

Commonwealth Witness Intermediaries.

Full Stop Australia submission to the Government's Scoping Study
30 November 2023



About Full Stop Australia

Full Stop Australia thanks the Attorney-General's Department for giving us the opportunity to make a submission on the scoping study to develop options for establishing a Commonwealth witness intermediary scheme.

Full Stop Australia is a nationally focused not-for-profit organisation, which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate to governments and in the media for laws and systems that better respond to, and ultimately prevent, gender-based violence.

About this submission

You have indicated that you're happy to receive our general thoughts on the accessibility and operation of witness intermediary schemes. Accordingly, our submission focuses on the principles we think should guide access to the support of witness intermediaries. Our submission also addresses some of the specific questions in your email dated 31 October 2023.

This submission was prepared by Emily Dale, Head of Advocacy and Taran Buckby, Legal Policy Officer at Full Stop Australia. If you have any questions in relation to this submission, please do not hesitate to contact Emily at emilyd@fullstop.org.au.

Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea, and community. We pay our respects to them and their cultures, and to Elders both past and present.

Benefits of witness intermediaries

There is general agreement that the overall quality of the justice system is enhanced when witnesses are supported to give their best quality evidence.¹ Evaluation of a Witness Intermediary Pilot Scheme in Tasmania found that more than half of respondents ‘agreed’, or ‘strongly agreed’ that the witness intermediary scheme contributed positively to the criminal justice process.² The program was considered important and necessary, with one respondent stating, “*I think it’s a great scheme. I think that it’s innovative justice, it’s smart justice ... I think it should just be available to vulnerable people.*”³

In addition to enhancing justice system processes, witness intermediaries have the potential to reduce retraumatisation from engagement with the justice system, by providing crucial support to vulnerable people. There is high representation of people with disability in the criminal justice system, and the vulnerabilities of this group can be exacerbated by criminal justice processes.⁴ Witness intermediaries can also provide important support to people from culturally and linguistically diverse backgrounds, and victims of family, domestic and sexual violence.⁵

Existing witness intermediary schemes

The Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) reported that many victims and survivors of child sexual abuse face challenges when participating in and accessing the criminal justice system, owing to evidentiary barriers and difficulties with communication.⁶ These findings emphasise the difficulties some witnesses experience when providing evidence, and the likelihood of re-traumatisation while navigating the criminal justice system.

The Royal Commission spoke to the role and benefits of witness intermediaries in assisting witnesses in child sexual abuse matters to give their best evidence.⁷ As a result, reforms have been introduced to support witnesses through the trial process, aiming to reduce trauma experienced in the criminal

¹ Jacqueline Giuffrida and Anita Mackay, ‘Extending witness intermediary schemes to vulnerable adult defendants’ (2021) 33(4) *Current Issues in Criminal Justice* 498,499.

² Dr Miriam Vandenberg (Tas), *Process Evaluation of the Witness Intermediary Scheme Pilot in Tasmania* (2022) 10.

³ *Ibid*, 9.

⁴ Sarah Hoff, Martine Powell and David Plater, ‘When good intentions are not enough: Professionals’ perceptions of the South Australian communication partner scheme’ (2022) 57(4) *Australian Journal of Social Issues* 970, 982.

⁵ *Ibid* 11.

⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II*, 2017.

⁷ *Ibid*.

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justice process, while also ensuring the right to a fair trial is preserved.⁸ These witness intermediary schemes (**WI schemes**) have been introduced across States and Territories.

However, there is significant variation in the operation and effect of the schemes, and limitations regarding who may access them:

- Many existing state and territory WI schemes do not apply to witnesses who are not children. For example, in Western Australia, communication assistants are available in proceedings in which children are concerned.⁹ Similarly, in Queensland, witness intermediaries may be appointed – on the Court’s initiative or by application of a party – for witnesses in child sexual offence matters, where the witness is under 16 years old or has an impairment of the mind or difficulty communicating¹⁰
- Some jurisdictions such as Western Australia, do not extend the use of communicators during pre-trial proceedings (such as the police interview process).
- Schemes in South Australia, Tasmanian, and the Australian Capital Territory are broader in that they focus more on the witness’s ability to communicate, rather than strictly on the witness being 16 years of age. However, the legislation governing access to witness intermediaries in those jurisdictions is not uniform.¹¹

Principles that should guide access to witness intermediaries

To improve access to justice for vulnerable people, we recommend that the proposed Commonwealth witness intermediary scheme should be broader than existing state and territory schemes.

We recommend using the following principles to determine access to witness intermediaries.

Witness intermediaries should be made available to anyone with communication difficulties

We support access to WI schemes being extended to anyone with communication challenges or who would benefit from communication assistance.

⁸ Victims Services, NSW Department of Justice, *Children’s Champion (Witness Intermediary): Procedural Guidance Manual* (2016), 4.

⁹ *Evidence Act 1906* (WA) s 106F.

¹⁰ *Evidence Act 1977* (Qld) s 22AZ.

¹¹ *Evidence Act 1929* (SA) s 14A; *Evidence (Children and Special Witnesses) Act 2001* (TAS) s 7F; *Evidence (Miscellaneous Provisions) Act 1991* s 4AJ.

Full Stop considers that Tasmania's WI scheme represents that best model of eligibility, of the existing state and territory schemes. Section 7F(1) of the *Evidence (Children and Special Witnesses) Act 2001 (TAS)* states:

... 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.

This scheme provides access to a witness intermediary, regardless of whether:

- the witness's communication needs are temporary, permanent, or recurring;
- there are fluctuations in the degree of severity of the communication need; and
- the witness's communication needs are caused by disability, illness, injury, trauma, or some other cause.¹²

Witness intermediaries should be made available to people who are impacted by trauma

By focusing on the communication needs of the witness, rather than a specific age or other qualification, the Tasmanian legislation enables the Court to consider the impacts of trauma on a victim's ability to communicate.¹³ Trauma has long-lasting impacts, which can negatively affect the ability to recall events in a linear fashion. For example:

- Victim-survivors of one-off traumatic events typically recall only three to five clear details – therefore, many details are often lacking;¹⁴ and
- Following trauma, memories may be impaired with amnesiac gaps, or may contain differences between accounts.¹⁵

¹² *Evidence (Children and Special Witnesses) Act 2001 (TAS)* s 7F (2).

¹³ Tasmanian Law Reform Institute, *Facilitating equal access to justice: An intermediary/communication assistance scheme for Tasmania?* (Report No 23, January 2018)

¹⁴ Holmes, E. A., Grey, N. and Young, K. A. D. (2005). Intrusive images and "hotspots" of trauma memories in posttraumatic stress disorder: An exploratory investigation of emotions and cognitive themes. *Journal of Behavior Therapy and Experimental Psychiatry*, 36(1), 3–17.

¹⁵ *Ibid.* See also Conway, M. A., Meares, K., & Standart, S. (2004), Images and goals. *Memory*, 12, 525–431; McNally, R. J. (2003). *Remembering Trauma*. Cambridge, MA: Harvard University Press.

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In light of this evidence base, Full Stop Australia recommends recognising the effects of trauma on the ability to communicate effectively, by giving people who have experienced trauma access to a witness intermediary under the proposed Commonwealth scheme.

Witness intermediaries should be made available to all victims of sexual offending and to witnesses under 18 years of age

Noting that victims of sexual violence often experience and are subjected to significant fear and trauma, which impacts their ability to communicate effectively, we recommend making witness intermediaries accessible to all victim-survivors of sexual offending. This would apply to any offence that involves sexual violence – regardless of the offence type. This approach recognises the strong correlation between sexual offending and trauma.

We also recommend that all witnesses under the age of 18 be provided with witness intermediary support. This recognises the inherent vulnerability of younger people, and the fact that younger people’s brains – including communication ability – are still developing.

Witness intermediaries should assist people at the police interview stage, as well as at trial

As noted above, some existing state and territory WI schemes do not provide assistance prior to trial – meaning witness intermediaries are not available to assist people with communication difficulties during the process of reporting to police.

Difficulty communicating with police can contribute to attrition of reported matters from the criminal justice system. For example, in the ten years to 2017, police “cleared” or resolved roughly 25 per cent of sexual assault investigations without making an arrest or taking other legal action.¹⁶ Reasons for this attrition include lack of sufficient evidence to press charges, or that the matter was withdrawn by the complainant. Improving the ability of victims to communicate with police might assist to improve the investigation process, and lower attrition rates.

¹⁶ Inga Ting, Nathanael Scott and Alex Palmer, ‘Rough justice: How police are failing survivors of sexual assault,’ ABC, available at: <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>.

Witness intermediary schemes should be publicly funded

We understand that under SA's witness intermediary scheme, witnesses and defendants must pay for witness intermediary services. Prior to this, we understand that accessing witness intermediary services was free, but that funding for the program ran out.

Full Stop considers that any Commonwealth witness intermediary scheme should be publicly funded and freely available to all witnesses who meet eligibility criteria. Requiring people to pay for WI scheme services impacts access to justice and will likely result in critical support being denied to vulnerable people.

Other comments

Finally, we note that your email mentions the accessibility of some WI schemes to defendants. As Full Stop's mission is to support vulnerable victim-survivors of gender-based violence, and we do not have an organisational focus on the rights of defendants, we do not have a position on this.