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South Australian Law Reform Institute

Review of the Use of Communication Partners in South Australia

Background Information & Consultation Questions

About SALRI

The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the University of Adelaide Law School. SALRI conducts inquiries – also known as references – into areas of law. The areas of law are determined by SALRI’s expert Advisory Board and may also be at the request of the South Australian Attorney-General or other parties. SALRI examines how the law works in South Australia and elsewhere (both in Australia and overseas), conducts multidisciplinary research and consults widely with the community, interested parties and experts.

When undertaking its work, SALRI has several objectives. These include identifying law reform options that would modernise the law, resolve identified issues with the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, adopt a legislative model from other States and Territories.¹ SALRI is committed to an active, impartial and inclusive consultation process. Following the research and consultation conducted during a reference, SALRI then makes reasoned recommendations to the State Government, enabling the Government and Parliament to make informed decisions about any changes to relevant law and/or practice. SALRI’s recommendations may be acted upon and accepted, however any decision on accepting a recommendation from SALRI is entirely an issue for the Government and/or Parliament.

Communication Partners in South Australia

There are wide and continuing concerns around access to justice for vulnerable parties, notably children and persons with intellectual disability or cognitive impairment. These concerns involve civil and criminal justice.

SALRI’s expert Advisory Board has approved SALRI to examine the role and operation of communication partners (also called ‘intermediaries’) in South Australia, with a particular focus on their use and effect in the higher South Australian courts. As part of its review, SALRI will examine law and practice in South Australia and elsewhere. SALRI will consider the role and use of past and present communication partner programs in South Australia, as well as similar models implemented in other jurisdictions (both in Australia and overseas). SALRI will also consider the effectiveness of communication partners, the features of any preferable model best suited for the particular circumstances of South Australia, as well as the wider issues and implications arising from the use of communication assistance, both in and out of court. SALRI will also undertake original research with the Centre of Investigative Interviewing at Griffith University to better understand the ways in which intermediaries can best contribute.

¹ This is significant as, in the aftermath of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, NSW, Queensland, Victoria, the ACT and Tasmania (from 1 March 2021) have introduced or expanded intermediary schemes to assist vulnerable victims and witnesses.

This combined work will then be used by SALRI to determine what legislative and/or other reforms may be appropriate.²

In the context of this reference, a communication partner (also known as a ‘communication assistant’ or ‘intermediary’) is a person who provides objective support to a party³ with complex communication needs.⁴ Their purpose is to facilitate communication between the person with the complex communication need (often a vulnerable person⁵) and other parties, such as the police, legal practitioners or a criminal or civil court.⁶ The role is objective and is not a support person or advocate. The concept of a communication partner has been contemplated in other jurisdictions for several decades.⁷ However, it has only been introduced relatively recently in South Australia. In late 2015, the Attorney-General’s Department launched the *Disability Justice Plan* (‘DJP’),⁸ which noted the lack of support for vulnerable witnesses in the criminal justice system. The DJP commented:

Vulnerable witnesses are capable of providing comprehensive and reliable testimony but may come up against barriers due to misconceptions about their capability or credibility and because they are not able to access the support they may require to give evidence.⁹

The DJP detailed a comprehensive approach to supporting vulnerable parties (including victims, witnesses, suspects and accused) throughout the legal process, and further included a number of initiatives that aimed to improve access to justice for these witnesses. One of these initiatives involved amending the South Australian *Evidence Act 1929* (SA) (‘SAEA’),¹⁰ and sought to entitle persons with complex communication needs to have a ‘specifically trained Communication Assistant present for any contact with the criminal justice system’.¹¹ The role may arise both in and out of court. On 1 July 2016, the SAEA was amended through the *Statutes Amendment*

² This factsheet is a work in progress and may not be the final version used in subsequent consultation.

³ Parties that may potentially benefit from a communication partner program include witnesses, victims, suspects and/or defendants. However, the availability and provision of a communication partner to vulnerable parties will depend upon the eligibility criteria as specified by the rules and regulations of the relevant jurisdiction. The term ‘vulnerable party’ does not hold universal support but SALRI uses this term to accord with the main Act, the *Statutes Amendment (Vulnerable Witnesses) Act 2015*.

⁴ A ‘complex communication need’ extends beyond lingual translation and interpretation. It may include assisting a person to communicate via gestures and/or behaviours, facial expressions, physical or emotional cues, or through the use of technological aids. See also South Australia, *Parliamentary Debates*, House of Assembly, 24 February 2016, 4392 (John Rau, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 6 May 2015, 1038 (John Rau, Attorney General); Penny Cooper and Michelle Mattison, ‘Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model’ (2017) 21(4) *International Journal of Evidence and Proof* 351, 354. The term ‘complex communication needs’ is not universally supported in this context but SALRI again uses this term to ensure consistency with the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

⁵ A ‘vulnerable’ person may include children, persons with cognitive impairment, persons from a non-English speaking background and/or Aboriginal communities.

⁶ Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37(3) *Melbourne University Law Review* 539, 557–8; Penny Cooper and Janet Grace, ‘Vulnerable Patients Going to Court: A Psychiatrist’s Guide to Special Measures’ (2016) 40(4) *BJPsych Bulletin* 220, 220–1.

⁷ In South Africa, the first intermediary was used in 1993: Gert Jonker and Rika Swanzen, ‘Intermediary Services for Child Witnesses Testifying in South African Criminal Courts’ (2007) 6(4) *International Journal on Human Rights* 90, 93. In England and Wales, the first intermediary was used in 2004: Cooper and Mattison, above n 4, 352. In Canada, an intermediary scheme was implemented in 2008: Kimberley Collins, Natalie Harker and Georgios A Antonopoulos, ‘The Impact of the Registered Intermediary on Adults’ Perceptions of Child Witnesses: Evidence from a Mock Cross Examination’ (2016) 23(2) *European Journal on Criminal Policy and Research* 211, 211.

⁸ Attorney-General (SA), *Disability Justice Plan 2014–2017* (June 2014) (‘DJP’). The DJP was released in response to a sexual assault charges that was ultimately discontinued on the basis that ‘prosecutors were concerned the disabled victims could not adequately communicate what happened to them’: Nance Haxton, ‘Abuse charges dropped against bus driver’, *ABC News* (online, 21 December 2011) <<https://www.abc.net.au/news/2011-12-20/abuse-charges-dropped-against-bus-driver/3740530>>.

⁹ DJP, above n 8, 9.

¹⁰ *Evidence Act 1929* (SA) (‘SAEA’).

¹¹ DJP, above n 8, 9.

(*Vulnerable Witnesses*) Act 2015 to include s 14A,¹² which formed the legislative basis for the first communication partner program in South Australia. This provision provides that a court may order that a witness with complex communication needs be provided with communication assistance. Such measures may include the provision of a communication partner, modification to court processes and/or other measures that may facilitate communication between the witness and the court, enabling them to give their best evidence possible.¹³ As to the use of communication partners outside of court, the law was further amended to require that, if practicable, a communication partner should be present for vulnerable witnesses or suspects when interviewed by police.¹⁴

There was strong all party support in Parliament for the *Statutes Amendment (Vulnerable Witnesses) Act 2015*, notably for the communication partner role. The South Australian Government subsequently contracted Uniting Communities, a not-for-profit organisation, to establish and run the communication partner service. The service was to consist of trained volunteers¹⁵ whom would then fulfil the role of a communication partner.¹⁶ The scheme was publicly funded with a set amount of \$3.26 million, to be available over four years starting from 2016.¹⁷ The scheme was formally launched in Adelaide in July 2017 by Judge Patricia Lees from London.

The local scheme received wide support from all parties in Parliament, practitioners and the disability sector.¹⁸ The model was seen to have real benefits for not only children and persons with intellectual disability but also for Aboriginal and multicultural communities. However, despite this wide support and the considerable efforts, commitment and expertise of Uniting Communities and the volunteers, the scheme was little used in practice. SALRI's initial research show that a communication partner was used on only three occasions during a trial in the District Court from 2016 to 2019 (though it was used more often in the Youth Court)¹⁹ It also appears that communication partners were seldom used by the police in interviewing suspects with complex communication needs (though it was used more often by specialist police in interviewing vulnerable witnesses and victims). One of the issues that SALRI is examining are the reasons for this lack of uptake.²⁰ The lack of uptake should not be seen as a reflection upon the commitment of Uniting Communities and/or the scheme's trained volunteers, and instead may well be attributed to other factors such as the structure of the scheme, operational considerations or cultural or training issues that could have played a part in the scheme's overall effectiveness.

Funding was not renewed and on 1 March 2020, the trained volunteer scheme ceased operation. The model now engages the services of paid professionals as communication partners for a fee.²¹ The communication partner is now privately funded by the individual requiring communication assistance.²² The eligibility for communication partners has also been adjusted, and the scheme now requires that a communication partner be qualified in speech pathology, occupational therapy, psychology, developmental education or social work.²³

¹² *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

¹³ *SAEA* s 14A.

¹⁴ *Summary Offences Act 1953* (SA) s 74H; *Summary Offences Regulations 2016* (SA) rr 19, 23. SALRI has been told that this requirement has been very rarely utilised by SAPOL for suspects with complex communication needs.

¹⁵ It should be highlighted that these trained volunteers were not random individuals 'off the street', but rather suitable individuals with expertise in the areas such as retired teachers or social workers or psychologists.

¹⁶ South Australia, *Parliamentary Debates*, House of Assembly, 10 March 2016, 4709 (Hon John Rau); South Australia, *Parliamentary Debates*, Legislative Council, 4 June 2015, 898–9 (Hon Gail Gago).

¹⁷ Government of South Australia, *2014–15 Budget Paper 4: Agency Statements* (Budget Paper No 4, 19 June 2014) vol 1, 67. See also South Australia, *Parliamentary Debates*, House of Assembly, 10 March 2016, 4709 (John Rau).

¹⁸ See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 2 July 2015 (Hon Kelly Vincent).

¹⁹ This emerges from anecdotal evidence provided by the Hon Geoffrey Muecke and Uniting Communities.

²⁰ As part of SALRI's project, it is intended that the Centre for Investigative Interviewing at Griffith University will conduct a focus group with involved parties to explore the reasons for the lack of uptake in detail.

²¹ 'Communication Partner Service', *Government of South Australia* (Web Page) <<https://www.agd.sa.gov.au/projects-and-consultations/disability-justice-plan/communication-partner-service>>.

²² *Ibid.* The user pays intermediary concept has attracted concern in SALRI's initial consultation.

²³ These persons must be recognised according to the guidelines of Speech Pathology Australia, Occupational Therapy Australia,

The Role of the Communication Partner

There has been significant debate as to how the role of the communication partner should be defined. It is generally accepted that the communication partner must remain independent and non-partisan.²⁴ The role does not include being an advocate for the party or providing emotional support.²⁵ In South Australia, the exact role of a communication partner has not been defined in legislation.²⁶ Some literature has characterised the role as quasi-interpretative.²⁷ In other jurisdictions such as NSW or England, the role of a communication partner is extended to be advisory and/or interventionist.²⁸ As the South Australian scheme has been used only a limited number of times within the courts, no clear practice has been established as to the boundaries or expectations of the role and whether the courts would allow the role to extend beyond the function of a quasi-interpreter.

Where the role of a communication partner is not clear, there is a risk that, without proper training or relevant qualifications, a communication partner may distort the evidence presented.²⁹ To minimise this risk, it is arguable that the role should be clearly defined so that the communication partner can be most effective in facilitating communication between the vulnerable party and the police, the lawyer or the court in a way that affords a fair process to all parties.³⁰ For example, intermediaries in the UK have a clear role under s 19 of the *Youth Justice and Criminal Evidence Act 1999* (UK) to further the objective of maximising the quality of witness's evidence.³¹ South Australia does not have any similar provisions.

The potential use and implications of an intermediary model are not confined to a criminal court and have wider application such as outside court, civil proceedings, family proceedings involving children and tribunals.

Are Communication Partners Effective?

There is an absence of sound empirical research as to the effectiveness of intermediaries or communication partners.³² However, the existing research suggests that a vulnerable person's ability to communicate can

Australian Psychology Society, Developmental Educators Australia Inc or Australian Association of Social Workers: Government of South Australia, 'Help Communicating About Legal Matters' (Web Page, 27 October 2020) <<https://www.sa.gov.au/topics/rights-and-law/victims-of-crime/assistance-with-communication>>.

²⁴ Martine Powell, Phoebe Bowden and Michelle Mattison, 'Stakeholders' Perceptions of the Benefit of Introducing an Australian Intermediary System for Vulnerable Witnesses' (2015) 48(4) *Australian and New Zealand Journal of Criminology* 498, 506.

²⁵ Penny Cooper, 'Like Ducks to Water? Intermediaries for Vulnerable Witnesses and Parties' (2016) 46 *Family Law* 374, 375; Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (Guidelines) ch 13.11A [2].

²⁶ The *SAEA* defines a communication partner as 'a person, or a person of a class, approved by the Minister for the purposes of providing assistance in proceedings to a witness with complex communication needs': s 4. Although the definition identifies the function of a communication partner, it does not necessarily clarify their role when giving communication assistance.

²⁷ Tasmanian Law Reform Commission, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (Report No 23, January 2018) 57 [4.2.18] ('*TLRI Report*').

²⁸ *Ibid* 65 [4.3.6].

²⁹ Joyce Plotnikoff and Richard Woolfson, 'Making the Best Use of the Intermediary Special Measure at Trial' (2008) 2 *Criminal Law Review* 91, 94; Penny Cooper and David Wurtzel, 'Better the Second Time Around: Department of Justice Registered Intermediaries Schemes and Lessons From England and Wales' (2014) 65(1) *Northern Island Legal Quarterly* 39, 60.

³⁰ Bowden, Henning and Plater, above n 6, 557–8; Cooper and Grace, above n 6, 220–1.

³¹ *Youth Justice and Criminal Evidence Act 1999* (UK) s 19 ('*YJCEA*').

³² Penny Cooper and Michelle Mattison, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21 *International Journal of Evidence and Proof* 351. 'The [CP] role is also designed to facilitate more effective police investigations and enhanced communication at trial but how and whether the role achieves this has been subjected to limited scientific study. It is striking how little research has been conducted into the completeness, accuracy and coherence of the evidence that intermediaries facilitate. There is huge potential for intermediary schemes to be used more widely in the pursuit of access to justice for vulnerable people in forensic investigations and [civil and criminal] hearings. However, justification for the ensuing costs may prove to be elusive without the backing of a substantial body of scientific research demonstrating a positive impact on the quality of a vulnerable person's

dramatically improve through the use of a communication partner or intermediary.³³ Legal commentators have concluded that communication partners offer ‘significant advantages to courts and to witnesses in improving the quality and quantity of evidence given by [vulnerable] witnesses’,³⁴ and that ‘[w]itness intermediaries can mean the difference between vulnerable witnesses communicating their best evidence or not communicating at all’.³⁵ These themes have also emerged in SALRI’s initial consultation.

A communication partner’s effectiveness can highly depend upon the stage at which they are engaged in the legal process. Police officers, prosecution and defence legal practitioners, the court and/or other relevant parties may potentially engage a communication partner for an eligible party. Indeed, the utility of a communication partner is not confined to criminal proceedings and may arise in civil or family proceedings³⁶ or before a tribunal such as SACAT.³⁷ The responsibility for identifying a person’s need for a communication partner does not lie with any particular individual under the South Australian law. In some circumstances, this can lead to late identification,³⁸ which may result in the party not receiving communication assistance until the trial stage or not receiving communication assistance at all.³⁹ The late identification is likely to diminish the effectiveness of a communication partner,⁴⁰ and it is important that this risk should be minimised. This may be achieved by ensuring that persons whom are likely to be in a position to offer or refer the services of a communication partner, such as a police officer, a legal practitioner or the courts can identify a person with complex communication needs, and can then enlist the services of a suitable communication partner for that individual. For this to occur, it might be necessary to promote the existence and function of the communication partner program through educational materials and training programs for professionals, experts and the community.

Communication Partner Models in Other Jurisdictions

New South Wales

Sections 275B and 306ZK(3)(b) of the *Criminal Procedure Act 1986* (NSW) has provided for the use of communication partners/intermediaries within the criminal justice system for some time.⁴¹ However, there is

evidence’: at 371. Professor Cooper has confirmed this in discussion with SALRI. As part of SALRI’s project, the Centre for Investigative Interviewing at Griffith University is conducting original research to better understand the ways in which intermediaries can best contribute. Specifically, this study seeks to understand the conditions in which eligible intermediaries’ knowledge and skills can have the maximum effect. Anyone wanting to take part in this study please contact Dr Sonja Brubacher at s.brubacher@griffith.edu.au.

³³ See, for example, Catherine Wiseman-Hakes et al, ‘Examining the Efficacy of Communication Partner Training for Improving Communication Interactions and Outcomes for Individuals with Traumatic Brain Injury: A Systematic Review’ (2020) 2(1) *Archives of Rehabilitation Research and Clinical Translation* 100036, 100037–8.

³⁴ Terese Henning, ‘Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments: “Plus Ça Change” or Prospects New?’ (2013) 37(3) *Criminal Law Journal* 155, 166, 171; Cooper and Mattison, above n 3, 364; Brendan O’Mahony, ‘The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary’ (2010) 38(3) *British Journal of Learning Disabilities* 232, 235.

³⁵ Thelma Agnew, ‘Finding a Voice’ (2006) 9(7) *Mental Health Practice* 10, 10.

³⁶ See, for example, Penny Cooper, ‘Intermediaries and vulnerable witnesses in family courts: what do we do now?’ (2012) 42 *Family Law* 868; *Re X (A child)* [2011] EWHC 3401 (Fam), [42].

³⁷ SALRI notes that SACAT recently utilised a communication partner for a party with complex communication needs.

³⁸ There is no clear provision under the *Evidence Act* allocating responsibility to a particular party. However, some guidelines as to whom may potentially identify as a vulnerable witness is listed on the SA Government website: Government of South Australia, ‘Help Communicating about Legal Matters’ (Web Page, 27 October 2020) <<https://www.sa.gov.au/topics/rights-and-law/victims-of-crime/assistance-with-communication>> (‘Help Communicating About Legal Matters’).

³⁹ Brendan M O’Mahony, ‘The Early Identification of Vulnerable Witnesses Prior to an Investigative Interview’ (2011) 13(2) *British Journal of Forensic Practice* 114, 119.

⁴⁰ Mandy Burton, Roger Evans and Andrew Sanders, ‘Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification’ (2006) (March) *Criminal Law Review* 229, 233.

⁴¹ *Criminal Procedure Act 1986* (NSW) ss 275B and 306ZK(3)(b).

little evidence to show that these provisions were used in practice.⁴² In mid-2016, a pilot intermediary scheme was introduced by the NSW Government.⁴³ The scheme was designed to assist child witnesses specifically, and mandated that an intermediary be provided to any child witness under 16 years of age in cases concerning a sexual offence.⁴⁴ The intermediaries engaged in this pilot program⁴⁵ were termed ‘children’s champions’.⁴⁶ It commenced in two New South Wales pilot courts, the Newcastle District Court and the Sydney District Court (Downing Centre),⁴⁷ and two additional judges were appointed.⁴⁸ The Victim’s Services Department was responsible for appointing a panel of witness intermediaries, whom are then to be registered and trained by the Department.⁴⁹ On 1 April 2019, the scheme became a permanent program in the District Court and will be funded by the NSW Government until June 2022.⁵⁰

Under the NSW model, the role of the intermediary extends beyond one that is solely interpretative. During police investigation, intermediaries are permitted to undertake an advisory role in that they are required to provide written reports to the court detailing the witness’ communication needs.⁵¹ At trial, intermediaries are accorded an interventionist role in addition to providing interpretative and/or advisory assistance — they can converse with the defence and prosecution about the appropriateness of questions being asked, and can even intervene where questions are deemed inappropriate.⁵² This accords with the English intermediary model.

The NSW scheme has received positive initial feedback. In November 2016, the Royal Commission into Institutional Responses to Child Sexual Abuse received evidence during a public meeting that eight trials had occurred under the scheme, 40 trials were in the pipeline, and 31 preliminary hearings had occurred with 15 foreshadowed. This data was described during the meeting as ‘quite a volume’.⁵³ SALRI has been informally told in initial consultation that the pilot NSW scheme works ‘well’ and has become an established and accepted mechanism within the NSW criminal justice system.⁵⁴

Victoria

The Victorian Government introduced a pilot intermediary program⁵⁵ after a major report of the Victorian Law Reform Commission was released on 22 November 2016.⁵⁶ This report contained several recommendations that highlighted the need to provide adequate support to victims and to improve their opportunity to participate

⁴² *TLRI Report*, above n 27, 58 [4.2.24].

⁴³ The scheme was based in legislation under sch 2 pt 29 of the *Criminal Procedure Act 1986* (NSW), which supplemented the existing measures set out in ss 275B and 306ZK(3)(b).

⁴⁴ *Criminal Procedure Act 1986* (NSW) cl 339(1); *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) cl 89(3).

⁴⁵ Eligibility for an intermediary under the NSW scheme is similar to that the current South Australian scheme: only professionals in the fields of psychology, social work, speech pathology, occupational therapy or ‘similar fields’ are recognised as eligible intermediaries. See *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) s 89(1)–(2).

⁴⁶ SALRI accepts that this label is less than ideal and is at odds with the objective nature of the role.

⁴⁷ *TLRI Report*, above, n 27, 61 [4.2.34].

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ ‘Child Sexual Offence Evidence Program’, *NSW Government: Communities and Justice* (Web Page) <https://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/vs_childrens-champion.aspx>.

⁵¹ *TLRI Report*, above n 27, 60 [4.2.31].

⁵² *Ibid.*

⁵³ Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 46, Transcript Day 234, 23912.

⁵⁴ SALRI has also been told though that the challenge and cost in extending the scheme to regional, rural and remote locations should not be overlooked.

⁵⁵ Intermediaries must be qualified in speech pathology, social work, psychology and/or occupational therapy: *Criminal Procedure Act 2009* (Vic) s 389H.

⁵⁶ Victorian Law Reform Commission, *The Role of Victims and Crime in the Criminal Trial Process* (Report, August 2016).

in the criminal trial process. In response to these recommendations, the intermediary program was established through amending the *Criminal Procedure Act 2009* (Vic) ('CPA'), and officially commenced in February 2018.⁵⁷ Eligible parties to the scheme include witnesses under the age of 18 years, or witnesses that have a cognitive impairment.⁵⁸ The CPA specifically mentions that the accused is not entitled to have a communication partner present.⁵⁹ Further, the case must concern a sexual offence or homicide.⁶⁰

The definition of an intermediary under this scheme was set out by the Attorney-General, the Hon Martin Pakula MP: 'An intermediary is a communication specialist whose role is to facilitate the witness giving their best evidence.'⁶¹ The Victorian Act specifically outlines the function of an intermediary as to help the witness understand the questions asked and to help the person questioning the witness to understand the witness' answers.⁶² Their role is mostly interpretative and advisory.⁶³ Their role is elaborated:

Intermediaries are skilled communication specialists who assist vulnerable witnesses to give their best evidence. Their role is to help communication with the witness and to assist the witness to give evidence to police and in court. Intermediaries are neutral and are officers of the court.⁶⁴

SALRI has been informally told in initial consultation that the pilot Victorian scheme works 'largely well' and the role has received judicial support.⁶⁵

United Kingdom

The UK introduced its intermediary scheme in 2004. Under the *Youth Justice and Criminal Evidence Act 1999* (UK), a witness in the criminal proceedings other than the accused⁶⁶ is eligible for communication assistance.⁶⁷ This assistance may be delivered in a number of ways, including the provision of an intermediary, the use of a live link in court to testify, adjustments to court settings such as the removal of wigs or gowns or the use of objects that aim to provide comfort to the party giving evidence (such as a sketching book or a child's toy).⁶⁸

Intermediaries must be registered under the Ministry of Justice Registered Intermediary Scheme.⁶⁹ This group may include 'speech and language therapists, psychologists, social workers, nurses, teachers or occupational therapists'.⁷⁰ The registered intermediary acts as a conduit for communication between relevant legal representatives, the police and the witness.⁷¹ Ideally, the intermediary should have the requisite qualifications to

⁵⁷ *Criminal Procedure Act 2009* (Vic) pt 8.2A ('CPA').

⁵⁸ *Ibid* s 389F.

⁵⁹ *Ibid*.

⁶⁰ Government of Victoria, *Intermediaries Pilot Scheme* (Factsheet).^[SEP]

⁶¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2017 (Hon Martin Pakula) 4359.

⁶² *Criminal Procedure Act 2009* (Vic) s 389(1).

⁶³ Judicial College of Victoria, *Disability Access Bench Book* (Bench Book, 1 December 2016) [13.11A].^[SEP]

⁶⁴ 'Victorian Intermediaries Pilot Program', <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>.

⁶⁵ *Ward (a Pseudonym) v The Queen* [2017] VSCA 37.

⁶⁶ The absence of the accused from the model proved controversial and the English courts resorted to their inherent jurisdiction to overcome this omission. In *R v Dixon* [2013] EWCA Crim 465, the Court of Appeal highlighted the responsibility of trial judges to actively ensure the effective participation in trials of vulnerable defendants, including through the use of an intermediary. In South Australia in contrast, the *Disability Justice Plan* always applied to accused as well as victims and witnesses.

⁶⁷ *Youth Justice and Criminal Evidence Act 1999* (UK) s 16.

⁶⁸ *Ibid* ss 23-30.

⁶⁹ Ministry of Justice (UK), *Registered Intermediary Procedural Guidance* (Guidelines, September 2020) 8.

⁷⁰ *TLRI Report*, n 27, 53 [4.2.5].

⁷¹ Crown Prosecution Service, *Special Measures* (19 September 2019) Crown Prosecution Service <<https://www.cps.gov.uk/legal-guidance/special-measures>>.

identify the most appropriate avenues for communication in light of the witness' specific vulnerability. The role of an intermediary is fact specific and will depend on the party's particular communication needs.⁷² The intermediary role in England has been found to vary depending upon the relevant individual's needs. It may vary from suggesting short concise questions to regular breaks in questioning to the use of a companion animal to alleviate the stress on a vulnerable party⁷³ to something more expansive and of 'substance' so as to take a more active role in the proceedings and positively assist the party to communicate such as by the use of such as speak-and-spell electronic communication devices or picture book aids or other means.⁷⁴

The English model has received widespread praise and has been deemed largely successful.⁷⁵ Many legal UK practitioners and commentators have attributed the success of the intermediary model to cultural change within law enforcement, the legal profession and the judiciary, as well as within the intermediary service itself.⁷⁶

Wider Considerations

Ground Rules Hearings

Communication assistance involves more than the services of communication partners. Many jurisdictions such as England and Victoria and now Tasmania have implemented ground rules hearings (GRHs), a pre-trial hearing involving any communication partner, the prosecution and defence advocates and the likely trial judge. The purpose of the hearing is for the parties to discuss prior to the trial certain rules and procedures that may be put in place to best assist the vulnerable person when giving evidence.⁷⁷ There is no express legislative provision in South Australia for GRHs but there is provision in the South Australia Court Rules for a pre-trial GRH type hearing. However, these hearings are not mandatory (unlike England or Tasmania) and apparently have not been used since the commencement of the *Statutes Amendment (Vulnerable Witnesses) Act 2015* on 1 July 2016.⁷⁸

In contrast in the UK, GRHs are recognised as an essential and beneficial component of the criminal justice system.⁷⁹ It is a requirement under r 3.8(7) of the *Criminal Procedure Rules 2005* (UK) for a GRH to be held where 'directions for appropriate treatment and questioning are required'.⁸⁰ In 2013, the importance of GRHs was

⁷² *R v Dean Thomas* [2020] EWCA Crim 117.

⁷³ See *Evidence (Vulnerable Witnesses) Amendment Act 2020* (SA) to explicitly allow the presence of Zero the companion dog.

⁷⁴ See Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Bristol University Press, 2015).

⁷⁵ 'The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court ... their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial.' Rt Hon Lord Judge, Lord Chief Justice of England and Wales, 'Vulnerable Witnesses in the Administration of Criminal Justice' (Speech delivered at the 17th Australian Institute of Judicial Administration Oration in Judicial Administration, Sydney, 7th September 2012). These themes have been echoed to SALRI by Judge Patricia Lees of Snaresbrook Crown Court. See also *R v Rashid* [2017] 1 WLR 2449; *R v FA* [2015] EWCA Crim 209.

⁷⁶ See generally Cooper, above n 22.

⁷⁷ Penny Cooper, Paula Backen and Ruth Marchant, 'Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court' (2015) 6 *Criminal Law Review* 420, 420; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System* (Bristol University Press, 2015) 110.

⁷⁸ *SAEA*, s 12AB(1).

⁷⁹ In *R v Jonas* [2015] Crim LR 742, the court described ground rules hearings as part of 'modern best practice'. 'The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked': *R v Lubemba*; *R v JP R v Lubemba* [2015] 1 WLR 1579, [43]). These themes have been echoed to SALRI by Judge Lees of Snaresbrook Crown Court. See also *DPP v Ward (a pseudonym)* [2017] VSCA 37.

⁸⁰ *Criminal Procedure Rules 2005* (UK) r 3.8(7).

recognised in the Criminal Practice Direction (UK) ‘as a key step in planning the proper questioning of a vulnerable witness or defendant’.⁸¹ The laws mandating the use of GRHs are translated into practice and are routinely held where a case involves a vulnerable person.

One issue that SALRI wishes to examine as part of this reference is the role and effect of GRHs in South Australia and if such hearings should be mandated.

Training and Education

Another relevant consideration is the availability of educational tools and training programs for persons likely to interact with the communication partner scheme. When the South Australian *Disability Justice Plan* was launched in 2014, it was released with many complementary materials, including guidelines for supporting vulnerable witnesses.⁸² When the scheme changed to a user-pays model in 2020, an additional guide was released for communication partners and their role in ensuring that vulnerable persons are provided with the opportunity to effectively participate in the judicial process.⁸³ Although these materials are comprehensive and detailed, there are no further materials available that offer information concerning the use of communication partners in investigative and legal processes.

Further to this, training programs have been identified as a useful way in jurisdictions such as the UK to promote the existence and use of a communication partner program to relevant parties, such as law enforcement, legal professionals, the judiciary, potential communication partners and persons with communication needs. Comparatively, intermediaries in the UK must undertake a training program that focuses translating specialised skills for use in a legal setting.⁸⁴ These programs have been identified as an important step in enabling intermediaries to effectively carry out their role in court.⁸⁵

There was significant training in South Australia as part of the *Disability Justice Plan* and especially to highlight the *Statutes Amendment (Vulnerable Witnesses) Act 2015* and the Uniting Communities communication partner scheme. However, SALRI has been struck in its initial consultation by how many parties, especially within the disability sector, who were unaware of the South Australian communication partner role or scheme.

Beyond Legislative Reform: A Cultural Change?

Many jurisdictions that have implemented communication partner programs, such as the UK, have attributed much of their success to the cultural uptake of the program within the legal profession and the judiciary.⁸⁶ It is noted that lawyers and judges may be reluctant or slow to change entrenched practices. Therefore, in addition to legislative reform, it is necessary to consider any operational or cultural or training changes that should occur for any communication partner program in South Australia to operate at a level that maximises access to justice for persons in need of communication assistance, both in and out of court.

⁸¹ See Cooper, Backen and Marchant, above n 77.

⁸² Attorney General’s Department (SA), *Supporting Vulnerable Witnesses in the Giving of Evidence: Guidelines for Securing Best Evidence* (Guidelines, 2014).

⁸³ Attorney-General’s Department (SA), *A Guide for Communication Partners* (Guideline, 2020).

⁸⁴ Agnew, above n 35, 10.

⁸⁵ Ibid.

⁸⁶ This has been noted to SALRI in initial consultation by Judge Patricia Lees and Professors Penny Cooper and Jonathan Doak.

Consultation Questions

1. Do you see a need for communication partners in South Australia?
2. What criteria should be used to determine the eligibility to be a communication partner?
 - a. Are trained volunteers or paid experts preferred?
3. What should be the role of the communication partner?
 - a. What should be the role of a communication partner for vulnerable parties with a complex communication who also require a language interpreter?
4. Why was the previous communication partner model used so little in South Australia?
5. What experience do you have with the previous or current South Australian communication partner model?
6. When and where should the communication partner model be used?
7. Are current training and educational programs about the use of communication partners in a legal setting sufficient for law enforcement and legal practitioners?⁸⁷
 - a. If not, what types of materials and/or educational programs should be available?
 - b. Who should be responsible for the development and provision of such materials and/or programs?
8. Should the communication partner program be available in civil, family and youth courts or before tribunals?
9. Are any changes to South Australian law or practice appropriate to clarify or improve the use and operation of communication partners?
10. Should pre-trial ground rules hearings be held?
 - a. If so, when and in what cases should they be held?
 - b. What should ground rules hearings involve?
 - c. Should they be mandatory in certain cases?
11. Should an approach used in an alternative jurisdiction be adopted in South Australia?
 - a. If so, which approach should be used?
12. Do you have any further comments or suggestions about the role and operation of communication partners or the wider issues and implications of such a role?

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

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⁸⁷ The educational materials currently available in South Australia include guidelines published by the Attorney-General's Department, *Supporting Vulnerable Witnesses in the Giving of Evidence: Guidelines for Securing Best Evidence*, and *A Guide for Communication Partners*. These guidelines give a general overview of the role of the communication partner both in and out of court. As for training programs, there are currently no programs aimed towards lawyers or judicial officers that inform them of the existence of the communication partner service, and promotes its use in a legal setting.