bar graph which shows a comparison of the number of referrals received for adult witnesses and child witnesses, at both the police stage and the court stage

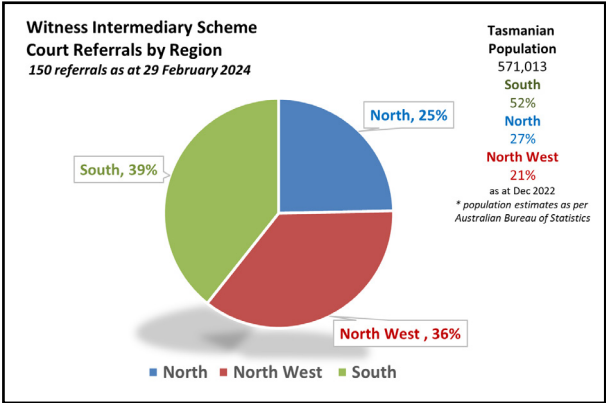


Figure 4 Breakdown of Court referrals to the Witness Intermediary Scheme by region.

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('Commission of Inquiry') was established on 15 March 2021 by Order of the Governor of Tasmania. The Commission of Inquiry's final report¹² was tabled in Parliament and made publicly available on 26 September 2023. The Commission of Inquiry's work was independent from government and is the state equivalent of a royal commission. It had the power to call witnesses at its hearings and compel the production of documents, including from the Tasmanian Government.

The Commission of Inquiry's terms of reference set out the purpose and scope of its inquiry. The focus was on responses to allegations and incidents of child sexual abuse that have occurred since 2000 or were reported after 2000.

Under its terms of reference, the Commission was asked to inquire into what the Tasmanian Government should do to:

- better protect children against child sexual abuse in institutional contexts in the future;
- achieve best practice in the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse in institutional contexts;
- eliminate or reduce problems that currently prevent appropriate responses to child sexual abuse in institutional contexts, including addressing failures in, and barriers to, reporting, investigation and responding to allegations and incidents of abuse; and
- address or alleviate the impact of past and future child sexual abuse in institutional contexts, including, in particular, in ensuring justice for victims through processes for referrals for investigation and prosecution and support services.

The Commission of Inquiry heard evidence that on several key socioeconomic metrics, Tasmania performs worse than the national average. For example, Tasmania has the lowest labour market participation rate, the lowest average weekly ordinary time-cash earnings and the highest underemployment rate in the country. It is generally accepted that, on average, Tasmanians also have poorer literacy rates and educational outcomes than other Australians.¹³

¹² Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, Who was looking after me? Prioritising the safety of Tasmanian children.

<https://www.commissionofinquiry.tas.gov.au/report>

¹³ Department of health. Our Healthcare Future. Health Workforce 2040. Allied Health Report (2021).

[https://www.health.tas.gov.au/sites/default/files/2021-12/Health workforce2040 allied health DoHTasmania2019.pdf](https://www.health.tas.gov.au/sites/default/files/2021-12/Health%20workforce2040%20allied%20health%20DoHTasmania2019.pdf)

The Commission of Inquiry also heard evidence that Tasmanian Aboriginal people experience further disadvantage. Individual and collective experiences of trauma resulting from colonisation have contributed to poverty and disadvantage. Aboriginal children and young people are vastly over-represented in Tasmania's youth justice system and the out-of-home care system.¹⁴

In addition to the socio-economic challenges that Tasmania faces, the Tasmanian Department of Health has acknowledged that the Tasmanian population is older and has higher levels of chronic disease and disability. Tasmania also has lower rates of many allied health professionals compared to other jurisdictions in Australia. In addition, the distribution of the allied health workforce across Tasmania is not equitable and the North West region faces further workforce challenges across most allied health professions.¹⁵

The Commission of Inquiry heard from a number of witnesses about the use of intermediaries in Tasmania. The relevant section of the report can be found at 5.2.1 (p 64 of Volume 7: Chapter 16 – Criminal justice responses). The Commission of Inquiry made two recommendations relevant to the Witness Intermediary Scheme review:

Recommendation 16.10

1. The Tasmanian Government should extend the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences, and fund it to do so.
2. The Tasmanian Government should consider whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

The full report can be viewed here: <https://www.commissionofinquiry.tas.gov.au/report>

The Tasmanian Government has committed to accepting and implementing the Commission of Inquiry's recommendations.

¹⁴ Ibid

¹⁵ Ibid

Review Remit

The remit of this review:

1. Provide expert advice on issues relevant to policy, scope and eligibility criteria for an ongoing Witness Intermediary Scheme in Tasmania; and
2. Provide an expert opinion on the general quality of operations of the running of the Scheme, particularly in reference to the relevant recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

This review considered:

- The views sought during consultation with senior stakeholders;
- The recommendations from The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Setting;
- Lessons learned from other jurisdictions;
- A brief analysis of the Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania including the progress on actioning the findings of the report;
- The options for policy, scope and eligibility based on the consultation, the experience of other jurisdictions and government priorities;
- The general suitability of the expertise, training, support and continuing professional development of the panel intermediaries;
- Referral rates and referral matching processes; and
- Any other relevant matters identified.

Methods

Monthly online meetings took place between the author and the principal commissioner of this report. It was agreed that this study would be conducted via online consultations, i.e. a public consultation, meetings with stakeholders and a survey, coupled with a review of the relevant intermediary policy and practice in jurisdictions other than Tasmania.

The author conducted a Tasmania specific review of Witness Intermediary Scheme Pilot literature including legislation and procedural rules and guidance as provided by the Intermediary Liaison Team and listed in Appendix 1.

Further information was gathered via online meetings with administrators of Northern Irish and English and Welsh intermediary schemes for the accused.

The author consulted with Dr John Taggart of Queen's University, Belfast. Dr Taggart conducted a PhD on witness intermediaries and continues to research their use, including for vulnerable suspects in the police station.

The author reviewed existing published literature on intermediary schemes. Where relied on, these are footnoted in this report. All aspects of this review, including online meetings, were conducted from the UK.

Public Consultation

The Intermediary Liaison Team conducted a public consultation as part of this review. Members of the community and community organisations were invited to make submissions about the future of the Witness Intermediary Scheme via the Department of Justice's 'Have Your Say' Community Consultation webpage. Submissions opened on 13 February 2024 and closed on 24 March 2024.

The public consultation invited feedback as follows:

- How you think the scheme might be improved
- Whether the use of witness intermediaries should be extended to other types of offences
- Whether the use of witness intermediaries should be extended to other types of witnesses, such as the accused and defendants
- Whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and adults with communication needs (including defendants) relating to sexual offences
- Whether the role of witness intermediaries is well understood.

Written submissions came from three organisations: two advocacy groups providing support for those affected by sexual assaults and one body representing professionals who support people with communication needs.¹⁶

Public Consultation Respondents by Organisation Type	Identifier Code	Number of Written Submissions
Advocacy Group	PAG	2
Professional Body	PPB	1
Total number of submissions		3

Stakeholder Consultation Meetings and Survey

The author chaired five consultation meetings (organised according to five stakeholder groups, see below) and reviewed the results of an online consultation survey. Invitations to participate in the meetings and take part in the survey were sent by the principal contact from Intermediary Liaison Team from a dedicated email address, accompanied by an information and consent form written by the author in conjunction with the principal contact from Intermediary Liaison Team.

The following individuals were directly invited by email to participate in the consultation and survey via the same email: all judicial officers; police officers who made a referral to the Scheme during the pilot; and DPP prosecutors and defence counsel who acted in a matter involving a witness intermediary during the three-year pilot.

The following organisations and individuals were asked by email to distribute the invitation to their staff or members more broadly via email: The Law Society of Tasmania (to all lawyers); The Tasmanian Bar Association (to all of its members); The Legal Aid Commission of Tasmania (to all its lawyers); The Tasmanian Aboriginal Legal Service (to all its lawyers); The Director of Public Prosecutions (to all prosecutors); and Inspectors of Tasmania Police in all three regions (to relevant investigating officers and to relevant police prosecutors).

Judicial officers and police officers were invited via email on 16 February 2024. In addition, all Witness Assistance Officers were sent an invitation to participate in the survey on 19 February 2024. The online survey was originally scheduled to close on 18 March 2024, however, access was extended until 1 April 2024 due to technical issues. The Intermediary Liaison Team encouraged the email invitation to be shared and distributed, therefore it is not possible to give a response rate.

24 people took part in online stakeholder meetings, and 16 people responded via the online survey.

Copies of the agenda for the stakeholder consultation meetings and the survey can be found at Appendices 2 and 3.

¹⁶ These public responses were submitted by the Sexual Assault Support Service (in this report 'PAG1'), Rape and Sexual Assault Research and Advocacy (in this report 'PAG2') and Speech Pathology Australia (in this report 'PPB1')

Technical support was provided by Sprout Labs,¹⁷ namely background attendance at the online consultations, recording and producing the consultation transcripts, publication of the online survey, and gathering of the survey responses.

Five online group consultation meetings took place between 11 December 2023 and 20 March 2024. All meetings followed the same plan and all meetings lasted for an hour or slightly longer.

Consultation Attendees by Stakeholder Group	Identifier Code	Number of Attendees
WIS Administrators and Managers (Australian jurisdictions)	CMA	5
Tasmanian Witness Intermediaries	CWI	9
Tasmanian Police Officers	CPO	2
Tasmanian Lawyers	CLA	5
Tasmanian Judicial Officers	CJO	3
Total number of attendees		24

Surveys were completed online between 19 February 2024 and 30 March 2024.

It is acknowledged that there were technical issues with the survey and some respondents had difficulty submitting a response during a discrete period. In summary, eighteen separate submissions were received. There are two incidents where the same respondent submitted two responses which were identical or nearly identical, so both were merged. Two police officers mistakenly stated they were judicial officers; this was clear from the email addresses they provided. A total of sixteen survey responses were analysed.

Survey Respondents by Stakeholder Group	Identifier Code	Number of Surveys
WIS Administrators and Managers	SMA	2
Tasmanian Witness Intermediaries	SWI	3
Police Officer	SPO	4
Lawyers ¹⁸	SLA	3
Judicial Officers	SJO	2
Other ("Justice Employee")	SOth	1
Witness Services Employee	SWS	1
Total number of completed surveys		16

¹⁷ <https://www.sproutlabs.com.au>

¹⁸ Consisting of one defence lawyer and two from 'prosecution services'.

Analysis

The written submissions from the public consultation, transcripts of consultation meetings and the survey responses were reviewed and analysed by the author with a view to identifying emerging themes and patterns from the data. This report offers digestible summaries of the responses under five main themes: intermediaries for the accused; witness intermediary practice (including ground rules hearings); eligibility criteria for an intermediary; legislation requiring police to use an intermediary; and awareness and understanding of the intermediary role.

Selected quotes are incorporated in this report. Quotes are verbatim unless otherwise indicated. Public consultation, meeting and survey participants have been given identifiers according to the source of the information (starting with P for public consultation, C for consultation meeting, and S for survey) and further letter identifiers according to the respondent category. For example, PAG indicates a quote via the public consultation from an advocacy group, CPO indicates a quote via a consultation meeting from a police officer, and SLA indicates a quote via the online survey from a lawyer.

The three organisations in the public consultation, and everyone taking part in a meeting (twenty-four in total), or the online survey (sixteen in total) were given their own unique number. For example, there were two advocacy groups that submitted responses to the public consultation and their quotes are identified as PAG1 and PAG2, and there were three survey responses from lawyers and their quotes are identified as SLA1 to SLA3.

Limitations

This final review focusses on issues relevant to policy, scope and eligibility criteria for an ongoing Witness Intermediary Scheme in Tasmania and the general quality of operations of the running of the Scheme, particularly in reference to the relevant recommendations of the Royal Commission and the Commission of Inquiry. This was not an evaluation of the impact of witness intermediaries and no witnesses participated in this review. Participation by stakeholders was voluntary and the responses received may not be representative of stakeholders in general.

Consultations and Survey Findings

This section provides a summary of the themes emerging from analysis of the public consultation written responses, face-to-face consultation meeting transcripts and the online survey printouts. Topics covered are intermediaries for the accused, stakeholders' perceptions and experience of witness intermediary practice, eligibility criteria for an intermediary, legislation requiring police to use an intermediary, and awareness and understanding of the intermediary role. Illustrative verbatim quotes are shown in italics.

Intermediaries for the Accused

Most respondents across all stakeholder groups expressed a clear view that the Scheme should be extended to the accused. One lawyer was unequivocal.

'Cease [the scheme] or include defendants and accused people.' SLA1

One respondent was against the idea of extending the Scheme to the accused.

'It will only unnecessarily complicate the process...Can't we just leave victims and suspects separate. Suspects have legal support which should be considering their communication needs. Let's as a society support the needs of victims first and let the defence team support the needs of the suspect.' SPO1

Another police officer expressed misgivings.

'As we do not want to see intermediaries be used just as an attempt to get off charges etc. It could also cause unease amongst victims and witnesses if they are used for accused / defendants as well. Particularly given the size of Tasmania.' SPO4

However, most stakeholders were in support of the Scheme being extended to the accused and a range of benefits were cited: it would help meet the communication needs of accused people, reduce the impact on a witness/victim, create a fair system/ equal access to justice, increase confidence in the criminal justice process, and support just outcomes.

Meeting the communication needs of accused people

'So the benefits are there for accused, or young people under investigation, or adults with a communication need who are accused or under investigation are precisely the same as the benefits that exist for complainants and witnesses, that is that they are enabled to comprehend and able to communicate their evidence effectively or their account effectively. And to be frank, I can't see any reason at all to exclude them.' CJO2

'We want to make sure that accused people who have communication difficulties can participate fully. And I think this program's worked very well in ensuring children or vulnerable witnesses are able to participate. And I've seen it work well ...with a very young child. So I think in so far as we have defendants with communication needs, particularly with young people who have communication needs and are defendants. Well we should be enlarging the program to cover them.' CLA5

'I have been involved with two defendants in different matters in the Supreme Court... the benefit is for a young person with a communication impairment to enable them to engage in the process, to really help them to sustain attention and regulation, not just in the court, but down in the cells and during the breaks. And also to be able to facilitate communication with counsel.' CWI2

Reducing the impact on a witness/victim

'[S]ometimes it reduces the time that complainants and witnesses have to go through, because that communication is so much better at the outset and it can lead to better outcomes, earlier pleas... if they're understanding the charges against them and their lawyer is able to communicate that to them, it makes it a much better process for the complainant or witness.' CMA1

'By having some appropriate measures in place we can minimise the impact, both to accused and victims / witnesses. By being able to clearly and appropriately put a case to an accused / defendant we could reduce the flow on impact to a witness / victim by front loading clarification of positions and minimising contested issues.' SLA3

Creating a fair system/ equality of arms

'I agree with [CPO2]. I think if we are providing an intermediary for the victim, then I think it's just as fair to provide one for the suspect or the accused too.' Yep. CPO1

'There is no justification for not extending the use of intermediaries to other classes of witness, including the accused and defendants. The scheme will not mirror the values of the criminal justice system unless they are included.' SJO2

Confidence in the process

'And in terms of community confidence in the process, the scheme ought to reflect the values of the criminal justice system. In other words, the values of equality and fairness, and the scheme is at risk of being regarded as unfair and treating people without equality if it's not extended to accused.' CJO2

Just outcomes

'If we are talking about children - definitely. The benefits of meeting their communication needs are at least as important as the victims and witnesses - in many cases - more so. Often they're victims themselves of some trauma or other. I think it becomes a bit more complex when you're talking about identifying adults with communication needs. But ideally, intermediaries would be available where there are communication needs, because the consequences of poor communication might be a miscarriage of justice.' SJO1

Most stakeholders believed the Scheme should be extended to the accused, and several also recognised potential obstacles around confidentiality/legal privilege, investigation timelines/custody time limits, overcrowding in the interview room, unrepresented accused persons and resourcing/ availability of intermediaries.

Confidentiality/ Legal Professional Privilege

'Obviously the concerns around confidentiality are significant.' CLA5

'The witness intermediary may become a relevant witness to the trial if they've heard something in the interview process (for example) that becomes an issue at the trial.' SLA1

'Spontaneous admissions need to be a consideration, as they can occur frequently and have huge impacts on investigation.' SOth1

'I would've thought that you'd want to have an absolute belt and braces provision that covered [confidentiality of consultations], because you wouldn't want there to be any doubt or get into any sort of arguments about where the communication's flowing to and from, and what's privileged and what's not.' CJO3

'[T]here would be concern from counsel that there might be sharing of one side to the other...But yeah, I was just wondering what would it look like for Witness Intermediary would be assigned to both the defendant and the witness.' CWI7

'[I]f it's being contemplated that it would be outside the courtroom in the sense of the intermediary being present when instructions are being taken.... I don't see that that necessarily falls within the umbrella of privilege. And I'm not suggesting that intermediaries are going to go running around disclosing instructions that are taken by counsel from clients. But if there isn't some form of privilege that's created by statute there, then there is I think a risk or at the very least a perception of a risk there.' CLA2

'In terms of intermediaries being involved in consultation, certainly privilege would need to apply in terms of the nuances of how that happens. That would obviously require some thought.' CLA3

'We almost ended up with an argument about privilege ... I'm sorry, I can't remember the detail of that now. But it may be that the role ought to be further protected by some legislative provision to prevent that occurring.' CJO1

Timelines/custody time limits

'Availability of an intermediary at the time of an arrest/interview, and having to hold a youth in custody for longer waiting for an intermediary to become available [could be an obstacle].' SPO3

'There will be challenges in arranging a roster of intermediaries who are available to conduct assessments and attend police interviews at short notice. However, it is noted that the scheme has demonstrated its capacity to be very agile and able to respond to urgent requests by the courts at short notice. It is likely that there will be a need to allow time for an assessment before the police interview is to be conducted with the young person. There will challenges involved in interviewing defendants who are in custody and the need to work within short time-frames.' SJO2

Overcrowding in the interview room

'Children who are the subject of investigations are provided with an independent persons to be present during their time with police, during interviews or charging processes. This is generally a family member, parent or responsible adult who has intimate knowledge of the youths abilities. To also have an intermediary present may be overwhelming to the youth, to have too many people in a room at once... The benefits of having access to an intermediary for suspect interviews etc certainly outweigh negatives to this concept.' SPO2

Unrepresented accused person

'Not many [suspects have legal representation]...We definitely give them the option and encourage obtaining some legal advice before participating in an interview... it is unusual in my experience for them to actually bring someone into the interview.' CPO1

'Witness intermediary doesn't necessarily understand the rights of the accused and may be in a situation where they aren't acting in their best interest (for example, encouraging them to do an interview with police)' SLA1

'I think some of the obstacles are, if there are additional training needs for the witness intermediaries, police interviews occurring without lawyers, and perhaps having an intermediary there without a lawyer present is a challenge.' CMA5

Resourcing/ availability of intermediaries

'If it is legislated, then this would dramatically increase the call outs for WIs and delay proceedings against suspects. Further to this, investigators would require a WI for the victim who is completely independent to the one provided to the suspect. Straight away this would double the call out as two WIs would be required for each investigation.' SPO1

'Concerning police involvement and admissions made at the scene, the presence of a responsible person is crucial to satisfy evidence laws. However, the admissibility of such evidence without a WI present should that be a requirement may open this up to legal challenge.' SOth1

'[S]upplying intermediaries for very long trials when an intermediary is working with the defendant, that has a real cost and resource implication.' CMA5

'The cost of having intermediaries present for whole trials is significant and in some cases, prohibitive. A challenge will be determining when the intermediary should be present in court. Intermediaries may also be helpful for defence prior to the proceedings in court such as meeting with clients to get instructions. This service would fall outside of any court order and so a challenge will be determining a referral and funding pathway for how and when defence can utilise an [intermediary].' SMA1

'Most accused people don't say a lot in court. Perhaps it would only be appropriate if the accused was giving evidence. I worry that it could have implications for legal advice/ understanding of laws and instructions to lawyers which could then lead to grounds for an appeal.' SLA2

All three organisations in the public consultation were in support of extending the Scheme to the accused.

'We are pleased that the Tasmanian intermediary program has, on occasion, provided intermediaries to suspects at the investigative stage and defendants in the Supreme Court under the Court's inherent jurisdiction however we assert that the intermediary program should be formally extended to include other witness types as soon as possible. Indeed, it is vital to learn lessons from England and Wales, so as not to develop a two tier or parallel stream of intermediaries (for example using registered intermediaries for witnesses and unregistered intermediaries for defendants, as is the case in England and Wales).' PPB1

'Many of the children and young people [we see] ... have also experienced multiple adverse events and varying types of trauma, which may have affected their neurodevelopment and ability to understand or communicate in clear or traditional ways... we strongly believe that it would be highly advantageous to extend the Witness Intermediaries Scheme for use with children under investigation for, or charged with, sexual offences.' PAG1

One advocacy group called for the Scheme to be accessible to:

- any person impacted by sexual assault with a communication need, regardless of age or location
- any person impacted by family violence with a communication need, regardless of age or location
- any person accused of a crime who has a complex communication need, regardless of their age or location
- any other witness with a complex communication need expected to give evidence in a trial 'PAG2

Citing the 'Disability Royal Commission',¹⁹ the professional body respondent pointed to the contribution that intermediaries could make to 'hearings conducted to determine a person's fitness to stand trial or plead'.

¹⁹ See Executive Summary at p146, 'In hearings conducted to determine a person's fitness to stand trial or to plead, the court must consider whether it can modify the trial process or ensure assistance is provided to facilitate the person's understanding and effective participation in the proceedings. This includes any cultural or other trauma-informed supports a First Nations person may need to ensure they can participate in a fair trial and understand the proceedings.'

<https://disability.royalcommission.gov.au/publications/final-report-complete-volume-formats>

'Although intermediaries should not be expected to assess fitness to plead or stand trial, it is vital that they are used during the assessment of fitness. Information regarding an individual's receptive and expressive language abilities, and strategies that may support their communication and participation, could assist in the assessment and demonstration of fitness to plead/stand trial, and in the assessment of witness competence. This ensures that the accused are given the maximum opportunity to be deemed fit by reducing communication barriers.' PPB1

Witness Intermediary Practice (including Ground Rules Hearings)

Most stakeholders who had experience of using an intermediary in practice described their experience in positive terms.

'Generally, the intermediary works in well with police. The rapport building is shared between police and the intermediary, so as not to confuse the child with who they should be speaking with, as police rapport is vital to get a child in conversation. There have been some instances where intermediaries have offered very good advice when a child is blocking or their age is so young that alternate methods are made available.' SPO2

'[They have been operating with] enormous distinction. I've had three, I think. Each added enormous value. I am completely confident that in one case, the complainant would not have been able to tell her story without implementation of the ground rules.' SJO1

'Reports [from intermediaries] are comprehensive and provided promptly to the court. Intermediaries provide helpful assistance at ground rules hearings in relation to any issues that are raised by counsel or the judicial officer and they offer sensible and practical solutions. I also mention that the assistance offered by intermediaries to review counsels' questions and provide feedback is very valuable... The involvement of intermediaries at hearing generally works extremely well. Interventions are unobtrusive and in a sense by then the work has been done with counsel taking into account the recommendations in their trial preparation. The success of the scheme in Tasmania is due to a significant extent to the fact that highly qualified and experienced practitioners are on the panel and available. It is also due to the very positive response from the legal profession which by and large has embraced the scheme. I also mention that the co-ordination of the scheme is excellent and responsive to any concerns or issues raised by the court.' SJO2

'[G]round rules hearings are being used in Tasmania and they've been really helpful. I think that's definitely assisted in terms of how the intermediary is going to engage in the trial. It's definitely assisted in terms of knowing what is going to be able to be done in terms of cross-examination. And gaining an understanding of how cross-examination is going to need to be tailored in terms of the witnesses that you're going to be cross-examining where they've applied.' CLA1

One advocacy group had had the opportunity to observe intermediaries working predominantly with child victims/survivors of sexual assault 'in a number of police interviews and in a small number of court cases':

Our observations of the work of Witness Intermediaries have been overwhelmingly positive. PAG1

A minority of stakeholders highlighted challenges/concerns.

'Okay [is my experience of intermediaries in practice]. But it's often awkward, and their assessments take far too long. They are playing games with them, then all of a sudden, police start with formal introductions etc. It usually doesn't flow well at all.' SPO3

'I think it can get a bit protracted at times, the assessments, and confusing for the kids that I've dealt with...sometimes they will wonder what on earth they're doing, playing this game and...I think they're doing some type of test and [the kids are] hoping that they pass it and then that's just an added stress to them. I think sort of coming up with some sort of assessment that is similar across the board would be really good.' CPO1

'I don't think many defence lawyers were spoken to prior to the pilot program being implemented. Its is often impossible, if not extremely difficult, to provide your questions prior to the court date (for example). Sometimes it appears as though they are against the defence counsel.' SLA1

'There have been a lot of teething issues from my perspective. I have been involved with a number of matters with intermediaries and from what I have seen generally they don't have to intervene at all so have done nothing... that the intermediary is meant to remain independent which I feel is very difficult with them sitting in the remote witness room with the witness and witness assistance as if there are any breaks they are chatting with the witness... There was a trial where a teenage witness who was giving evidence in the courtroom who was given a stuffed dog toy in a basket that breaths which was in full sight of the jury. Whilst this was approved and the jury should not perhaps think anything of this I don't believe this helps her credibility.' SWS1

'In Tasmania [remote witness] rooms are very small and so we will end up with three people in the remote witness room. That being the witness assistance officer who is there appointed as a person to provide support to the witness and the intermediary. And that can be quite claustrophobic of the witness. It can also be quite distracting for the witness and the jury...it should be the exception rather than the rule that the intermediary is actually in the remote witness room with the witness...it would be of benefit for the intermediary to be in the courtroom.' CLA3

CLA3 went on to describe other instances where in their opinion the practical involvement of the witness intermediary had been less than ideal but concluded by saying,

'I think all of these things are administrative things that are being ironed out as the pilot continues'.

A judicial officer expressed the view that in one case the intermediary's role was 'invisible'.

'[B]earing in mind the ability of those...complainants to give evidence, that it played no useful role in the proceedings at all, to be really blunt with you...Look, I took the case over from another magistrate after everything had been done. So it was a bit late in the piece by then. I came into the last couple of weeks and realized where it was going. And then, when the witnesses turned up, it was abundantly clear that they were completely able to manage entirely as you would expect any 16-year-old could.' CJO3

In response CJO2 said,

'I haven't had [CJO3's] experience of a case where witness intermediaries were involved but not needed. I've certainly had the case where their involvement intervention hasn't been obvious, but the scheme has still been really, really valuable because the assess assessment reports made recommendations which have been adopted at ground rules hearing.' CJO2

The same judicial officer also made the point that ground rules hearings played their part in minimising interventions from the intermediary at the hearing.

'[B]y the time you've had your report, your ground rules hearing, and you've got to the actual evidence, the role of the intermediary has almost been invisible, and counsel following the court's recommendations, and taking those up, and then it runs itself, really. And so often the witness intermediary's role is quite minimal for the purpose of the hearing.' CJO2

CJO1 also noted the benefits of a ground rules hearing.

There was certainly some initial apprehension, but the lawyers that I've had deal with it have been really good, and actually really valued doing the ground rules hearing and working out the best way to question the witness. And it's been good. CJO1

CJO1 and CJO3 estimated that the ground rules hearing was usually conducted at least a week or even a month before the witness gives evidence. Only one lawyer talked about their experience of ground rules hearings. Their responses covered both what they called 'normal' ground rules hearings for witnesses and a ground rules hearing for the accused which was about adjusting the trial process. As the defendant did not give evidence, they did not need a second ground rules hearing to address how the defendant would be questioned.

'[Ground rules hearings have] been really helpful. I think that's definitely assisted in terms of how the intermediary is going to engage in the trial. It's definitely assisted in terms of knowing what is going to be able to be done in terms of cross-examination. And gaining an understanding of how cross-examination is going to need to be tailored in terms of the witnesses that you're going to be cross-examining where they've applied. So pre-trial I think it's really working quite well, during the trials I haven't had any difficulties with the intermediaries and they've been helpful.' CLA1

'There probably wasn't as much depth in terms of what would be a normal ground rules hearing in relation to the accused. It was more how the trial process would work, what needs there were in terms of adjournments and attention spans and those types of things based on the psychiatric report that we had. And then similarly during the trial...So yeah, I guess it wasn't as in-depth and then he didn't give evidence. So we didn't have a need for a second one.' CLA1

One lawyer's view was that intermediaries' confidence, and skills were improving as the Scheme progressed. One intermediary reflected that, for them personally, with more cases, including ground rules hearings, comes more confidence.

'[I]ntermediaries I have worked with have become more and more effective over the last year. In recent experiences, they have been adept at making child witnesses comfortable without straying into a support role...Intermediaries I am meeting have a stronger sense of confidence and scope when they come to court than they did over a year ago.' SLA2

'I feel that I just don't have enough exposure myself. So as you progress through a case or you do a ground rules hearing and then a hearing and you go to trial, you get a little bit more confident and you learn every time.' CWI5

The professional body, PB1, recommended that 'future resources are directed to meet the needs of individuals in regional areas' and that Tasmania 'continues to employ both in-house and contracted/panel intermediaries to help meet this need.'

Appointment of and Eligibility Criteria for an Intermediary

Overall views were divided as to whether all those under 18 years of age should be automatically appointed an intermediary. Most police officers, lawyers and judicial officers were not in favour of blanket approach to the provision of intermediaries for under 18s.

'When you are dealing with a teenager for example, they may be old enough and intellectually capable enough to drive a vehicle, have their own home, and care for their own child, yet suddenly they are not able to speak with a police officer without an intermediary? It's unnecessary, time consuming, and often quite awkward... It should just be left to a case by case basis. If an officer really thinks there is a need for an intermediary to be there, of course they are going to get one...common sense needs to prevail.' SPO3

'I think if it is on a case by case basis on a perceived need, then yes, I don't think it should be a blanket policy that all children should have one. And similarly, I don't know that all victims or witnesses...I don't know that it's appropriate to have a blanket approach to that either. I think there are lots of cases where, particularly with older children, there's really no role for the witness intermediary if the young person has communication skills that don't need any extra support.' CPO2

'I would've thought sort of under 14 or might be a good point at which to make it automatic, but I'm not so sure that under that, oh, sorry, over that, that it's entirely appropriate unless they have a particular difficulty, remembering that this can include sexual offenses from the most minor to the most major.' CJO3

One lawyer acknowledged that some teenagers would need an intermediary and suggested it be left to the witness to choose whether their communication needs and abilities were assessed by an intermediary.

'Some teenagers need it, others don't. I don't think it's beneficial to force teenagers to undergo an assessment they may not want or need, they are already disempowered within the system as it is. I think this is an aspect that gives them a choice and autonomy within the process.' SLA3

Most scheme managers and administrators thought all under 18s should be automatically appointed an intermediary.

'Some judges don't believe that a child who is a teenager that appears to have good communication skills may not need an intermediary...the more that has gone on, the more the judiciary...see more of a benefit of it. But I think yes, all witnesses under the age of 18 should get an intermediary.' CMA2

'This is a difficult one. On the one hand, I think it is relatively common for older teenagers to not have any specific communication needs. On the other hand, I think police and prosecutors can overestimate their ability to judge if a witness has a communication need. There have been a number of instances where we have been told that a witness didn't have a communication need, only for the witness intermediary to attend and discover there were significant communication needs.' SMA2

One highly experienced scheme manager/administrator said this:

'[I]nvariably a judge or a lawyer or a prosecutor or whoever, they aren't as skilled in identifying those communication needs, either...I think the role of the intermediary is poorly explained, and so [one young witness] said, "I don't want one," so they had to remove the order that was made for intermediary and then they got halfway through questioning and then it was very apparent that they needed an intermediary, and there was this rush to get an intermediary in there to do an assessment and provide a report...So I think yes, that it should be required for all witnesses age under 18. Again, it's a resourcing thing. How do you prioritize which witnesses? But I think that they're very essential and those stakeholders that are divided are probably not best placed to decide on whether someone has good communication abilities.' CMA1

This was echoed in a survey response from an intermediary.

'It can be hard for police officers to assess an adolescent's communication needs as language difficulties with this age group may not be as evident compared to a young child. Adolescents may also have more social, emotional and behavioral difficulties or mental health needs. This can result in them having difficulties sustaining attention and regulation which can impact on their ability to communicate.' SWI2

Most respondents thought that the Scheme should be available to a wider range of offences/all offences.

'[We strongly advocate] for the use of intermediaries in all matters involving an individual with communication needs, regardless of the offence type.' PPB1

'All offences should have the opportunity to have a witness supported. Particularly when we look at the magistrates court context it can be particularly isolating and challenging for vulnerable witness/victims.' SLA3

'[The scheme could be improved if it were] available to other witnesses, in addition to victims of sexual crimes and homicide. That it not be a 'requirement' but an available tool for investigators.' SPO2

Most respondents thought the Scheme should be expanded to a wider range of witnesses/all witnesses with communication needs. Several respondents indicated that the Scheme should extend to witnesses in cases involving 'Family Violence'.

'[The Scheme should be extended to] Family Violence Offences. Children giving evidence about family violence they've experienced or witnessed can sometimes use assistance, especially if a parent is the accused. I think some adult victims of FV would also benefit from the option to be supported by intermediaries. However, I think a blanket application would be excessive and it would work best on a case by case issue.' SLA2

'Family violence and personal violence should both be included given the potential vulnerability of these witnesses. [Eligibility should be determined via] policy guidelines and legislation. The judicial officer should have some leeway to request an intermediary for all witnesses with a serious communication need.' SMA1

'I think that family violence in particular should be included in scope, as I expect that a child having to give evidence in a matter that involved violence inflicted in the home on either themselves or a parent would often be traumatic and anxiety inducing.' SMA2

'I believe that family violence offences are suitable for inclusion in the use of WI. Drawing from my experience in family violence investigations, I have witnessed firsthand the trauma and stress inflicted by the judicial process on individuals who come forward.' SOth1

'I'm just thinking about some of our family violence hearings, and I'm thinking when I did have where the complainant had a disability and we tried to manage that, but she would've really benefited from a witness intermediary. And we have quite a lot of hearings where it's complainants who have got trauma backgrounds and find it very difficult to give evidence.' CJO1

'The range of crimes should include family violence, personal violence, third party stalking, but also perhaps other crimes such as causing death/grievous bodily harm by dangerous driving and similar.' SJO2

'And I'm quite concerned about the non-use of people that have been in family violence and coercive control. And there's a lot of shutdown in communication and I think we could be incredibly beneficial under those circumstances as well.' CWI9

Legislation Requiring Police to Use an Intermediary

Respondents were asked about the pros and cons of legislation requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

Most police officers were against the idea of a requirement in legislation or were concerned that it would create practical difficulties.

'Don't legislate it. It takes the discretion and common sense out of it. And if anything, relax the requirements of when one has to be used, for example the teenager.' SPO3

'Unless an intermediary was available 24 hours per day, or work within a police station, I think this would be extremely difficult to maintain.' SPO2

'It would ensure consistency across the department. It would also help guide those who are reluctant for change in procedures. [But the challenges may be] If police fail to comply. It may also be restrictive. In particular if an intermediary is required outside of business hours.' SPO4

Most lawyers were in favour of legislation enabling, as opposed to mandating, the use of intermediaries.

'I would tend to agree that a requirement to consider the use of an intermediary might be a good way to balance those issues...A lot of these interviews with child defendants are being done while they're in custody, they're being done under time constraints... if there was a requirement that they had to use an intermediary that might prove counterproductive in some other respects.' CLA2

A witness support employee emphasised the desirability of witness choice.

'It should only be legislation that enables the use of one not mandates it. The benefit of this would be that witnesses and defendants still get to make that choice but it is available to them if they want it.' SWS1

Judicial officers did not express a view/a distinct view.

A minority of respondents cited potential benefits of legislating a requirement to use an intermediary.

'Benefits could include clear guidelines to work through need for an intermediary by a screening process to ensure those who require assistance receive it and those who don't aren't introduced unnecessarily to additional hurdles.' SLA3

'The benefit would be setting a strong cultural expectation that intermediaries should be used when interviewing children and young people in matters relating to sexual offences...Legislation would set the tone from the top - that there is an expectation that intermediaries are used.' SMA1

The impact of the absence of a requirement in legislation to use an intermediary was illustrated by one police officer.

'At present the use of WI's is not legislated...it is only a requirement in the [Tasmania Police Manual]. As such, until it is properly legislated, I as an investigator would not contact a WI.' SPO1

An advocacy group and a professional body were in favour of legislation.

'[We] would support legislation which safeguards automatic access to witness intermediaries for children, adults with communication needs (including defendants) and anyone else who has need.' PAG2

'[We recommend] that legislation is enacted to require the use of an intermediary in police interviews with an individual with communication needs (including defendants), but this should not be limited to matters relating to sexual offences.' PPB1

The other advocacy organisation did not feel it had enough information to make a considered recommendation about legislation requiring police to use intermediaries.

Awareness and Understanding of the Intermediary Role

Most people in the judicial officer stakeholder group thought there was good awareness and understanding of the role.

'There was certainly some initial apprehension, but the lawyers that I've had deal with it have been really good, and actually really valued doing the hearing and working out the best way to question the witness. And it's been good.' CJO1

'And now I must say, and I think this is really significant in Tasmania, that our profession, the bar, the defence barristers, as the crown, have embraced the scheme. So they've really taken on board the recommendations and implemented them. And all the work's done in the preparation, often. So I think that's why the interventions have seemed quite minimal. And that to me seems ideal...for me, the intermediaries is a game changer, it really is, for the giving of evidence in criminal proceedings. So you're not seeing witnesses who are giving evidence in a state of fatigue, being overwhelmed, or confused. And I think the scheme is working very, very well and it really has changed, I think the face of the criminal justice system. I know that sounds like, in a way, a big statement, but it has in these cases.' CJO2

'I think people are well and truly switched onto it. Yeah. And it seems to me that I've had a matter recently where crown counsel brought the matter on because her predecessor hadn't done anything about setting this all in motion and she was aghast, obviously. So I think it's pretty well embedded with the DPP, with defence counsel, and as far as I can tell amongst my colleagues.' CJO3

An advocacy group said,

'Within [our organisation] the role of witness intermediaries appears to be very well understood – particularly amongst our Intake and Counselling staff who have directly observed Witness Intermediaries in police interviews and/or court proceedings'. PAG1

CLA4 thought that understanding of the role amongst colleagues was 'not as broad as what it probably needs to be'.

'...assist police, the legal community, the courts, and the public to understand the role and function of Witness Intermediaries. At present, Witness Intermediaries are often confused with being advocates for survivors, and this can lead to resistance or concern.' PAG2

One lawyer saw room for improved understanding of the role amongst judicial officers.

'The role is better understood now than it was a year ago. Some Magistrates and Judges will fail to prompt intermediaries to be sworn in and this can be awkward.' SLA2

Responses from some police and lawyers indicated there was room for improved awareness and understanding of the role amongst some of their colleagues.

'There was not a lot of training for [Tasmanian] police as to the role of intermediary. I do not think police fully understand the benefits...I do not know what their role in court is... I think the scheme is important. There needs to be more training between police and intermediary to better understand each other's business to ensure we have a good working relationship to achieve the best results'. SPO4

One police officer was candid about their own lack of knowledge.

'I feel as though I know their role in an interview room, but not after. No idea what they do at that end [in the court]'. SPO3

Views about patchy awareness were borne out by the responses of witness intermediaries and managers and administrators.

'Some detectives have very strong knowledge and others very little...[and understanding at court] depends on judicial officer and counsel.' SWI1

'I think we just need a lot more education because we do keep running into this preconceived idea where, as others have said, that the detectives have determined that there's no communication need...I think just a lot more education and a lot more groundwork needs to occur so they have a better understanding of our role and what we do.' CWI5

Training was highlighted by several respondents from the managers and administrators group as being an important factor in developing awareness and understanding. CMA1, 2 and 3 are from separate jurisdictions in Australia other than Tasmania.

'We took some time too and have now embedded ourselves into the interviewing vulnerable witness training that all prescribed interviewers must undertake before they can interview vulnerable people, so we go out and do that. [T]here's a good understanding now in [this jurisdiction], but that's taken a lot of time and training and reminding every time they go out... it's about, again, word of mouth and spreading that through their agencies.' CMA1

'We are the same, constantly having to remind police, primarily police, that the witness is not to be left alone with the intermediary... It is a constant education. Like the others, we attend the [police training]...they've actually invited us to help them refine their training for future.' CMA2

'And just commenting on the current level of understanding...[we] work closely with the police in their training, so we present every month there. And interestingly, every time we go there, there's a few people who've heard of intermediaries, but there's a large cohort who don't know what an intermediary is.' CMA3

A police officer suggested adding intermediary training to police courses if there is space in the program.

'We have a sergeant's course, we have a frontline supervisor course, so these are courses for people who are aspiring to have some kind of supervision role. So that's probably a good place to start because you've got a targeted audience.' CPO2

The professional body (PPB1) noted that awareness of the role is 'essential' to the smooth running of a scheme and stated they were 'keen to continue to collaborate on awareness-raising and recruitment activities in the future.'

Discussion and Recommendations

Intermediaries for the Accused

Almost all consultation and survey respondents were in favour of extending the scope of Tasmania's Scheme to the accused. i.e. vulnerable suspects being interviewed by the police and vulnerable defendants at trial. Against that backdrop it is unsurprising that in the short time that the Scheme has been running, there have already been some 'out of scheme' referrals for the accused from the Supreme Court. There is no statutory basis on which to do this and appointments by the court for the accused were made using its inherent powers.

Experience in England and Wales provides an unfortunate vision of what is likely to happen in Tasmania if the Scheme is not extended to the accused. Witness intermediaries will continue to establish themselves as beneficial for witnesses with a communication need and demand will grow. Under current policy, witnesses will be prioritised and eventually there will be no/limited capacity to meet referrals outside the scope of the current legislation. Legal practitioners and judicial officers will seek to bridge the access gap that exists for vulnerable accused persons. Defence lawyers will, on an 'ad hoc' basis, engage the services of privately practising unregistered intermediaries, and judges will rely on the court's inherent power to direct their use in criminal trials.²⁰

Such 'ad hoc' arrangements in England and Wales resulted in legal confusion in practice about the intermediary eligibility criteria for vulnerable defendants, uncertainty about the scope of their use,²¹ and problems for lawyers trying to find and fund private sector intermediaries. Other practical problems included: '[No] qualification requirement for defendant intermediaries, no professional conduct regulation, nor any continuing professional development monitoring or supervision' and 'serious concerns over quality assurance' when compared to the Registered Intermediary scheme for witnesses.²² In addition, when there is no formal matching system to allocate cases, police and lawyers may tend to go to the same intermediaries again and again, leading to question marks about intermediary neutrality or even pressure on the intermediary to feel part of a prosecution or defence team.

When Fairclough considered the commitment of the law in England and Wales to ensuring that all of those potentially giving evidence have an equal opportunity to do so in criminal trials,²³ she concluded that the 'exclusion of vulnerable and/or intimidated defendant witnesses from eligibility for special measures was not in keeping with this principle'.

²⁰ Cooper, P. and Wurtzel, D. (2013). A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales. *Criminal Law Review* 1, 4 -18.

²¹ For example, for the whole trial or only for giving evidence. 'Unregistered', unregulated intermediaries worked in court, sometimes for a whole trial, sometimes engaged two at a time working in relay as a 'tag team', but more commonly on their own and only if the vulnerable defendant chose to give evidence.

²² Taggart, J. (2021). 'I am not beholden to anyone... I consider myself to be an officer of the court': A comparison of the intermediary role in England and Wales and Northern Ireland. *The International Journal of Evidence & Proof*, 25(2), 141-162.

²³ Fairclough, S. (2018). Speaking up for injustice: Reconsidering the provision of special measures through the lens of equality. *Criminal Law Review*, 1, 4-19

Eventually in 2022, after ongoing calls for a regulated defendant intermediary scheme in England and Wales,²⁴ HMCTS awarded contracts to a selection of suppliers for the provision of intermediary services.²⁵ This may turn out to make the engagement of intermediaries for defendants easier for legal practitioners and address concerns about quality. However, the statutory provision has remained unimplemented for more than a decade. In England and Wales neither the statutory provision nor the HMCTS scheme extends to vulnerable suspects in the police station. Vulnerable suspects in Northern Ireland, and in ACT²⁶ have access to intermediaries in police stations, however Taggart notes that ‘vulnerable suspects in England and Wales will continue to rarely receive such assistance.’²⁷

The South Australia scheme is of limited value when comparing policy and practice in other jurisdictions. ‘SA’s scheme is significantly limited because it is ‘user pays’ and Communication Partners are not officers of the court.’²⁸ In contrast, ACT has recently begun to implement its statutory provision which provides intermediaries for vulnerable accused persons via a panel overseen by ACT’s Human Rights Commission. In readiness, ACT has developed detailed intermediary and stakeholder training packages, and updated their intermediary procedural guidance.²⁹ New Zealand has introduced its own intermediary scheme; the role is known as a communication assistant. The role is undertaken by speech and language therapists from one of two agencies contracted by the Ministry of Justice.

As the most established scheme of its kind, Northern Ireland provides the starting point for a blueprint for a successful and more comprehensive scheme. From the outset Northern Ireland’s legislation made Registered Intermediaries available for the vulnerable accused as well as vulnerable witnesses. The Northern Ireland Department of Justice (NI DoJ) justifies the provision of intermediary assistance at the police station on the need to ‘enable suspects to participate effectively when being interviewed by the police’.³⁰ Intermediaries are available at short notice and out of normal office hours; custody time limits are not extendable or suspended while the police engage an intermediary. In Northern Ireland, an accused person who is unrepresented is eligible for an intermediary.

²⁴ For example, see Cooper, P. and Wurtzel, D. (2013) A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales. *Criminal Law Review* 1, 4-18, one of the first of many pieces by academics and others calling for reform in this area.

²⁵ Taggart, J. (2022). Vulnerable defendants and the HMCTS court appointed intermediary services. *Criminal Law Review*, 6, 432-447, 432.

²⁶ ‘The ACT is the first Australian jurisdiction to expand intermediary services to accused persons, with the initial cohort being children and young people 18 years and younger accused of sexual offence and homicide matters.’ See

<https://www.hrc.act.gov.au/news-and-events/news/australian-first-as-act-intermediary-program-expands,-supporting-communication-needs-of-vulnerable-accused>

²⁷ Taggart, J. (2022). Vulnerable defendants and the HMCTS court appointed intermediary services. *Criminal Law Review*, 6, 432-447, 447.

²⁸ Giuffrida, J., & Mackay, A. (2021). Extending witness intermediary schemes to vulnerable adult defendants. *Current Issues in Criminal Justice*, 33(4), 498-516, 516.

²⁹ Author’s correspondence with the Director of the ACT Intermediary Program.

³⁰ Department of Justice, Northern Ireland. (2015). Northern Ireland Registered Intermediaries Schemes Pilot Project: Post-Project Review, 3.

At court, Northern Ireland's Registered Intermediaries ('RIs') are available if the defendant chooses to give evidence. Northern Ireland's RIs are not available to support the defendant in the dock to understand the evidence of others.

'The Department considered that the RI's role is not to provide support for a defendant during a trial as they are officers of the court and must be neutral, impartial, objective and transparent in all that they do. If an RI were to support the defendant for the duration of the trial, this would be in breach of these principles of practice and they could be perceived as then acting for the defence. Importantly, there are others capable of fulfilling this support role, which does not require the expertise of an RI. During the pilot there have been instances where this function has been undertaken, for example, by family members, carers or a defence legal team member.'³¹

Nor are Northern Ireland's RIs available in legal consultations when the accused is considering written evidence, giving instructions to and receiving advice from their lawyer; the Northern Ireland DoJ considers that the intermediary's advice to the accused's representative on communication is sufficient. There was a practice of Northern Ireland's RIs attending legal consultations in the early years of their scheme, but this largely came to a halt after the judgment in the Court of Appeal (Northern Ireland) in *The Queen v WP* [2017] NICA 21:

'In a novel, even audacious submission, [the defence] contended...that a Registered Intermediary should have attended at the relevant consultations between the applicant and his lawyers "...and this failure alone is reason enough why it would be unjust for the guilty plea to stand". We unhesitatingly reject that submission in light of the material summarised above. Neither the court nor any of those appearing before it in this appeal had ever heard of a Registered Intermediary attending legal consultations. Although we did not receive any detailed argument on the point it would arguably be inappropriate for the court appointed RI to undertake such a task on behalf of one of the parties.' [24]

Anecdotal evidence suggests that Northern Ireland's RIs sometimes add value beyond the official scope of their Northern Ireland's DoJ role.

'A vulnerable defendant, who had RI assistance to communicate, was given a Probation Order. The Judge requested that the RI attend the first meeting between the defendant and the Probation Service to explain his particular communication difficulties so that they could consider these when writing their pre- sentence reports.'³²

³¹ Ibid, 6.

³² Department of Justice, Northern Ireland. (2016) Northern Ireland Registered Intermediaries Schemes Pilot Project Phase II Review, 7.

The Tasmania Law Reform Institute recommended in 2018 that an intermediary scheme should be introduced which supported victims, witnesses and the accused.³³ If Tasmania were to carry on with a Scheme for victims and witnesses only, this inequality of provision would be, and would be widely perceived to be, inherently unfair. An ad hoc scheme for the accused would likely develop with the same practical difficulties that existed for years in England and Wales.

Therefore, I recommend:

- Introducing legislation so that intermediaries are also available for accused people with a communication need. Such legislation should apply not only to the accused person with a communication need if they choose to give evidence in court but also to the accused person with a communication need who is to participate in a police interview and, when necessary, in follow-on hearings such as sentencing.

There is a legal question mark over the use of intermediaries for the vulnerable accused in legal consultations. Certainly, there is potential for intermediaries to assist communication in the lawyer-client consultations, as they did initially in Northern Ireland. ACT is embarking on this practice and the experience there will no doubt be informative.

For Tasmania, this topic requires further detailed consideration by stakeholders including defence lawyers and the judiciary. Some stakeholders contributing to this review raised concerns about confidentiality and privilege. Legal professional privilege ('LPP') attaches to lawyer-client consultations, and arguably the intermediary is not bound by LPP. Communications between lawyer and client must be uninhibited and this would not be the case if the intermediary could be called as witness about the content of consultations. The issue is whether the Tasmanian defence lawyer can give an absolute and unqualified assurance that what a client tells them in confidence will never be disclosed without that client's consent even when that disclosure is made in the presence of an intermediary.

If Tasmania makes intermediaries available for the accused, there will be a significant increase in demand for intermediary services.

I recommend:

- Increasing capacity to handle referrals in respect of accused people with a communication need. Increasing capacity will require funding for the recruitment of additional staff within the Intermediary Liaison Team, as well as funding for the recruitment of additional in-house and panel intermediaries. Increased capacity should take into account support from an intermediary, in appropriate cases, to help the court and lawyers communicate with the defendant at follow-on hearings such as sentencing.

Other concerns about intermediaries for the accused that were raised by stakeholders centred around investigation timelines, custody time limits, overcrowding in the interview room, unrepresented defendants and availability of intermediaries. These concerns have proven to be surmountable in Northern Ireland and can be addressed by sound guidance and training.

³³ Tasmania Law Reform Institute. (2018). Facilitating Equal Access to Justice: An Intermediary/ Communication Assistant Scheme for Tasmania? TLRI

I recommend:

- Developing strict ethical and procedural guidance for intermediaries working with the accused.
- Developing procedural guidance for police for the use of an intermediary in a suspect interview. Such guidance should include practical matters such as referral mechanisms, availability of intermediaries, custody time limits, investigation timelines, overcrowding in the interview room, and unrepresented defendants.
- Developing a specialist training module for intermediaries working with the accused; successfully completing this module should be a pre-requisite for working with the accused.
- Offering fresh judicial officer awareness sessions, as well as police, lawyer and other stakeholder training on the work of intermediaries with the accused.³⁴

It will be important to consider training for other stakeholder groups once the accused is brought within the remit of the Scheme. For example, forensic medical examiners assessing suspects in the police station as well as forensic psychiatrists and psychologists advising on fitness to plead/stand trial issues. Expansion of the Intermediary Liaison Team and the number of intermediaries (as recommended above) should take into account their additional awareness raising and training responsibilities.

Witness Intermediaries in Practice

This review did not have the same remit or cover the same ground as the 2022 Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania.³⁵ There was some cross-over in terms of the areas covered with stakeholders. Where there was cross-over, the findings of this study were consistent with five of the twelve key findings³⁶ in 2022:

- There is a high level of support for the purpose of the Scheme among evaluation participants and its potential to contribute positively to criminal justice processes in Tasmania.
- WIs are generally considered essential for child witnesses. Stakeholders are divided on the need to involve WIs when interviewing/questioning teenagers with good communication capabilities, however the best way to determine this eligibility is unclear.
- In practice, the role and functions of WIs in the context of the roles of other stakeholders (including police, Witness Assistance Officers, lawyers, prosecutors and judicial officers) requires further clarity and adherence.

³⁴ ACT is leveraging the training materials for intermediaries to create new material for other stakeholders.

³⁵ Vandenberg, M. (2022). Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania. Sprout Labs, DoJ, Tasmania

³⁶ The other seven key findings of the 2022 evaluation covered areas not directly within the scope of this report/there was insufficient data to make a comparison. However, communication between the author and the Intermediary Liaison Team confirms that the Intermediary Liaison Team is actively responding to these key findings for example, providing further stakeholder engagement and education, providing in-person support where necessary at hearings, individually reviewing reports and giving feedback, and providing peer support for communication assessments. Mentoring, continuing professional development and resources for intermediaries have been increased and continue to be offered and new feedback and self-reflection tools have been introduced.

- Further stakeholder engagement and marketing of the Scheme among stakeholders is required to clarify the unique role and functions of WIs and how all stakeholders can collaborate most effectively around vulnerable witnesses.
- There is widespread support for considering the use of WIs with other vulnerable groups.

Intermediary Appointment, Eligibility and Legislation Requiring Police to Use an Intermediary

Tasmania's stakeholders remain divided on the need to involve intermediaries when questioning teenagers. When reviewing eligibility criteria, the starting point is the legislation. *Tasmania's Evidence (Children and Special Witnesses) Act 2001* includes 'Part 2A - Intermediary Scheme'. Eligibility by virtue of a 'communication need' is set out as follows:

7F. Meaning of communication need

- (1) For the purposes of this Part, a witness who is to give evidence in a specified proceeding will be taken to have a communication need if the quality or clarity of evidence given by the witness may be significantly diminished by the witness's ability to understand, process or express information.
- (2) Subsection (1) applies regardless of whether –
 - (a) the witness's communication need is temporary, permanent or reoccurring; or
 - (b) the degree of severity of the witness's communication need changes over time or due to circumstances; or
 - (c) the witness's communication need is caused by disability, illness, injury, trauma or some other cause.

These are comprehensive but may not be the easiest criteria to interpret and apply in practice. When problems related to police interpretation of eligibility for intermediaries were encountered in England and Wales, this resulted in the Association of Chief Police Officers issuing new guidance in 2005.³⁷ There was a similar issue in Northern Ireland regarding advice on applying eligibility criteria. In Northern Ireland in 2016, the pilot scheme review recommended:

'...that officers are advised to actively consider if children 7 years of age and under may need an RI assessment and document their conclusions. In this process, they should take into consideration: if the child has any other vulnerability apart from young age; may there be language delay; the nature/seriousness of the offence; has there been previous reports in relation to the child/family; would they be likely to recommend to [Public Prosecution Service] that the suspect is prosecuted, etc. Where there is doubt, an RI should be requested.'³⁸

³⁷ Plotnikoff, J. and Woolfson, R. (2015). *Intermediaries in the Criminal Justice System*. Policy Press, Bristol. UK.13.

³⁸ Department of Justice, Northern Ireland. (2016) *Northern Ireland Registered Intermediaries Schemes Pilot Project Phase II Review*, 5.

Legislation requiring the use of an intermediary is likely to be, on balance, counterproductive for reasons highlighted by several stakeholders. A legislative requirement could lead to ineffective investigations if intermediaries are not available when needed, or evidence being deemed inadmissible at court due to the absence of an intermediary. However, a clear signal is required to practitioners that intermediaries must be considered, thus setting the ‘tone at the top’ as one stakeholder put it. The way to achieve this is through guidance, awareness raising and training. Officers should document their decision, and where there is doubt an intermediary should be requested. Officers should also document what they have explained to the vulnerable person, and their family/carer if appropriate, and document their responses.

I recommend:

- Issuing fresh guidance to clarify eligibility criteria. Guidance should include practical ways to explore whether a communication need exists,³⁹ and checking if that person has had an intermediary before.
- Amending current guidance on the age range (currently anyone under 18 years) when an intermediary is required for children and young people. Guidance should require that intermediaries are actively considered for all children and young people but their use should be mandatory for a lower age range than at present.
- Amending the Tasmania Police Manual to include new guidance on intermediary eligibility criteria and how to apply the criteria.

Tasmania Department of Justice’s current intermediary policy makes the Scheme available to ‘all children under the age of 18 years participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters.’ The Scheme as it stands is a success and going forward, should be available to all witnesses and accused people with a communication need, regardless of their age or the offence type. Realistically this can only be achieved by organic growth of the Scheme, i.e. incremental increase in capacity to meet demand when the accused and further offence types are incorporated into the Scheme. More intermediaries will be needed to meet the needs of witnesses and accused persons as the Scheme expands. Citing a 2019 study from England and Wales, Giuffrida and Mackay concluded on cost:

‘There is no avoiding an investment of resources for intermediaries, and some delay. However, the costs may not be overly high... [and the investment] preferable to protect a fair trial, and particularly preferable to a wrongful conviction.’⁴⁰

³⁹ See for example Toolkit 10 on [theadvocatesgateway.com](https://www.theadvocatesgateway.org/files/ugd/1074f0bc65d21318414ba8a622a99723fdb2a0.pdf).<https://www.theadvocatesgateway.org/files/ugd/1074f0bc65d21318414ba8a622a99723fdb2a0.pdf>

⁴⁰ Giuffrida, J., & Mackay, A. (2021). Extending witness intermediary schemes to vulnerable adult defendants. *Current Issues in Criminal Justice*, 33(4), 498–516, 508.

I recommend:

- Expanding the Scheme to cover all offence types. Expansion should be incremental so that the Intermediary Liaison Team, panel of intermediaries, and awareness and training can keep pace as the Scheme expands. Many stakeholders in this study prioritise Family Violence matters. Consideration should be given to including Family Violence offences in the next phase of expansion of the Scheme.

Awareness and Understanding of the Intermediary Role

It has been a consistent theme from previous evaluation of witness intermediary pilot schemes in England and Wales, Northern Ireland and New South Wales that intermediaries have an ongoing educative aspect to their role. Stakeholders develop greater awareness and understanding as the Scheme progresses and they meet the role firsthand. Taggart recognises that intermediaries 'skill-up' other criminal justice practitioners and, agrees with my previous finding that they initiate culture change.⁴¹ Understanding the professional boundaries and negotiating them sensitively with police, lawyers and judicial officers is also integral to positive perceptions of the role.⁴²

The more effective their assessments and the ability of police and legal practitioners to follow the intermediary recommendations, the fewer interventions the intermediary will need to make. Therefore, it might appear to some stakeholders, particularly at the court hearing, that an intermediary is not doing much. It is somewhat paradoxical that the less obvious the intermediary is at trial, the more effective they have probably been in their skilling-up role. It is understandings such as these that grow over time as stakeholders gain firsthand experience of intermediaries.

'[A]fter involvement in a trial with an intermediary, evaluations have shown that most legal professionals become supportive of the intermediaries' expertise and the value they add to the trial'⁴³

It has been my experience over the years that intermediary administrators and intermediaries frequently encourage each other's endeavours and openly share best practice ideas.⁴⁴ Tasmania is no different. The Intermediary Liaison Team has engaged and educated a range of stakeholders across Tasmania including Magistrates, police sex crimes units, and Witness Assistance Officers. The Intermediary Liaison Team has also contributed to the establishment of the 2024 Inaugural Australasian Intermediary Conference: Gathering Momentum, increased the frequency of intermediary professional development opportunities to every six weeks, and agreed to share information with those who run the training of intermediaries in the Republic of Ireland.⁴⁵

⁴¹ Taggart, J. (2022). Examining the role of the intermediary in the criminal justice system. PhD thesis, London School of Economics and Political Science. 234.

⁴² Taggart, J. (2023). Intermediaries in the criminal justice system: professional work, jurisdictions, and boundary work. *International Journal of Law in Context*, 19(4), pp. 475–497.

⁴³ Giuffrida, J., & Mackay, A. (2021). Extending witness intermediary schemes to vulnerable adult defendants. *Current Issues in Criminal Justice*, 33(4), 498–516, 508

⁴⁴ For example, see the publications of the late Dr Ruth Marchant, an intermediary who specialised in communication with very young witnesses. See also Kearns, Á., Clarke, D., Cusack, A., Gallagher, A., Humphreys, J., Kedge, S., & McKee, A. (2022). Intermediaries in the justice system for people with communication disability: Enacting Sustainable Development Goal 16 in Ireland, Northern Ireland, and New Zealand. *International Journal of Speech-Language Pathology*, 25(1), 141–146

⁴⁵ Communication with the author

I commend the Intermediary Liaison Team's commitment to raising awareness and understanding of the role of intermediaries in Tasmania. Taggart recognised the value of communities of learning, in the form of small peer groups for support and maintaining consistency between practices.⁴⁶ As the Scheme matures, it will be vital to maintain efforts to ensure awareness and understanding of the Scheme continue to grow.

I recommend:

- Forming specialist intermediary peer groups to support and maintain consistent practices particularly for the assessment of vulnerable witnesses, the assessment of vulnerable suspects, and working with defendants with a communication need at court.

The implementation of the pilot Scheme had the benefit of a steering committee; the Pilot Intermediary Scheme Steering Committee ('PISSC'), monitored and advised on issues that arose during implementation. The PISSC was made up of senior legal and justice stakeholders. The implementation of my recommendations above will greatly benefit from the establishment of an Intermediary Scheme Expansion Advisory Committee ('ISEAC'), once again made up of senior legal and justice stakeholders and should also include at least one experienced intermediary. ISEAC should have input on practical details related to these recommendations including but not limited to:

- Wording of new/amended intermediary legislation to cover the accused;
- The order in which to bring further offences within the scope of the Scheme;
- Estimating future referral numbers;
- Suitable third parties to be present with the intermediary and an unrepresented suspect or defendant;
- Guidance on the age range when the use of an intermediary is mandatory for children and young people;
- Guidance for those applying intermediary eligibility criteria including how to identify a 'communication need';
- Content of practice directions or similar as the Scheme expands to include the accused;
- Feasibility of intermediaries assisting in legal consultations with the accused; and
- Training materials for stakeholders.

Therefore, and last but by no means least, I recommend:

- Establishing an Intermediary Scheme Expansion Advisory Committee.

⁴⁶ Taggart, J. (2021). 'I am not beholden to anyone... I consider myself to be an officer of the court': A comparison of the intermediary role in England and Wales and Northern Ireland. *The International Journal of Evidence and Proof*, 25, 141–162

Though the use of intermediaries beyond the criminal justice system is outside the scope of this review, it is inevitable that demand will grow for intermediaries in other Tasmanian courts and tribunals. I envisage that the advisory committee will also have an important role to play in informing future use of intermediaries beyond the criminal justice system.

The Commission of Inquiry's Recommendations

The Commission of Inquiry made two recommendations relevant to the Witness Intermediary Scheme review:

Recommendation 16.10

1. The Tasmanian Government should extend the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences, and fund it to do so.
2. The Tasmanian Government should consider whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

The findings of this report support the first recommendation. In fact, this report goes further and recommends extending the Witness Intermediary Scheme to cover all suspects with a communication need who are to participate in a police interview and all defendants with a communication need who are to give evidence in all types of offences and recommends further funding to support this expansion.

The findings of this report support a modified version of the Commission of Inquiry's second recommendation. This report concludes that there should be legislation to make intermediaries available for accused people with a communication need including a suspect with a communication need who is to participate in a police interview. However, this report finds that legislating that police are required to use witness intermediaries is likely to be counterproductive. Stakeholders identified, and I agree, that a legislative requirement could lead to ineffective investigations if intermediaries are not available when needed, or evidence being deemed inadmissible at court due to the absence of an intermediary. Rather than a legislative requirement, guidance should require that intermediaries are actively considered for all children and young people and adults with a communication need who are to be interviewed by the police and mandatory for a lower age range than at present (currently anyone under 18 years).

Conclusions and Summary of the 2024 Review Recommendations

A key recommendation of the Royal Commission was for all state and territory governments to establish witness intermediary schemes for any prosecution witness with a communication difficulty in child sexual abuse cases. Tasmania has done so successfully via its three-year pilot Scheme. Intermediaries are available to assist in police investigative interviews of children and other vulnerable witnesses for specified offences as prescribed by policy. Intermediaries have relevant professional qualifications to assist in communicating with vulnerable witnesses. They are trained for their role and to understand that their duty is to assist the court to communicate with the witness and to be impartial. Intermediaries provide recommendations to police and the court on how best to communicate with the witness and intervene in an interview or examination where they observe a communication breakdown. The evidence from this study is that ground rules hearings are operating effectively.

Tasmania's Witness Intermediary Scheme has been a successful pathfinder. At this crucial stage in the development of the Scheme, there exists an opportunity to build on the solid foundations of its three-year pilot. Future policy and practice can and should be informed by experiences in other jurisdictions specifically in relation to accused people with communication needs. If the role is expanded, as it should be, to cover the accused and starts to bring other criminal matters within its scope, continued awareness raising and training of intermediaries and stakeholders is key.

I recommend:

1. Introducing legislation so that intermediaries are also available for accused people with a communication need. Such legislation should apply not only to the accused person with a communication need if they choose to give evidence in court but also to the accused person with a communication need who is to participate in a police interview and, when necessary, in follow-on hearings such as sentencing.
2. Increasing capacity to handle referrals in respect of accused people with a communication need. Increasing capacity will require funding for the recruitment of additional staff within the Intermediary Liaison Team, as well as funding for the recruitment of additional in-house and panel intermediaries. Increased capacity should take into account support from an intermediary, in appropriate cases, to help the court and lawyers communicate with the defendant at follow-on hearings such as sentencing.
3. Developing strict ethical and procedural guidance for intermediaries working with the accused.
4. Developing procedural guidance for police for the use of an intermediary in a suspect interview. Such guidance should include practical matters such as referral mechanisms, availability of intermediaries, custody time limits, investigation timelines, overcrowding in the interview room, and unrepresented defendants.
5. Developing a specialist training module for intermediaries working with the accused; successfully completing this module should be a pre-requisite for working with the accused.

6. Offering fresh judicial officer awareness sessions, as well as police, lawyer and other stakeholder training on the work of intermediaries with the accused.
7. Issuing fresh guidance to clarify eligibility criteria. Guidance should include practical ways to explore whether a communication need exists, and checking if that person has had an intermediary before.
8. Amending current guidance on the age range (currently anyone under 18 years) when an intermediary is required for children and young people. Guidance should require that intermediaries are actively considered for all children and young people but their use should be mandatory for a lower age range than at present.
9. Amending the Tasmania Police Manual to include new guidance on intermediary eligibility criteria and how to apply the criteria.
10. Expanding the Scheme to cover all offence types. Expansion should be incremental so that the Intermediary Liaison Team, panel of intermediaries, and awareness and training can keep pace as the Scheme expands. Many stakeholders in this study prioritise Family Violence matters. Consideration should be given to including Family Violence offences in the next phase of expansion of the Scheme.
11. Forming specialist intermediary peer groups to support and maintain consistent practices particularly for the assessment of vulnerable witnesses, the assessment of vulnerable suspects, and working with defendants with a communication need at court.
12. Establishing an Intermediary Scheme Expansion Advisory Committee.

Undoubtedly there will be challenges but the experience from other jurisdictions is that the challenges can and will be overcome. Key ingredients to the ongoing success of and confidence in the Scheme are the continued willingness of stakeholders to develop a shared understanding of professional boundaries, embrace the educative skilling-up benefits of intermediaries, and build those lessons into guidance and training. The prospects for the Scheme are extremely good especially considering the evidence of a strong Intermediary Liaison Team culture of continuous improvement.

Stakeholders in intermediary schemes never stop learning. One scheme manager summed it up like this: 'Several years on with the scheme and every day is like a school day.'

Penny Cooper

16 July 2024

Appendices

Appendix 1: Background Material supplied by DoJ (Tas)

- Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: <https://www.childabuseroyalcommission.gov.au/criminal-justice>
- Tasmania Law Reform Institute ('TLRI'), Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?:
Microsoft Word - Intermediaries FR_10_A4_print.docx (utas.edu.au)
- The Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings: Who was looking after me? Prioritising the Safety of Tasmanian Children:
<https://www.commissionofinquiry.tas.gov.au/report>
- The Witness Intermediary Manual
- Witness Intermediary Panel Allocation Summary (of skill sets)
- Part 2A, Evidence (Children and Special Witnesses) Act 2001 (Tas):
<https://www.legislation.tas.gov.au/view/html/inforce/current/act-2001-079>
- Background information on the Evidence (Children and Special Witnesses) Amendment Bill 2020 can be found here: https://www.parliament.tas.gov.au/__data/assets/pdf_file/0014/52205/31_of_2020-fact20sheet.pdf
- Tasmania Police Manual (4.6.1.0): Tasmania-Police-Manual-November.pdf
- The Tasmanian Intermediary Scheme Online Training Modules
<https://tas.intermediaries.com.au/>
- The Witness Intermediary Schedule of Fees
- De-identified samples of assessment reports (on request)
- Witness Intermediary Scheme Pilot Final Review Framework (October 2023)
- Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania: https://www.justice.tas.gov.au/__data/assets/pdf_file/0020/710264/WISP-12-Month-Evaluation-Report.PDF
- Witness Intermediary Jurisdictional Comparison Table

Appendix 2: Stakeholder Consultation Meeting Plan

Welcome and introductions.

Check if participants have seen and understood the information and consent document.

Ground Rules established: Use the raise hand function if you wish to speak. Lower it when you have been called up to speak. Keep answers as brief as possible to allow everyone to take part. Give verbal responses and only use the chat function for technical queries/emergencies. Please keep your microphone turned off unless speaking.

By way of a reminder of what we said in the information sheet, in the time available we aim to cover:

- Whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with a communication need (including defendants), relating to sexual offences.
- Whether the use of intermediaries should be extended to suspects with communication needs at the police interview stage.
- Whether the use of intermediaries should be extended to defendants with communication needs at court.
- Whether an intermediary is required for all eligible witnesses under the age of 18.
- Whether the use of intermediaries should be extended to other classes of witness or other types of offence.
- The current level of awareness of the Witness Intermediary Scheme.
- How intermediaries are operating pre-trial and at trial, including the use of ground rules hearings.

Issues I will not be addressing in this review are the administration of the Scheme (for example referrals and matching), costs of the Scheme, intermediary remuneration and working conditions, and use of intermediaries outside the criminal justice system.

The Witness Intermediary Scheme Pilot in Tasmania applies to:

- all children under the age of 18 years participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters
- adults with a communication need participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters
- all Tasmanian courts and
- all Tasmanian police districts.

Firstly, I will ask you about the use of intermediaries for suspects and those charged in sexual offences cases. The Tasmanian pilot Scheme has dealt with a small number of suspects at the investigation stage. Also under the pilot Scheme, there have been three defendants where the Supreme Court exercised its inherent jurisdiction to order the use of an intermediary.

Q1.

In 2023, the Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings made two recommendations relevant to the Witness Intermediary Scheme review:

Recommendation 16.10

1. The Tasmanian Government should extend the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences, and fund it to do so.
2. The Tasmanian Government should consider whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

Based on your knowledge and experience of intermediary schemes including your own:

(i) What are the benefits and the obstacles/challenges to extending the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences?

(i) What are the benefits and the obstacles/challenges to legislation which would require police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

Q2.

Should witness intermediaries be available at court for:

(i) Children and young people, and adults with communication needs who are accused of sexual offences.

Q3.

This question is about determining eligibility for the assistance of an intermediary. The Tasmanian 2022 process evaluation concluded that intermediaries are generally considered essential for child witnesses, but stakeholders were divided on the need to involve intermediaries for teenagers with good communication abilities.

(i) Should the use of an intermediary be required for all witnesses under 18?

Q4.

(i) Should the use of intermediaries should be extended to other classes of witness or other types of offence?

(ii) What is the best way to determine who should be eligible for the assistance of an intermediary?

Q5.

(i) What is the current level of understanding of the role of witness intermediaries?

Q6.

(i) How have intermediaries been operating in practice during police investigations, pre-trial (including at ground rules hearings) and at trial?

Q7.

Is there anything else that you would like to say about:

(i) the scope of the Scheme?

(ii) how the Scheme might be improved?

(iii) anything else?

Thank you for your time and contributions.

We will share the result of this review in a report. The report will be in the public domain later this year. If we have your email address for you, we will contact you by email to let you know how to access the final report when it is published.

An online questionnaire is also available to complete – please feel free to add any further thoughts or comments via the questionnaire when it becomes available.

Meeting closes.

Appendix 3: Survey

Witness Intermediary Scheme Pilot: The Final Review - Have your say

Thank you for participating in the Final Review of the Witness Intermediary Scheme. Your views are very important to us and we thank you for taking the time to complete the following questionnaire.

Hyper Link: Background to the Witness Intermediary Scheme Pilot.

Questions for the Final Review

The overall goal of the final review is to:

1. Provide expert advice on issues relevant to policy, scope and eligibility criteria for an ongoing Witness Intermediary Scheme in Tasmania, and
2. Provide an expert opinion on the general quality of operations of the running of the Scheme, particularly in reference to the relevant recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The review will consider:

- The views obtained during consultation with stakeholders
- The recommendations from The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings
- Lessons learned from other jurisdictions
- Any other relevant matters identified.

The review is being conducted by Prof Penny Cooper BSc., Barrister (retired), PhD, Tiger's Eye Consulting Limited. Professor Cooper is an international expert in the questioning of vulnerable witnesses and intermediary schemes.

Your input is valuable to us. You can choose to answer all questions or only those that apply to you.

What will happen to the data collected from this survey?

Survey results will be analysed and incorporated into the review report. The report will be made publicly available online.

You do not need to share your name or email address, but if you choose to, they will not be shared with anyone unless you say something that causes us to believe that you or another person is at risk of serious harm; in that case we will contact the appropriate services.

The report will not contain names or identifying features of anyone taking part in this consultation.

It will not be possible to withdraw after submitting your answers.

What are the benefits of taking part?

We hope you will find it useful sharing your experiences and views about the Witness Intermediary Scheme Pilot and the future operation of intermediaries in the criminal justice system in Tasmania.

Who do I contact if I have an enquiry about the Final Review?

If you have any concerns or wish to speak with someone about this survey, please contact Marita O'Connell Assistant Director – Client Liaison Child Abuse Royal Commission Response Unit, Department of Justice.

Phone: (03) 6165 4802

Email: marita.oconnell@justice.tas.gov.au

Questionnaire

What involvement have you had with the Witness Intermediary Scheme in Tasmania?

Drop Down Menu: Judicial officer, Prosecution services, Defence lawyer, Professional support service, witness intermediary, Witness, personal support person, Policy, Observer, No direct involvement, Other, please specify.

Questions

The Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings ('Commission') made two recommendations relevant to the Witness Intermediary Scheme review:

Recommendation 16.10

- The Tasmanian Government should extend the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences, and fund it to do so.
- The Tasmanian Government should consider whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

Q1.

(i) What are the benefits of extending the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences?

(ii) What are the challenges of and obstacles to extending the Witness Intermediary Scheme to include children who are under investigation for, or who have been charged with, sexual offences?

Q2.

(i) What are the benefits of introducing legislation which would require police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences?

(ii) What are the challenges of and obstacles to introducing legislation which would require police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.

(i) If legislation is introduced which would require police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences, should witness intermediaries be available at court for those same witnesses?

The following questions are about determining eligibility for the use of an intermediary.

Q3.

The 2022 process evaluation concluded that intermediaries are generally considered essential for child witnesses, but stakeholders were divided on the need to involve intermediaries for teenagers with good communication abilities.

(i) Should the use of an intermediary be required for all witnesses under 18?

(drop down: Yes, No, Unsure)

(ii) Please explain your answer (optional).

Q4.

The Witness Intermediary Scheme Pilot in Tasmania applies to:

- all children under the age of 18 years participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters
- adults with a communication need participating in the criminal justice process who are victims or witnesses (other than a defendant) in sexual offence matters and homicide related matters
- all Tasmanian courts and
- all Tasmanian police districts.

i. Should the use of intermediaries be extended to other types of offences?

a(drop down: Yes, No, Unsure)

bIf yes, what other classes of witnesses should the use of intermediaries be extended to:

c(Drop down: Family Violence Offences, Offences involving Personal Violence, All offences where a communication need exists, Other)

ii. Please explain your answer.

iii. Should the use of intermediaries be extended to other classes of witness, including the accused and defendants?

a. (drop down: Yes, No, Unsure)

iv. Please explain your answer.

v. What is the best way to determine who should be eligible for the assistance of an intermediary?

The following questions relate to how intermediaries are performing in the criminal justice system.

Q5.

(i) Is the role of witness intermediaries well understood at the investigative (police interview) stage? Drop down (Yes, No, Sometimes, Other).

(ii) Please explain your answer.

(iii) Is the role of witness intermediaries well understood at the court stage? Drop down (Yes, No, Sometimes, Other).

(iv) Please explain your answer.

Q6.

(i) In your experience, how have intermediaries been operating in practice during police investigations?

(ii) In your experience, how have intermediaries been operating in practice during pre-trial activities (including at ground rules hearings)?

(iii) In your experience, how have intermediaries been operating in practice during pre-recorded hearings and at trial?

Q7.

Is there anything else that you would like to say about:

(i) the scope of Tasmania's Witness Intermediary Scheme?

(ii) how the Scheme might be improved?

(iii) anything else?

Thank you for your time and contributions.

Your contributions will remain anonymous.

We will share the result of this review in a report. The report will be in the public domain in 2024. If you wish to include your email address below, we will contact you by email to let you know how to access the final report when it is published.

Your email address (optional):

For more information on the Final Review Contact:

Department of Justice

The Child Abuse Royal Commission Response Unit

Witness Intermediary Scheme

Phone:

(03) 6165 4802

Email:

intermediary@justice.tas.gov.au

www.justice.tas.gov.au/carcru/

