

Your Ref:
Our Ref: 853/348

17 April 2020

The Secretary
Office of the Secretary
Department of Justice
Email: haveyoursay@justice.tas.gov.au

Dear Secretary

Re: Evidence (Children and Special Witnesses) Amendment Bill 2020

Thank you for the opportunity to comment on the draft Evidence (Children and Special Witnesses) Amendment Bill 2020 (the draft Bill). I am grateful for the extension of time in which to provide feedback.

According to the explanatory material for the draft Bill, it is intended to reflect the Tasmanian Government's commitment to implement a pilot witness intermediary scheme in Tasmania (the pilot scheme). This commitment is set out in detail in the Tasmanian Government's *Second Annual Progress Report and Action Plan 2020 - Implementing the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*.

This significant area of law reform aims to reduce stress for children who are witnesses in criminal proceedings for child sexual abuse or murder, and to help them give their best evidence. I congratulate the Government on its commitment to establishing and implementing the pilot scheme.

Role of the Commissioner for Children and Young People

As you are aware, the Commissioner for Children and Young People is an independent statutory office established under Tasmania's *Commissioner for Children and Young People Act 2016*. My functions and powers, and the principles to which I must have regard in carrying out these functions and exercising these powers, are set out in that Act.

Consistent with my statutory functions, my comments below focus on matters that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.¹

Background

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) found that intermediary schemes have the potential to make a significant difference in reducing the problems that children and people with disability face participating in and being heard by the criminal justice system.

¹ Pursuant to section 3 of the CCYP Act, 'child' means a person who has not attained the age of 18 years; and 'young person' means a person, who has not attained the age of 18 years, as determined by the Commissioner in accordance with section 8(4).



The Royal Commission made several recommendations regarding the establishment of witness intermediary schemes to assist in the collection of the best evidence available (*Criminal Justice* report, Chapter 30). In this context, the term ‘best evidence’ means the most complete and accurate evidence a witness is able to give.

For ease of reference I have set out below the recommendations of the Royal Commission which are directly relevant to the pilot scheme and the draft Bill:

Investigative interviews for use as evidence in chief

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

Police responses to reports of child sexual abuse made by people with disability

Rec 13.c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

Intermediaries

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.

Comment

I understand that the Tasmanian Government’s pilot scheme will be:

- Established and administered by the Department of Justice (DoJ).
- Supported and monitored by the Pilot Intermediary Scheme Steering Committee which includes members of the judiciary, as well as key legal, mental health and disability stakeholders, and Tasmania Police.
- Delivered state-wide for a period of three years.



- Available to all child witnesses in court proceedings for a “specified offence” where, having obtained an assessment report provided by a witness intermediary, the court is satisfied that the use of a witness intermediary will assist the proceeding (proposed new sections 7H and 7I of new Part 2A - see Clause 9 of the draft Bill). I note that the term “specified offence” is defined in Clause 4 of the draft Bill to include sexual crimes under the *Criminal Code Act 1924* (the Code), and crimes under Chapter XVII of the Code (including murder).
- Available to support Tasmania Police in the conduct of investigative interviews on a voluntary “opt in” basis.

Proposed new section 7F of new Part 2A of the draft Bill provides that the Secretary is to establish and maintain a panel of persons who are suitable to be witness intermediaries. The functions of witness intermediaries are set out in proposed new section 7G of new Part 2A of the draft Bill. These include assessing the communication needs of a witness and preparing a report about those needs, providing advice to the judge and any lawyer involved in the proceedings as to any adjustments to be made to enable the best communication of a witness, and providing advice to the judge and any lawyer involved in the proceedings in relation to communication with a witness. A witness intermediary must act impartially in performing their functions.

Advice provided at officer level by members of the pilot scheme project team within the Royal Commission Reform Unit in DoJ has greatly assisted me to understand the intended scope and features of the pilot scheme.

Outlined below are my specific comments in relation to the draft Bill and the proposed pilot scheme.

1. I strongly support the establishment and implementation of an appropriately resourced, state-wide intermediary pilot scheme in Tasmania. Consistent with the findings of the Royal Commission, the pilot scheme has the potential to make a very real and positive difference for children accessing the criminal justice system, especially in the context of proceedings for child sexual offences.
2. The draft Bill does not provide for the use of witness intermediaries in criminal investigations or police interviews. However, I am advised that the pilot scheme will be available to support Tasmania Police in the conduct of investigative interviews on a voluntary “opt in” basis. I understand that this approach is intended to allow for a degree of flexibility – for example, a police interview would not be prevented from proceeding where an intermediary is unavailable, and it would be contrary to a child’s best interests to delay the interview. Indications from other states are that police find the scheme very useful, and it is hoped that police will avail themselves of the pilot scheme voluntarily.

Consistent with recommendation 13c of the Royal Commission, it would in my view, be appropriate for guidelines to be issued so that police officers who conduct investigative interviews with children, particularly in relation to child abuse matters, are appropriately informed of the pilot scheme and are strongly encouraged to make appropriate use of witness intermediaries so that victims are able to give their best evidence.

3. It is crucial that the pilot scheme is appropriately resourced so that witness intermediaries can access high quality training and continuing professional development and are remunerated at a rate commensurate with their important role. I am pleased to note that witness intermediaries will be required to have a tertiary qualification in psychology, social work, speech pathology or occupational therapy, or other qualifications or training which means they are suitable for the functions of an intermediary (proposed new section 7F of new Part 2A) However, on the information available to me, it is not entirely clear what the level of demand will be for witness intermediaries across the state, and whether referrals will be sufficient to retain witness



intermediaries on a sessional basis and provide opportunities to build and maintain specialist skills and knowledge. This is a matter that should be closely monitored during the pilot. Consideration should also be given to the experience of other jurisdictions – for example, I understand that recruitment, retention and training of witness intermediaries were identified as challenges in the context of the evaluation of the Child Sexual Offence Evidence Pilot in New South Wales.²

4. Robust and transparent processes for monitoring, quality assurance, and evaluation should be incorporated into the project design (and its associated budget) from the outset. I strongly recommend that the pilot scheme is independently evaluated as was the case in New South Wales.

The draft Bill does not include provisions to the effect that a witness intermediary must maintain confidentiality or refrain from using information gained in the performance of their functions to benefit themselves or another. Further, it is not entirely clear what the consequences would be if a complaint or concern arose about the conduct of a witness intermediary (for example, a witness intermediary takes on a clinical role for a witness). Under the New South Wales Criminal Procedure Regulation 2017, inclusion of a witness intermediary on the panel can be subject to conditions and the Department responsible for its administration may suspend or revoke the inclusion of a person on a panel. I recommend this approach is adopted for the pilot scheme in Tasmania, perhaps with the assistance of an independent board or group of persons with expertise in regulation and quality assurance.³

Inclusion of a witness intermediary on the witness intermediary panel should in my view be conditional upon compliance with a Code of Conduct and/or Code of Ethics, role-specific continuing professional development and other requirements as necessary to promote the integrity and quality of the pilot scheme and to promote the wellbeing of child witnesses.

5. Proposed new sub-section 7H(2)(b) of new Part 2A of the draft Bill currently permits the Court to order that an assessment report be prepared and provided by a witness intermediary for “a child who is to give evidence in respect of an offence”. The drafting of this sub-section means that it can be read to include reference to a child defendant who elects to give evidence in their own defence during trial or hearing for a specified offence. While I note that such an approach would go beyond the scope of the Royal Commission recommendations (which focus on communication supports for prosecution witnesses) I would nevertheless support application of the pilot scheme to child defendants who choose to give evidence where the judge is satisfied that use of a witness intermediary will assist the proceeding.

Further, there is strong evidence that many young people who come into contact with the youth justice system have unidentified communication disorders which can affect their ability to effectively engage in the justice process more broadly (e.g. in police interviews, in diversionary processes such as formal cautions and conferences, and when communicating with lawyers, judicial officers or youth justice officers). In some jurisdictions, including New Zealand,

² Judy Cashmore and Rita Shackel (2018), *Evaluation of the Child Sexual Offence Evidence Pilot*, UNSW; Sydney, <https://www.victimsservices.justice.nsw.gov.au/Documents/CHILD-SEXUAL-OFFENCE-EVIDENCE-PILOT-FINAL-OUTCOME-EVALUATION-REPORT-24-Aug-2018.pdf>

³ In the United Kingdom, a Quality Assurance Board (QAB) has been established. The QAB meets quarterly and brings together individuals with substantial professional experience in the field of regulation and quality assurance. The objectives of the Board are:

- To ensure that Registered Intermediaries act in accordance with the Code of Practice and Code of Ethics.
- To ensure that complaints against Registered Intermediaries are fully investigated in accordance with the Intermediary Registration Board's Complaints Policy and Procedure.
- To agree the standards for and assist in the recruitment, training, accreditation and continuing professional development of Registered Intermediaries.
- To maintain and support the Registered Intermediary Register and ensure that it is fit for purpose.
- To monitor and support the development of consistency and quality in the RI profession.



communication assistants are used to address communication difficulties for young people who come into conflict with the law. In this regard, I note also the recommendation of the Tasmania Law Reform Institute's 2018 Final Report No. 23, *Facilitating Equal Access to Justice: An Intermediary/ Communication Assistant Scheme for Tasmania?* to the effect that communication experts (intermediaries) be made available to assist defendants who have communication needs to communicate with police, lawyers and the courts. This type of broad communication assistant scheme is of course beyond the scope of the draft Bill. However, I would be interested to understand the extent to which investigating police, defence lawyers or magistrates sitting in the Youth Justice Division of the Magistrates Court could avail themselves of the pilot scheme to receive advice or assistance regarding any communication needs of children and young people who are suspected of or charged with committing an offence, to enable their meaningful participation in the investigation (should they wish to participate in an interview), diversionary processes or court proceedings.

Conclusion

Thank you for the opportunity to comment on the draft Bill and related pilot scheme. I would be very pleased to discuss my comments in more detail if this would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc *The Hon Elise Archer MP, Attorney General, Minister for Justice*
The Hon Roger Jaensch MP, Minister for Human Services