

15 July 2016

The Law Reform Institute Tasmania
Private Bag 89
Hobart TAS 7001

By email: law.reform@utas.edu.au

An intermediary/Communication Assistant Scheme for Tasmania

TasCOSS welcomes the opportunity to provide input into the Law Reform's scoping of need for an intermediary/communication assistant scheme in Tasmania.

It is necessary for the justice system in Tasmania to properly recognise and protect the participatory rights of all children under 18 and to recognise and protect the rights of those in our community who have complex communication needs. Both the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities demand such an approach.

Presently, communication barriers exist for victims, suspects and witnesses dealing with the Tasmanian justice system which have not been well served by police guidelines and the inherent jurisdiction of the judiciary. Complex communication needs have not been met. The reasons for this are manifold but the result is that justice in Tasmania does not serve this vulnerable group effectively and the principle of all of us being equal before the law has been eroded. As a society we are poorer as a result. These barriers arise during and throughout the first interaction with police, extend through the investigation period, preparation for court and in the court process itself. Outcomes are therefore compromised. The justice system requires comprehensive reform to address the shortcoming and a new approach to gathering and testing evidence is required to help those with complex communication needs understand what is going on.

This submission proposes that a new inquisitorial approach be adopted whereby evidence is collected early, (within a few days of the incident) and pre-recorded with participation from a suite of communication and legal experts as occurs in Norway. This will in turn lead to more reliable evidence and the best evidence being placed before decision makers at all levels of the justice system and has the capacity to lead a cultural change within the justice system that respects the human rights of those experiencing communication difficulties placing their capacities at the centre of decision making. Such an approach will ensure all voices are heard throughout the justice interaction.

Modifications to the scheme that operates in Norway pertaining to intermediaries is however required. Communication assistances/intermediaries should be accessible to all youth, under 18 and adults with complex communication needs. This assistance should be provided throughout the interaction, that is, before talking to police, during talking to police, talking with their lawyer and in other preparation for court and during the court process. Thus, it is proposed in this response that the Norwegian inquisitorial Barnehus approach be adopted in Tasmania in an expanded manner to apply to all criminal matters and to apply to all those with complex communication needs and all children under 18. It is therefore envisaged that adapting this model would require specialist police interviewers trained to question suspects, witnesses and victims involved in any incident contemporaneously with a live linkup to judges, prosecution, defence lawyers and a psychologist and/or other trained communication professional. Once the police have questioned the suspect, witness and/or victim, with intervention if necessary from those on the linkup, any additional areas of evidence may be appropriately explored by counsel.

This process has the added advantage of only requiring the evidence to be delivered and questioned contemporaneously with the incident and allows particularly victims and witnesses to then work through any associated trauma related to the incident and then leave the incident in the past as far as possible, without the need to relive the experience some 12-24 months after it occurred. It is also beneficial for suspects with complex communication needs as this allows the best evidence to be delivered and queried at the outset while the incident is fresh in the mind and in the long run has the potential to be a much more efficient use of judicial time and maximises limited justice resources.

Additionally an inquisitorial approach of this type has the potential to meet the best interests of the child as contemplated in the UN Convention on the Rights of the Child. In particular **article 3 provides:**

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being,...and to this end, shall take all appropriate legislative and administrative measures.”¹

Australia and the Tasmanian Government in particular should be mindful of the Committee on the Rights of the Child’s Concluding Observation that the principle of the best interests of the child is not well known and appropriately applied in Australia noting:

“...the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children...”²

The Committee proceeded to urge Australia

“...to strengthen its efforts to ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and all policies, programmes and projects relevant to, and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to public and private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child.”³

Thus adopting a model that focuses on ensuring that the child, all those under 18, involved in any criminal proceeding, understands the nature of questions and the nature of evidence they are providing goes some of the way to implementing the best interests of the child principle. Having the intervention of communication experts on hand who are able to intervene if necessary during any questioning of a suspect, witness or victim will also assist in bringing the focus of all parties to the best interests of the young person involved. Such an approach whereby all those under 18 benefit from such a system also accords with the United Nations Convention on the Rights of the Child which defines a child as “... every human being below the age of eighteen years ...”.⁴

¹ Articles 3.1-2 United Nations Convention on the Rights of the Child.

² See Concluding Observations of the United Nations Committee on the Rights of the Child on Australia, CRC/C/AUS/CO/4, para 31.

³ See Concluding Observations of the United Nations Committee on the Rights of the Child on Australia, CRC/C/AUS/CO/4, para 32.

⁴ CRC article 1.

Thus TasCOSS proposes that all children, whether suspects, victims or witnesses in criminal proceedings should have intermediaries tasked with helping them understand information and questions and with providing advice and/or advocacy. Such intermediaries ideally require specialised training with qualifications in communicating and an understanding of the law.

Similarly the United Nations Convention on the Rights of Persons with Disabilities requires the effective participation in decisions made in society of all those with disabilities; requires equality of opportunity (including an obligation to modify laws and practices to accommodate those with disabilities) and accessibility.⁵ Participation, equality and accessibility of the disabled to justice is therefore expected by the international community and these principles have been accepted by Australia when the instrument was ratified.

The definition of disability contemplated in the Convention on the Rights of Persons with Disabilities is recognised as an evolving concept directed at the “interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”

Governments signing the Convention on the Rights of Persons with Disabilities are expected to “take measures to provide access by persons with disabilities to the support they require in exercising their legal capacity.”⁶ Furthermore, effective access for persons with disabilities is described in the Convention as requiring the facilitation of “...their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”⁷ In order to give effect to these provisions domestically the Tasmanian Government is therefore justified in modifying the law to enable those with disabilities to properly and appropriately participate in criminal proceedings in a way they understand, whether that participation be as a witness, victim or suspect. The basic principle is the person with disability must understand the proceedings to participate in it. These provisions when considered cumulatively mandate the Tasmanian Government to act and modify the law to accommodate those with complex communication needs.

To give effect to the changes suggested in this submission both the *Criminal Law (Detention and Interrogation) Act 1995 (Tas)* and the *Evidence (Children and Special Witnesses) Act 2001 (Tas)* require amendment. Relying on guidelines and inherent jurisdictions of the court will not deliver the required cultural change to the way police are to behave regarding those unable to understand legal questioning, technique and processes. Therefore, special measures must be adopted within the legislative framework to protect all those with complex communication needs.

Intensive training is also required for police, lawyers and the judiciary concerning working with and for children and people with complex communication skills. Establishing ground rules applicable before the pre-record of any evidence is also an important additional step which could take the form of a directions hearing.

Any new system adopted also needs to be appropriately resourced by the Government to ensure the responsible department can lead the required cultural change. All members of the community have the right to access justice and participate in the judicial system as witnesses, victims and suspects – we also have to ensure these participants understand what is going on. For those with complex communication needs their rights require modification of the investigative, pre-trial and hearing processes to accommodate their participation on an equal footing to ensure justice is accessible to everyone. An approach that respects the human rights of all witnesses, victims and defendants is long overdue in Tasmania. Reforms are required that are designed to assist the justice system effectively operate upon the best evidence available.

⁵ United Nations Convention on the Rights of Persons with Disabilities, see article 3 c), 3 e), 3 f).

⁶ Convention on the Rights of Persons with Disabilities, article 12.3.

⁷ Convention on the Rights of Persons with Disabilities, article 13.1.

While it is the responsibility of the communicator to be understood, where complex communication needs are identified the judicial process may need assistance from outside to ensure that this occurs. The principles of equity and the participatory human rights of both children and those with complex communication needs must be properly respected and understood in the justice system. To achieve this goal affirmative social measures must be pursued and afforded statutory prominence.

Thank you again for the opportunity to provide the perspective of the TasCOSS membership and on behalf of low income and disadvantaged Tasmanians. Please do not hesitate to contact me if you would like to discuss any aspects of our submission.

Yours sincerely



Kym Goodes
Chief Executive