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ENSURING THE RIGHT TO A FAIR CRIMINAL TRIAL USING COMMUNICATION ASSISTANCE

ANITA MACKAY & JACQUELINE GIUFFRIDA*

Given the emphasis on verbal testimony in Australian criminal trials, witnesses and accused experiencing communication barriers due to vulnerabilities such as age (i.e., child witnesses), cultural or language background (in particular, Indigenous Australians), physical disabilities, and mental impairment or cognitive disabilities may require support to provide evidence. Around Australia, such support is increasingly being provided by communication assistants or intermediaries. This paper argues that such assistance is a precursor to a fair trial, which is an international human rights law obligation stemming from Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), as well as a common law right. There are gaps in coverage of communication assistance/intermediary schemes, including the complete absence of specific legislation and assistance in the Northern Territory, the limited eligibility criteria in jurisdictions that have introduced schemes, the lack of provision for Indigenous Australian people and people from Culturally and Linguistically Diverse ('CALD') backgrounds, and lack of provision for vulnerable accused (only two jurisdictions provide assistance to accused). These gaps should be addressed to ensure the right to a fair trial.

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I INTRODUCTION

The right to a fair trial is a long-standing common law right, with the High Court describing this as ‘a central pillar of our criminal justice system’.¹ Australia has an international obligation to provide fair criminal trials under Article 14 of the *International Covenant on Civil and Political Rights*.² This right has been incorporated into domestic law in the three jurisdictions that have specific human rights legislation (the Australian Capital Territory (‘ACT’), Victoria, and Queensland).³

Communication barriers present a major obstacle to a fair trial, given that the adversarial system is heavily reliant on verbal testimony. Communication barriers may prevent a witness from giving evidence, or from providing their ‘best evidence’, which refers to ‘the

¹ *Dietrich v The Queen* (1992) 177 CLR 292, 298. At common law the right is more accurately described as a right ‘not to be tried “unfairly”’: at [7]. For a discussion of the history of the common law right see Australian Law Reform Commission (‘ALRC’), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report No 127, August 2015) 221-26. For a discussion about fair trial and the inherent jurisdiction of courts see: Rebecca Ananian-Welsh, ‘The Inherent Jurisdiction of Courts and the Fair Trial’ (2019) 41(4) *Sydney Law Review* 423.

² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’). Australia ratified the ICCPR on 23 November 1980.

³ Although there are some variations in wording from Article 14 of the ICCPR (This is explicitly acknowledged in the Explanatory Memorandum to the Victorian Human Rights and Responsibilities Bill 2006, which notes that ‘intentional modifications have been made to the minimum guarantees’ p18). See *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 24-25, *Human Rights Act 2004* (ACT), ss 21-22, and *Human Rights Act 2019* (Qld) ss 31-32.

most complete and accurate evidence a witness is able to give'.⁴ These barriers may also prevent an accused from participating in their own defence and from giving their 'best evidence' should they choose to do so (an accused is not required to give evidence due to the privilege against self-incrimination; otherwise known as the 'right to silence'⁵). At the extreme end of the spectrum, communication barriers can lead to wrongful convictions.⁶

Part 2 of this article gives an overview of the types of vulnerabilities that may lead to communication barriers for both witnesses and accused. Part 3 provides a summary of a new form of communication assistance in Australia: intermediaries. Part 3 commences with a comparison of the legislation and practice in the states/territories that have introduced schemes to date. Part 3 then provides an overview of how such schemes lead to better quality evidence upon which to base verdicts in criminal trials. Part 4 provides the human-rights based justifications for provision of intermediary assistance, with a focus on the fair trial rights for accused that are protected in the *ICCPR*. The specific human rights protections afforded people with disabilities by the *Convention on the Rights of Persons with Disabilities* ('*CRPD*')⁷ are also considered. In Part 5, the gaps at the national level are discussed with a view to demonstrating that Australia is not complying with its international human rights law obligations.

This article builds on the authors' earlier examination of this topic. In 2020 we focused on where states and territories were up to in introducing witness intermediary schemes and ground rules hearings in response to recommendations made by the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse ('*CSARC*'); arguing that

⁴ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) pts VII–X and apps, 5.

⁵ In *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456 [463]–[464] Lord Mustill identified six disparate immunities that are encompassed by 'the right to silence', two of which are most relevant to trials: (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock; (6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial. This right is also protected by Article 14(3)(g) of the *ICCPR*. This article uses the terms 'defendant' and 'accused' interchangeably because both terms are used across the jurisdictions considered by this article.

⁶ Joseph MacFarlane and Greg Stratton 'Marginalisation, Managerialism and Wrongful Conviction in Australia' (2016) 27(3) *Current Issues in Criminal Justice* 303; see also the examples of Australian wrongful convictions that involved communication barriers discussed in Jacqueline Giuffrida and Anita Mackay 'Extending witness intermediary schemes to vulnerable adult defendants' (2021) 33(4) *Current Issues in Criminal Justice* 498, 506 ('Extending witness intermediary schemes').

⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 2 May 2008) ('*CRPD*'). Australia ratified the *CRPD* on 17 July 2008.

legislative uniformity would be desirable in this area before too much further divergence.⁸ In 2021 we considered the justifications for extending witness intermediary schemes to vulnerable adult defendants, drawing on the experience of other countries that provide such assistance including the United Kingdom, Northern Ireland and New Zealand.⁹ This article provides both up-to-date analysis and comparison of the state and territory schemes, and the human-rights based justifications for provision of assistance to both witnesses and defendants.

II VULNERABILITIES OF PARTICIPANTS IN CRIMINAL TRIALS

There are a range of vulnerabilities that impact on a person's participation in a criminal trial whether as a defendant or a witness. These vulnerabilities include age, education, cultural or language background, physical disabilities, and mental or intellectual/cognitive disabilities.¹⁰ In some cases, a person may be considered vulnerable due to the nature of the offence that has taken place; for example, witnesses in domestic violence or sexual offence proceedings.¹¹ A person may also be considered vulnerable if they have received threats of violence or fear retribution for giving evidence in a proceeding.¹²

Mental illness and cognitive impairment are distinguishable disorders but are often grouped together. This is because the conditions they cause can impact upon a person's ability to participate in a trial, and more importantly for an accused person to participate in their own defence.¹³

⁸ Anita Mackay and Jacqueline Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse for the Protection of Vulnerable Witnesses: Royal Commission Procedures and Introduction of Intermediaries and Ground Rules Hearings around Australia' (2020) 29(3) *Journal of Judicial Administration* 136 ('Implications of the Royal Commission into Institutional Responses to Child Abuse').

⁹ Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6).

¹⁰ See, *Evidence Act 1995* (Cth) s 41(2)(a)-(b); *Evidence Act 1939* (NT) s 21A(1); *Criminal Procedure Act 2009* (Vic) s 389A(3); *Evidence Act 1929* (SA) s 4(1)-(3); *Evidence Act 1906* (WA) s 106R(3); *Criminal Procedure Act 1986* (NSW) s 306M; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7F; *Evidence Act 1939* (NT) s 21AB.

¹¹ See, e.g., *Evidence Act 1939* (NT) s 21A(1).

¹² See, e.g., *Evidence Act 1929* (SA) s 4 (definition of 'vulnerable witness' (d) (i)-(ii)).

¹³ Ruth McCausland and Eileen Baldry, "'I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 297.

It is difficult to establish the exact number of people who have been accused of crimes who would be considered 'vulnerable'. There are two methods of determining the prevalence of vulnerability among accused persons: (i) examining how frequently mental impairment is identified by police when dealing with the public (the entry point of the criminal justice system) and, (ii) identifying the number of people in prison who suffer from a mental impairment or cognitive disability (the population that has progressed through the criminal justice system to conviction, and been sentenced to imprisonment).¹⁴ Studies have shown that in both cases the number of people identified as having a mental illness or cognitive impairment is significantly higher than in the general population.¹⁵ For example, in Victoria police reported that '47% of critical response callouts involved a mentally ill person',¹⁶ while the Australian Institute of Health and Welfare noted that '40% of people entering prison reported being told they had a mental health condition'.¹⁷

It has been reported that Indigenous Australians 'are five times more likely to experience a mental health condition than other Australians',¹⁸ Indigenous people in the criminal justice system are also more likely than non-Indigenous people to be suffering from a mental illness or cognitive disability.¹⁹ Some Indigenous accused may also face intercultural communication barriers.²⁰

¹⁴ Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 503-504.

¹⁵ See, e.g., Helen Punter and Simon Bronitt, 'New paradigms of policing mental illness in Australia: The future of mental health street sweeping' in John McDaniel, Kate Moss and Ken Pease (eds), *Policing and mental health: Theory, policy and practice* (Taylor & Francis, 2020) 59, 66; Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 2019) 61; Ruthie Jeanneret et al, 'Enhancing early detection of cognitive impairment in the criminal justice system: Feasibility of a proposed method' (2019) 31(1) *Current Issues in Criminal Justice* 60, 62; Gaye Lansdell et al, 'I am not drunk, I have an ABI: Findings from a qualitative study into systemic challenges in responding to people with acquired brain injuries in the justice system' (2018) 25(5) *Psychiatry, Psychology and Law* 737-738. See also Anna Eriksson, Bernadette Saunders and Gaye Lansdell, 'Neurodisability and the 'revolving' prison door: an international problem viewed through an Australian lens' in Gaye Lansdell, Bernadette Saunders and Anna Eriksson (eds), *Neurodisability and the Criminal Justice System: Comparative and Therapeutic Responses* (Edward Elgar Publishing Limited, 2021) 196.

¹⁶ Colin Rogers and Emma Wintle, 'Accessing justice for mentally ill people: A comparison of UK and Australian developments' in John McDaniel, et al (eds), *Policing and Mental Health: Theory Policy and Practice* (Routledge, 2020) 38, 44.

¹⁷ Australian Institute of Health and Welfare (n 15) 28. Note that because this is only those who have 'been told' they have a condition, it is likely to be an under-estimate.

¹⁸ South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) 148 [6.2.1] ('SALRI') citing Law Council of Australia, *The Justice Project: People with Disability* (Final Report, August 2018) 9.

¹⁹ Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 505.

²⁰ MacFarlane and Stratton (n 6) 311-13.

There is an over-representation of Indigenous Australians in the criminal justice system. While Indigenous Australians make up 2% of the Australian population, they make up 29% of Australia's prison population.²¹ Indigenous Australians are more likely to be charged with an offence, face court for that offence, and receive a prison sentence (as opposed to a community-based order).²² They are also over-represented in both the remand and prison populations. The average daily imprisonment rate (number of people in prison) of the general adult population in Australia is 212 per 100,000 adults.²³ However, amongst the Indigenous population this rate is 2,394 per 100,000 adult Indigenous peoples, with males imprisoned at a rate of 4,380 per 100,000 Indigenous adults, and females at a rate of 449 per 100,000 Indigenous adults.²⁴

Mental illness and cognitive impairment are not the only factors that may impact a person's ability to give their best evidence at trial. Oral language difficulties may also adversely affect an accused or witness's ability to give accurate testimony. Young people with oral language difficulties have been identified as being over-represented in the criminal justice system. In their study, Snow and Powell found that 'nearly half of the sample group (46%) of incarcerated young offenders, had been identified as language impaired'.²⁵

III COMMUNICATION ASSISTANCE/INTERMEDIARY SCHEMES IN AUSTRALIA

To achieve 'best evidence',²⁶ there have been many changes made to the way vulnerable people can give evidence. These include, but are not limited to, the use of screens or partitions in courtrooms and giving evidence by video-link from a remote witness

²¹ Australian Bureau of Statistics, *Prisoners in Australia 2020* (Web page, 3 December 2020) ('ABS') <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners>>; For further discussion see Anita Mackay, *Towards Human Rights Compliance in Australian Prisons* (ANU Press, 2020) ch 1.

²² Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Indigenous and Torres Strait Islander Peoples* (Report No 133, December 2017) 90-91.

²³ Australian Bureau of Statistics ('ABS'), *Corrective Services, Australia, September Quarter 2021* (25 November 2021) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>>.

²⁴ *Ibid.*

²⁵ Pamela Snow and Martine Powell, 'Oral language competence in incarcerated young offenders: Links with offending severity' (2011) 13(6) *International Journal of Speech-Language Pathology* 480, 485.

²⁶ There has been some criticism of this term because vulnerable people may need assistance with matters in addition to giving evidence, but 'best evidence' is the term that has been accepted by multiple law reform bodies, including the Royal Commission into Institutional Responses to Child Sexual Abuse: SALRI (n 18) vii.

room,²⁷ the use of support dogs,²⁸ and more recently the use of witness intermediaries/communication assistants.

The intermediary schemes operating in Australia are based on the scheme that has been operating in the England and Wales since first piloted in 2004. An intermediary scheme for child witnesses in sexual assault proceedings was introduced in New South Wales (NSW) in 2016 following an investigation by the then NSW Attorney-General (the Honourable Brad Hazzard MP), into the scheme operating in the United Kingdom.²⁹ Other states and territories introduced schemes in response to Recommendation 59 of the CSARC made in 2017,³⁰ and reports by the Victorian and Tasmanian Law Reform Commission/Institute in 2016 and 2018, respectively.³¹

Intermediaries play an important role in assisting vulnerable witnesses in trials and, in some jurisdictions, assisting vulnerable defendants. To cater for diverse communication needs, intermediaries are generally professionals from various allied health disciplines such as speech pathology, social work, psychology, and occupational therapy, all with a range of different capabilities. They are not advocates putting forward a particular position or argument, they do not act as a 'support person' for the accused or witness, nor are they expert witnesses offering an opinion. Rather, intermediaries are impartial officers of the court whose role it is to ensure that a witness gives their best evidence,³² and where available to an accused, to ensure the accused is able to properly participate in their own trial and give their best evidence should they choose to take the stand. Intermediaries assist the person giving evidence to understand the questions that are being put to them, and to respond accurately. The following definition from the *Youth Justice and Criminal Evidence Act 1999* (UK) is a concise summary of the role:

²⁷ *Royal Commission into Institutional Responses to Child Sexual Abuse* ('CSARC'): *Criminal Justice Report* (Report, 2017) pts VII-X and apps, 19-20.

²⁸ See, e.g., Judicial College of Victoria, *Victorian Criminal Charge Book* (at April 2021) [2.3.4].

²⁹ Penny Cooper, 'A Double First in Child Sexual Assault Cases in NSW: Notes from the First Intermediary and Pre-recorded Cross-examination Cases' (2016) 41(3) *Alternative Law Journal* 191, 191.

³⁰ CSARC (n 27) pts VII-X and apps, 101. This recommendation states that all state and territory governments establish an intermediary scheme like the United Kingdom scheme.

³¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (August 2016); Tasmanian Law Reform Institute, *Facilitating equal access to justice: An intermediary/communication assistance scheme for Tasmania?* (Report No 23, January 2018) ('TLRI').

³² Law Council of Australia, 'The Criminal Justice System – Issues Paper' submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (17 August 2020) 38-39.

*The function of an intermediary is to communicate (a) to the witness, questions put to the witness, and (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.*³³

Where intermediaries are used, pre-trial or 'ground rules' hearings generally also take place prior to a witness or accused giving evidence.³⁴ These hearings are very important because they provide the intermediary with an opportunity to explain to the judge and others involved in the case (including the lawyers), what difficulties the witness or accused may be experiencing and what measures may be helpful.³⁵

All Australian jurisdictions, except for the Northern Territory ('NT'), currently operate some form of intermediary scheme. However, it is worth noting that while Western Australia ('WA') has some legislative provisions,³⁶ a formal intermediary scheme similar to those operating in other states and territories is not in operation. As a result, in practice, intermediaries are rarely used.³⁷ WA is also currently only using ground rules hearings in very limited circumstances.³⁸

When the legislation and schemes are compared, significant variation in eligibility, operation and terminology may be observed. Even the definition of a 'child' is not consistent. The following is an overview of the current situation in a table format (Table 1) (in chronological order), followed by a more detailed comparison.

³³ *Youth Justice and Criminal Evidence Act 1999* (UK) s 29.

³⁴ This is also in response to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendation 60 (except for NSW, which was operating a scheme prior to the Royal Commission's report).

³⁵ Penny Cooper and Michelle Mattison, 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary mode' (2017) 21(4) *International Journal of Evidence and Proof* 351, 363.

³⁶ See *Evidence Act 1906* (WA) ss 106F and 106R.

³⁷ Jonathan Doak et al, *Cross-Examination in Criminal Trials Towards a Revolution in Best Practice?* (Report, 2021) 93.

³⁸ District Court of Western Australia, *Consolidated Practice Directions and Circulars to Practitioners – Criminal Jurisdiction* (26 March 2019) [19.1.2]. See also Mackay and Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse' (n 8) 149. There is also some information to suggest intermediaries have been used in Western Australia in the past: TLRI (n 31) 61-63.

Table 1: Australian communication assistance schemes (December 2021)

Jurisdiction	Commencement of scheme	Terminology	Legislation	Scheme management	Ground rules hearings	Eligibility		
						Children ³⁹	Grounds for adult witnesses	Accused
New South Wales	2016 (pilot) April 2019 (program)	Children's champions (who may also be called a witness intermediary)	<i>Criminal Procedure Act 1986</i> (NSW)	Victims Services NSW	Yes	Up to 16; or 16-18 if have difficulty communicating	N/A	No
Victoria	July 2018	Intermediary	<i>Criminal Procedure Act 2009</i> (Vic)	Department of Justice and Regulation ⁴⁰	Yes	Up to 18	Cognitive impairment	No
South Australia	Relaunched March 2020 (replacing earlier scheme that commenced in 2016)	Communication partners	<i>Evidence Act 1929</i> (SA)	User pays; privately sourced	Yes	Up to 16	Vulnerable or cognitive impairment	Yes
Australian Capital Territory	January 2020	Intermediary	<i>Evidence (Miscellaneous Provisions) Act 1991</i> (ACT)	Human Rights Commission (ACT) Intermediary Program Team	Yes	Up to 18	Communication difficulties	Yes

³⁹ Guidance for judicial officers dealing with children giving evidence is provided in the Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2020).

⁴⁰ *Criminal Procedure Act 2009* (Vic) s 389H. See also Natalia Antolak-Saper and Hannah MacPherson 'Vulnerable witnesses and Victoria's intermediary pilot program' (2019) 43 *Criminal Law Journal* 325.

Tasmania	March 2021 (pilot)	Intermediary	<i>Evidence (Children and Special Witnesses) Act 2001</i> (Tas)	Department of Justice (Tasmania)	Yes	Up to 18	Communication need	No
Queensland	July 2021 (pilot)	Intermediary	<i>Evidence Act 1977</i> (Qld)	Department of Justice (Queensland).	Yes	Up to 16	Communication difficulty	No
Western Australia	No formal scheme/guidelines	Communicator	<i>Evidence Act 1906</i> (WA)	N/A	Extremely limited use	Under 18	Special witness	No
Northern Territory	No scheme							

As shown in Table 1, NSW, Victoria, and South Australia ('SA') have been operating schemes in some form (such as a pilot) for the past five years, with the ACT, Tasmania and Queensland schemes established very recently i.e., in the past two years.

The NSW scheme commenced as a pilot in March 2016 and transitioned to a program in April 2019 (following evaluation).⁴¹ The Victorian program commenced as a pilot scheme on 1 July 2018 and has since been extended with the support of the Victorian courts.⁴² The intermediary scheme operating in SA began in 2016 but was relaunched in a different format in March 2020.⁴³

The ACT intermediary program commenced in January 2020, the Tasmanian Witness Intermediary Pilot Scheme began on 1 March 2021 and will be evaluated after three years of operation, and the Queensland intermediary pilot program began in Brisbane and Cairns in July 2021.

Who is considered a 'vulnerable witness' for the purpose of criminal trials varies across jurisdictions.⁴⁴ Some allow for a very broad definition, while others list specific examples of vulnerability. For example, in Tasmania any person with a 'communication need' is considered vulnerable, and a communication need is defined as any situation where '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'.⁴⁵ Conversely, the NSW legislation lists the conditions that would render a person vulnerable.⁴⁶ The age at which a child witness is considered vulnerable can also vary. In Victoria, for instance, a 'child' is considered vulnerable if they are under 18 years of age,⁴⁷ while in SA it is under 16 years of age.⁴⁸

⁴¹ Judy Cashmore and Rita Shackel, *Evaluation of the child sexual offences evidence pilot* (Final Outcome Evaluation Report, UNSW August 2018).

⁴² As detailed by the SALRI (n 18) 327-28.

⁴³ In August 2021 the Statutes Amendment (Child Sexual Abuse) Bill 2021 was introduced in the SA parliament. This Bill proposes some changes to s 12AB of the *Evidence Act 1929* (SA) regarding special pre-trial procedures/grounds rules hearings. For further detail see SALRI (n 18) [9.1.5]-[9.1.7].

⁴⁴ For a discussion of 'vulnerability labelling' see Florencia Luna, 'Elucidating the concept of vulnerability: Layers not labels' (2009) 2(1) *International Journal of Feminist Approaches to Bioethics* 121.

⁴⁵ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7F.

⁴⁶ *Criminal Procedure Act 1986* (NSW) s 306M.

⁴⁷ *Criminal Procedure Act 2009* (Vic) s 389A(3).

⁴⁸ *Evidence Act 1929* (SA) s 4(1) (definition of 'vulnerable witness').

The terminology used also varies. In NSW, witness intermediaries are referred to as ‘children’s champions (who may also be called a witness intermediary)’, emphasising the focus of this scheme on provision of assistance to child witnesses.⁴⁹ In SA, they are referred to as ‘communication partners’.⁵⁰ WA uses the term ‘communicator’,⁵¹ and the remaining jurisdictions’ operating schemes use the term ‘intermediary’.⁵²

The eligibility criteria also vary, and NSW has one of the most limited schemes. The relevant legislation provides that the court *must* appoint a children’s champion if the witness is under 16 years of age, and *may* appoint a children’s champion for a witness aged 16 or older if the court is satisfied that the witness has difficulty communicating.⁵³ However, the term *witness* in this context refers to ‘a child who is a complainant or prosecution witness’.⁵⁴ Therefore, the scheme is only available to witnesses up to 18 years of age, and excludes the accused. The scheme is also limited to proceedings related to prescribed sexual offences.⁵⁵

The Victorian legislation provides that intermediaries are available in most criminal proceedings and at any stage of the proceeding, to a witness *other than the accused* who is under the age of 18 or has a cognitive impairment, provided the proceeding is being held in a participating venue of a court.⁵⁶ However, in practice the scheme is currently ‘operating more narrowly than the scheme set out in the Act and is only available to vulnerable complainants in sexual offences matters, and vulnerable witnesses, apart from the accused, in homicide matters’.⁵⁷

The Queensland scheme is limited to witnesses for the prosecution who are under 16 years of age, have an impairment of the mind or have difficulty communicating.⁵⁸

⁴⁹ *Criminal Procedure Act 1986* (NSW) sch 2 div 3 cl 88 (emphasis omitted).

⁵⁰ *Evidence Act 1929* (SA) s 13A(e)(ii).

⁵¹ *Evidence Act 1906* (WA) s 106R(4)(b).

⁵² See, e.g., *Criminal Procedure Act 2009* (Vic) div 2.

⁵³ *Criminal Procedure Act 1986* (NSW) s 89(3).

⁵⁴ *Ibid* s 82.

⁵⁵ *Ibid* s 83(1).

⁵⁶ *Criminal Procedure Act 2009* (Vic) s 389F.

⁵⁷ County Court Victoria, ‘Multi-jurisdictional court guide for the Intermediary Pilot Program: intermediaries and ground rules hearings’ (Version 2.0, 22 March 2021) [3.3].

⁵⁸ *Evidence Act 1977* (Qld) s 21AZL(1).

Intermediaries are not available to an accused. The scheme is also limited in its application as it is only available in child sexual offence proceedings.⁵⁹

The ACT has broad eligibility criteria 'on paper', with the program available to a witness in a criminal proceeding with a communication difficulty⁶⁰ and 'witness' is defined to include the defendant.⁶¹ However, as with other programs that are still in their early stages, the focus is currently on children in sexual assault and homicide cases, but other matters will be considered.⁶²

This leaves the SA and Tasmanian schemes that both refer to people with communication needs. The Tasmanian scheme makes a witness intermediary available to both children and adults, *other than a defendant*, with a 'communication need' (definition above).⁶³ Witness intermediaries are available in a 'prescribed proceeding', which is defined very broadly.⁶⁴

SA 'communication partners' can assist any witness, including the accused, who is considered vulnerable or has communication difficulties. Vulnerable witnesses include children under the age of 16 as well as a witness who is cognitively impaired.⁶⁵ Complex communication needs exist where 'the witness's ability to give the evidence is significantly affected by a difficulty to communicate effectively with the court, whether the communication difficulty is temporary or permanent and whether caused by disability, illness, injury, or some other cause'.⁶⁶

The final point of divergence is who appoints and manages intermediaries/communication assistants. Apart from SA, intermediaries are provided by the State and managed by the organisations listed in Table 1. By contrast, in SA communication partners are engaged by the parties from privately run organisations and

⁵⁹ Ibid s 21AZJ.

⁶⁰ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AJ(1).

⁶¹ Ibid s 4AG(2).

⁶² ACT Human Rights Commission, 'ACT Intermediary Program Information for Service Providers', *ACT Intermediary Program* (Fact Sheet: Information for Service Providers) < <https://hrc.act.gov.au/wp-content/uploads/2020/05/4.-ACT-Intermediary-Program-Fact-Sheet-for-Service-Providers.pdf>>.

⁶³ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7I(1). This is despite the fact that the Tasmanian Law Reform Institute recommended that Tasmania introduce a scheme that extends to defendants: TLRI (n 31) 75-76 (recommendation 3).

⁶⁴ See *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3 (definition of 'prescribed proceeding').

⁶⁵ *Evidence Act 1929* (SA) s 4(1).

⁶⁶ Ibid s 4(2).

at the engaging parties' expense.⁶⁷ This means there is less quality control and oversight than in other jurisdictions.

In summary, there has been significant law reform in this area since the CSARC recommended the introduction of intermediaries in 2017. It is encouraging that the pilots in both NSW and Victoria have transitioned to ongoing schemes, and that two further pilots commenced in 2021 (ACT and Tasmania). The reforms have diverged significantly in application, both in terms of legislation and practice.⁶⁸ The gaps in coverage that result from this divergence will be analysed in Part 5.

The schemes will need to be in operation longer before the impact of the reforms, including any benefits for vulnerable witnesses and accused, may be evaluated in practice.

IV HUMAN RIGHTS BASED JUSTIFICATIONS FOR PROVISION OF COMMUNICATION

ASSISTANCE/INTERMEDIARIES

Australia's international human rights law obligations support the provision of communication assistance/intermediaries. The focus of international human rights law is equality. In the context of criminal trials, the aim is to put an accused facing communication barriers in the same position as a person who does not have such difficulties i.e., remove the barriers to the extent possible.⁶⁹ The reverse of this is that not providing assistance to an accused who needs it will violate that person's rights, including the right to be 'equal before the courts'.⁷⁰ There is also a need to gather the 'best evidence' from witnesses as a way of protecting the right of the accused to be tried fairly. In other words, the provision of intermediary assistance to both witnesses *and* accused who need assistance is necessary to protect the right of the accused person to a fair trial.⁷¹

⁶⁷ Government of South Australia, *A Guide for Communication Partners* (June 2020) 7.

⁶⁸ It has been argued that the provisions should be uniform and be incorporated in the Uniform Evidence Scheme, see Mackay and Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse' (n 8) 136.

⁶⁹ National Disability Authority, *NDA Independent Advice Paper on the use of intermediaries in the Irish justice system* (2020) 27.

⁷⁰ ICCPR (n 2) Art 14(1).

⁷¹ This reflects a broader conception of a fair trial (ie. broader than the rights of the accused) that has been referred to as involving a 'triangulation of interests'; namely the interests of 'the accused, the victim and his or her family, and the public': *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 188 per

The *ICCPR* protects the rights of those charged with criminal offences to be tried in person and choose their own legal assistance,⁷² ‘adequate time and facilities for the preparation of his [sic] defence’⁷³ and to have an interpreter if they ‘cannot understand or speak the language used in court’.⁷⁴ They also have the right to ‘examine, or have examined, the witnesses against him [sic] and to obtain the attendance and examination of witnesses on his [sic] behalf under the same conditions as witnesses against him [sic]’.⁷⁵ In other words, the right to a fair criminal trial under the *ICCPR* is comprised of multiple component rights that need to be afforded to those accused of criminal offences, rather than existing as a stand-alone right.⁷⁶

There is no specific right to communication assistance contained in the *ICCPR*, but this could arguably be considered a ‘facility’ for preparing a defence, as well as being analogous to the role of an interpreter because both aid communication.⁷⁷ In this way communication assistance arguably helps to protect a component right that supports the overarching right to a fair criminal trial under the *ICCPR*.

The three Australian jurisdictions that have specific human rights legislation have incorporated these protections for accused in criminal trials to varying degrees. Victoria and Queensland have gone further than the *ICCPR* in providing a right ‘to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance’.⁷⁸ The explanatory memorandum for the *Victorian Charter of Human Rights and Responsibilities Bill 2006* makes it clear that the purpose of these ‘communication tools’ is for the accused to properly ‘understand the nature and the reason for the criminal charge and to participate

Lord Steyn. The concept of ‘triangulation’ has also been cited in Australian cases. For discussion of the concept see SALRI (n 18) 195-97.

⁷² *ICCPR* (n 2) Art 14(3)(d).

⁷³ *Ibid* Art 14(3)(b).

⁷⁴ *Ibid* Art 14(3)(f).

⁷⁵ *Ibid* Art 14(3)(e).

⁷⁶ Art 14 of the *ICCPR* is commonly referred to as the right to a ‘fair trial’; UN Human Rights Committee, *General Comment no. 32, Article 14, Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 (23 August 2007). See also, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) pt 3 chp 14.

⁷⁷ Giuffrida and Mackay, ‘Extending witness intermediary schemes’ (n 6) 505.

⁷⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(j); *Human Rights Act 2019* (Qld) s 32(2)(j).

in the judicial process'.⁷⁹ On the face of it, this provides a right to communication assistance, for any accused with communication 'difficulties'. However, as noted above, neither the Victorian scheme, nor the Queensland pilot extend to defendants.

While the *Human Rights Act 2004* (ACT) does not contain the same provision about specialised communication tools that Victoria and Queensland have introduced, as noted in Part 3, the ACT is one of two jurisdictions (along with SA) that provides intermediary assistance to defendants. The explanatory memorandum for the 2019 amendments that introduced an intermediary scheme in the ACT refers to the promotion of a fair trial in two ways: the provision of the best evidence by witnesses and the provision of support to defendants who have communication difficulties.⁸⁰

When SA introduced amendments to the *Evidence Act 1929* (SA) to make provision for communication assistance in 2015, they also emphasised the importance of a fair trial, with the Minister noting in the second reading speech that '[t]he Bill preserves an accused person's right to a fair trial'.⁸¹ The speech goes on to describe communication assistance as analogous to the provision of an interpreter:

*It is only right that persons, be it witnesses, victims, suspects, or defendants, with complex communication needs have the same entitlement of support to communicate effectively and/or understand the relevant proceedings as someone who is unable to speak or understand English.*⁸²

Courts in New Zealand ('NZ') have held that the failure to provide communication assistance may have the same impact on an accused's right to a fair trial as the failure to provide an interpreter. This argument has been based on the right to prepare a defence, which is protected by s 25(e) of the *Bill of Rights Act 1990* (NZ).⁸³ In 2019, in *Mathews v The Queen*, the Court of Appeal of NZ referred to the earlier Supreme Court decision in *Abdula v R* that found:

⁷⁹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 19.

⁸⁰ Explanatory Memorandum, Evidence (Miscellaneous Provisions) Amendment Bill 2019 (ACT) 7.

⁸¹ South Australia, *Parliamentary Debates*, Legislative Council, 4 June 2015, 897 (G E Gago).

⁸² *Ibid* 898.

⁸³ This section provides 'the right to be present at the trial and to present a defence'.

*Inadequate interpretation could result in an unfair trial if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence.*⁸⁴

Additionally, it went on to hold that '[t]he same principles can be applied when considering whether Mr Mathews received a fair trial in the absence of a communication assistant'.⁸⁵

It is clear that the NZ courts are considering the substantive position of the accused when assessing the right to a fair trial,⁸⁶ as opposed to focusing on types of vulnerabilities or types of cases to determine eligibility, which is the overarching approach under the Australian legislative schemes. The gaps generated by this approach will be considered in more detail in Part 5.

Article 1 of the *CRPD* provides that persons with disabilities includes 'those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full effective participation in society on an equal basis with others'.⁸⁷ As outlined in Part 2, people with mental illness and cognitive impairment are over-represented among accused people, and in Part 3 it was explained that witnesses with mental or cognitive disabilities are included in most Australian communication assistance schemes.⁸⁸ Therefore the *CRPD* provides additional protections for any witnesses and accused who fall within this broad ambit.

⁸⁴ *Mathews v The Queen* [2019] NZCA 131, [25], citing *Abdula v R* [2011] NZSC 130, [43].

⁸⁵ *Ibid.* The role of intermediaries in protecting the right to a fair trial has also been recognised in other jurisdictions. See, e.g., Lord Chief Justice's Office, *Case management in the crown court including protocols for vulnerable witnesses and defendants, Practice direction no. 2/2019* (12 November 2019) (Northern Ireland) and *R v Rashid* [2017] EWCA Crim 2 [73] (Lord Thomas CJ).

⁸⁶ It is important to note that the New Zealand scheme extends to defendants, as detailed in Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 511-12. For further discussion of provision of communication assistance in New Zealand see Kelly Howard et al, 'Two Legal Concepts Collide: The Intersection of Unfitness to Stand Trial and Communication Assistance' (2019) 28(3) *New Zealand Universities Law Review* 459-473.

⁸⁷ This definition focuses on the barriers people with disabilities face, which was 'meant to help move away from emphasising diagnostic and deficit-based categorisation which pathologises disabled people': Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN convention on the rights of persons with disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 130.

⁸⁸ The Victorian and South Australian legislation provides assistance to adults with cognitive impairment and the ACT, Tasmanian and Queensland legislation supports people with communication

Article 5 of the *CRPD* affirms that ‘all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’ and Article 13(1) protects access to justice as follows.

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the *provision of procedural and age-appropriate accommodations*, in order to *facilitate their effective role* as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.⁸⁹

The intersection between these two Articles for the purposes of criminal trials is helpfully clarified by Gooding and O’Mahony, as follows: ‘in requesting accommodations defendants can argue that a failure to provide accommodations amounts to a form of discrimination under Article 5, as well as a failure of the more specific right to access to justice’.⁹⁰

The interpretation of these Articles of the *CRPD* is aided by the 2020 *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, prepared by the Special Rapporteur on the Rights of Persons with Disabilities. The guidelines emphasise the importance of people with disabilities being provided with ‘individualized procedural accommodations’ in legal proceedings, with specific reference to ‘intermediaries or facilitators’. The principles go on to require state parties to fund and implement an intermediary program where the intermediaries are independent and trained ‘to assist with communication throughout the course of the proceedings’.⁹¹

Therefore, provision of communication assistance to vulnerable witnesses and accused is supported by the provisions of the *CRPD*. While no Australian State or Territory has

needs/difficulty that may be caused by disabilities. For a detailed discussion of the legislative provisions see Giuffrida and Mackay, ‘Extending witness intermediary schemes’ (n 6) 501-3.

⁸⁹ *CRPD* (n 7) art 13(1) (emphasis added).

⁹⁰ Gooding and O’Mahony (n 87) 132. For a more detailed discussion about the application of Article 5 and 13 in Australia see Penny Weller, ‘Access to Justice and the Convention on the Rights of Persons with Disabilities – an Australian Perspective’ in Lansdell, Gaye, Bernadette Saunders and Anna Eriksson (eds) *Neurodisability and the Criminal Justice System: Comparative and Therapeutic Responses* (Edward Elgar Publishing Limited, 2021).

⁹¹ United Nations Human Rights Special Procedures, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, August 2020) 15 (Principle 3). For a more detailed discussion of how these Principles may be used to support an intermediary scheme see SALRI (n 18) [7.7].

specifically incorporated provisions of the *CRPD* into domestic law in the way that three jurisdictions have incorporated provisions of the *ICCPR*, the ratification of the *CRPD* by Australia requires compliance.⁹²

Ensuring an accused's right to equality and a fair trial justifies provision of intermediaries to both witnesses and accused who face communication barriers in criminal trials. For the accused it is the right to have adequate facilities to prepare a defence that underpins the right to an intermediary in most jurisdictions, and in Queensland and Victoria it is the specific right to 'assistants and communication tools'.

For witnesses and accused who fall within the broad ambit of Article 1 of the *CRPD*, there are additional requirements in the *CRPD* to provide communication assistance as an individually tailored 'procedural accommodation' that is required to support the right to equality and access to justice.

V A HUMAN RIGHTS ASSESSMENT OF INTERMEDIARIES/COMMUNICATION ASSISTANCE SCHEMES

There are a plethora of ways in which the current provision of intermediary/communication assistance in Australia does not meet these obligations when the national picture is considered. In Part 4 it was demonstrated that Australia's international law obligation to provide fair criminal trials, as well as the obligation to provide equal protection and access to justice for people with disabilities, both support the provision of intermediary/communication assistance to vulnerable witnesses and defendants.⁹³ The approach of the NZ courts reveals that an assessment should be made of the needs of the individual accused vis-à-vis the charges they are facing. A commitment to achieving substantive equality would mean prioritising people in the categories of vulnerability outlined in Part 2, with particular emphasis on:

- the needs of Indigenous Australians and others facing cultural communication barriers (people from CALD backgrounds), and

⁹² The *CRPD* has, however, informed relevant policies, such as the *SA Disability Justice Plan 2014-2017*, which was the framework underpinning the introduction of the initial communication partner scheme in SA in 2016: SALRI (n 18) [7.1.1], [7.2.1], [7.6.1], [8.2.6].

⁹³ See Part 3 above.

- people with mental illness and cognitive impairment who are over-represented in the criminal justice system and entitled to additional human rights protections under the *CRPD*.

The first is that two of the jurisdictions with the highest imprisonment rates of Indigenous peoples (NT and WA) are not providing any, or adequate, assistance. The NT is the only jurisdiction that makes no legislative provision for, does not currently operate, nor is it considering introducing an intermediary scheme. Yet the NT has a significant Indigenous population (25.5% of the total population),⁹⁴ its daily imprisonment rate is almost 3-5 times that of any other state or territory,⁹⁵ and the NT Indigenous imprisonment rate is 2909 per 100,000 compared to the national Indigenous imprisonment rate of 2397 per 100,000.⁹⁶ WA has also not established an intermediary scheme and is using ground rules hearings in limited circumstances. In WA, Indigenous people are imprisoned at a rate of 3727 per 100,000,⁹⁷ which is even higher than both the national and NT Indigenous imprisonment rates.

Even in the jurisdictions that do provide intermediary assistance, the needs of Indigenous Australians and those from CALD backgrounds have been largely overlooked. Some Indigenous witnesses and defendants may need intermediary assistance that is tailored to their communication requirements, but there are currently no schemes that specifically provide for these individuals.

For example, a recent report by the South Australian Law Reform Institute ('SALRI') which examined the provision of communication assistance in SA, highlighted that 'Indigenous peoples continue to experience systemic and attitudinal barriers to justice that extend to language and culture'.⁹⁸ The report identified that the 'communication partner' model currently operating in SA 'largely overlooks' the needs of Indigenous

⁹⁴ Australian Bureau of Statistics, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Web page, 31 August 2017) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/latest-release#counts-by-state-territory-and-capital-city-rest-of-state>>.

⁹⁵ Sentencing Advisory Council, *Australia's Imprisonment Rates* (Web Page, 15 April 2021) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/australias-imprisonment-rates>>.

⁹⁶ ABS (n 23).

⁹⁷ *Ibid.*

⁹⁸ SALRI (n 18) 146 [6.1.1].

communities.⁹⁹ The SALRI endorsed the communication partner model,¹⁰⁰ but made several recommendations regarding a 'hybrid model' for Indigenous peoples that provided for greater trust and cultural awareness.¹⁰¹ This includes a recommendation that this model be co-designed with SA Aboriginal communities and organisations.¹⁰²

The risk of wrongful conviction is heightened when there is a lack of intercultural communication training. This was evident in the wrongful conviction for murder of Indigenous woman Ms Robyn Kina, where 'lawyer-client *miscommunication*' was a central cause.¹⁰³

In a report which evaluated the Child Sexual Offence Evidence Pilot program in NSW, the authors noted that it was important to recruit both Indigenous and CALD intermediaries by expanding the appointment criteria.¹⁰⁴ The ACT Intermediary Program appears to be showing some commitment in this area. In the *Application Pack* for prospective intermediaries, it states:

*It is highly desirable that applicants also have experience engaging responsively with people who are disproportionately impacted by crime and trauma - particularly Aboriginal and Torres Strait Islander people and/or people from Culturally and Linguistically Diverse backgrounds. Applicants able to demonstrate their contribution(s) in these regards will be viewed favourably.*¹⁰⁵

These are welcome steps but a more needs to be done nationally.

Secondly, it is problematic that the SA scheme requires users to pay for the services of a communication partner because the right to a fair trial should not be denied to those without the resources to pay for assistance. The fact that Ms Kina was unable to afford to pay for legal representation played a role in her wrongful conviction.¹⁰⁶ The SALRI's

⁹⁹ Ibid 146 [6.1.3].

¹⁰⁰ Ibid 191 [6.8.2].

¹⁰¹ Ibid 194 [6.8.13].

¹⁰² Ibid 194 [6.8.13] (Recommendation 23).

¹⁰³ Diana Eades, "'I don't think the lawyers were communicating with me": Misunderstanding Cultural Differences in Communicative Style' (2003) 52 *Emory Law Journal* 1109, 1109 (emphasis added). See further 1119-21.

¹⁰⁴ Cashmore and Shackel (n 41) 8.

¹⁰⁵ ACT Human Rights Commission, 'Panel Intermediary Application Pack' (May 2021)

<https://hrc.act.gov.au/wp-content/uploads/2021/05/ACT-Intermediary-Program-Panel-Intermediary-Application-Pack_updated.pdf>.

¹⁰⁶ Eades (n 103) 1113-14.

inquiry into the SA scheme found that '[i]t was universally' agreed that this aspect of the scheme's operation 'is undesirable and undermines effective access'.¹⁰⁷ The SALRI has recommended that the scheme be replaced with a government-funded scheme,¹⁰⁸ and that the scheme continue to be available to accused.¹⁰⁹

Finally, the eligibility criteria for the schemes do not align with the vulnerabilities international human rights law seeks to protect e.g., the ACT is focusing on child witnesses in sexual assault and homicide cases, and the Victorian scheme is also not making provision for all the witnesses eligible in the legislation. Furthermore, as previously noted, only two jurisdictions make any provision for vulnerable accused.

While there is scope to be somewhat optimistic about the reforms that have taken place around Australia, when the vulnerabilities outlined in Part 2 are compared with the coverage of the schemes currently in operation, there are significant gaps and areas for improvement that need to be addressed to achieve compliance with human rights law

VI CONCLUSION

There has been a flurry of law reform around Australia since 2016 designed to respond to the needs of people with communication barriers involved in criminal trials, as discussed in Part 3. While there are significant variations in the eligibility for intermediaries (and in some jurisdictions the assistance is given a different label), at their core these reforms will improve the likelihood of fair trials by maximising the provision of best evidence. This accords with Australia's international law obligations under the *ICCPR* and *CRPD*. The *ICCPR* provisions have been incorporated domestically in three jurisdictions, with Victorian and Queensland human rights legislation going further than the *ICCPR* in providing a specific right to 'assistants and communication tools'.

However, some jurisdictions are not yet providing intermediary assistance, and others are operating pilots with limited eligibility. Furthermore, there are two glaring omissions from the current schemes that are in operation that jeopardise the likelihood of the schemes facilitating a fair trial in all trials involving vulnerable witnesses or accused. The

¹⁰⁷ SALRI (n 18) 26 [1.5.21].

¹⁰⁸ Ibid 27 [1.5.28] (Recommendation 3).

¹⁰⁹ Ibid 27 [1.5.28] (Recommendation 1).

first is assistance for vulnerable accused; only SA and the ACT make any provision for vulnerable accused in their intermediary schemes, and in SA this is user-pays, which is a significant limitation. The second is provision for Indigenous Australians and CALD users. No jurisdiction has given these groups adequate attention.¹¹⁰

There is an over-representation of vulnerability amongst accused — particularly those with mental impairment or cognitive disability and Indigenous people. To properly protect the right to a fair trial and access to justice, and avoid potential for wrongful conviction(s), all Australian intermediary schemes need to be expanded to include vulnerable accused, and specifically cater to the needs of Indigenous and CALD witnesses and accused requiring assistance.

Without amendments to legislation and adjustments to practice to address the current gaps in coverage, best evidence upon which sound criminal convictions can be made, will not be before the courts, risking unfair trials and potential wrongful conviction(s).

¹¹⁰ The work of the South Australian Law Reform Institute in highlighting this major oversight is welcome; See, SALRI (n 18) pt 6.

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