

## **Submission to the Australian Law Reform Commission on the use of Witness Intermediaries in Sexual Offence Trials**

### **Team**

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We are a team of psychology researchers across several Australian universities. Our research focuses on factors impacting accessibility to justice for complainants. We conduct this research using jury simulation methods to understand the factors that impact juror decisions. In jury simulation research, participants play the role of jurors, where they are exposed to fictitious trial materials (e.g., a vignette, a trial transcript, a video trial), and complete decision-making questionnaires to determine their verdict preferences and perceptions of the individuals involved in the trial. Jury simulation research allows researchers to manipulate key variables with a high degree of experimental control, so that causal inferences can be made (Bornstein, 2017).

In this submission, we will address **Question 17** posed by the Australian Law Reform Commission. In other words, we will discuss the **use of witness intermediaries when complainants are giving evidence**.

### **Response**

**Q17. Do you have any ideas generally about the use of intermediaries in the criminal justice system?**

While we are overall positive about allowing complainants to give evidence assisted by a witness intermediary, there is a scarcity of empirical evidence on the use of witness intermediaries in the courtroom. This means that there is only a small evidence base about the benefits, challenges or issues of giving testimony in court with the help of a witness intermediary. For example, we do not yet know a lot about:

- 1) Whether testifying with a witness intermediary actually improves the quality of the testimony provided by complainants.

There is research supporting the need for specialised interview processes in the legal system for people with vulnerabilities to improve the accuracy of their evidence (see e.g., Tudor-Owen et al., 2022). Further, judges and lawyers are not trained in identifying the unique communication needs of each witness and have been shown to still use inappropriate questions despite being educated on best questioning practices, highlighting the importance of witness intermediaries (Cooper, 2012). However, only one study has examined the effectiveness of witness intermediaries facilitating this best-practice. The study found that typically developing children, but *not* autistic children, recalled significantly more details with an intermediary present

during an interview (Henry et al., 2017). The lack of further empirical evidence here is significant.

Despite this, there is some evidence suggesting that vulnerable witnesses *perceive* witness intermediaries to be helpful. For example, one study found that 88% of a sample of autistic witnesses in the UK, a group who often report poor understanding of their communication differences in the legal sphere, found an intermediary to be useful (Maras et al., 2017). Because part of the witness intermediary role is to also facilitate greater participation in the criminal justice system, evidence of these positive experiences with intermediaries is an important consideration.

2) Whether the presence of a witness intermediary actually prejudices the outcomes of legal trials.

Intermediaries are present in the courtroom and can potentially intervene during questioning. Therefore, their presence in the courtroom has potential to impact the way a jury perceives the witnesses they assist. This is an important point to address because if the presence of an intermediary changes the way a jury perceives a witness, the integrity of the trial process is potentially undermined.<sup>1</sup>

There are a few empirical studies on this issue. Promisingly, **most find no evidence to suggest that witness intermediaries impact upon juror perceptions of the witness they assist** (children: Krahenbuhl, 2019; Ridley et al., 2015; Smethurst & Collins, 2019; adults: Gous et al., 2022; Smith & van Golde, under review). One study has found that the presence of a witness intermediary resulted in child witnesses being perceived as more truthful, believable, confident, consistent, and accurate (Collins et al., 2017).

However, the frequency of intermediary interjections may have an impact, with one study showing that participants are more likely to rate a trial as progressing towards a guilty verdict when the intermediary was present and did not intervene compared to when they did intervene (Krahenbuhl, 2019). This suggests intermediary interventions may draw juror attention to the limitations of a witness (thus reducing credibility), or alternatively, being present but not intervening may indicate to jurors the witness is more capable in giving evidence than the “average” vulnerable witnesses (thus increasing credibility; see Krahenbuhl, 2019). Some jurisdictions require judicial instructions to a jury about the use of a witness intermediary, such as informing them that it is standard procedure to use a witness intermediary and warn them not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight.<sup>2</sup> However, there is currently no research on whether such a direction is effective or could be improved.

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<sup>1</sup> A related issue is whether the intermediary will be visible to the jury when evidence is given via recording or video-link. For example, South Australian and Victorian legislation requires the witness intermediary to be visible to the jury: *Evidence Act 1929* (SA) s 13A(5); *Criminal Procedure Act 2009* (Vic) s 389K(2).

<sup>2</sup> E.g., *Criminal Procedure Act 1986* (NSW) s 249O (informing of standard procedure and warning); c.f. *Evidence Act 1977* (Qld) s 21AZU (warning only).

### Further Challenges

One of the issues faced by intermediary schemes is broader awareness of them in the criminal justice system, both in terms of witnesses and legal practitioners.

For instance, there is documented reluctance about legal practitioners' willingness to engage with intermediary programs (Howard et al., 2019; Giuffrida & Mackay, 2021; Maras et al., 2017; Powell et al., 2015). This reluctance appears to stem from concerns that their role infringes upon established legal practices, unfamiliarity with their use, and lack of understanding of their role (see e.g., Victims' Commissioner for England and Wales, 2018). Consequently, it is vital that police, judges and lawyers are aware of witness intermediaries and understand their role in order to allow vulnerable victims and witnesses to give properly supported evidence.

It is also important to ensure that victims and witnesses have access to clear information about their rights to a witness intermediary. One key issue here is the lack of consistency regarding witness intermediaries across state jurisdictions, with the scope of programs differing markedly across states, as shown in Table 1. Notably, for example, the NSW scheme does not extend to adult witnesses or victims who have difficulties in communication (though a recent case study did see a witness intermediary appointed to an adult defendant with a cognitive disability and autism; Stein et al., 2023). This points to another issue—there is a need for intermediaries to be available for *all* vulnerable witnesses in proceedings which may have communication difficulties, regardless of whether they are giving evidence as a victim, eyewitness or defendant, to ensure there is equality in access to justice (see Giuffrida & Mackay, 2021).

### Conclusion

In summary, we are positive about the use of witness intermediaries to support vulnerable witnesses. However, we note that:

- 1) Their effectiveness in improving the accuracy of witness evidence is largely unknown (especially regarding witnesses with cognitive differences or impairments);
- 2) There is no research on whether judicial instructions about witness intermediaries are effective or could be improved;
- 3) There is documented reluctance of legal professionals to engage with witness intermediaries, and this should be assessed and addressed in Australia following the introduction of these schemes; and
- 4) There are differences in schemes across state jurisdictions which should be addressed (with all vulnerable witnesses entitled to an intermediary) to improve clarity of the schemes and ensure equal access to justice.

**Table 1***Current Scope of Intermediary Programs Across Australian State Jurisdictions*

<b>Jurisdiction (Year Implemented)</b>	<b>Eligibility for Intermediary Program</b>		
	<b>Offences</b>	<b>Role</b>	<b>Vulnerability</b>
NSW (2016) <sup>a</sup>	Child sexual offences.	Victims, witnesses.	Children under 16, or those aged 16–18 who have a ‘difficulty communicating’.
Victoria (2018)	Sexual offences, homicide matters.	Victims, witnesses.	Children under 18, or anyone who is ‘cognitively impaired’.
ACT (2020)	All offences.	Victims, witnesses, defendants.	Anyone with a ‘communication difficulty’.
South Australia (2020) <sup>b</sup>	All indictable offences.	Victims, witnesses, defendants.	Anyone with a ‘complex communication need’.
Queensland (2021)	Child sexual offences.	Victims, witnesses.	Children under 16, or anyone with an ‘impairment of the mind’ or ‘communication difficulty’.
Tasmania (2021)	Sexual offences, homicide matters.	Victims, witnesses.	Children under 18, or anyone with a ‘communication need’.

*Note.* Western Australia has legislation allowing ‘child communicators’ which appears to permit assistance from a third party, however, it has not been accompanied by policy or guidelines and is seldom used (Powell et al., 2015).

<sup>a</sup> A limited trial scheme began in NSW in 2016, but full state-wide implementation has only occurred recently in 2023 following campaigning by sexual assault survivors (see Carey, 2023).

<sup>b</sup> South Australia implemented a volunteer intermediary service from 2016–2019 that was discontinued due to a lack of use. The new program implemented in 2020 is under a user-pays scheme (Hoff et al., 2022).

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