

Consultation Paper
Children's Champions and Pre-recording of Evidence
July 2015

Legal Aid NSW submission
to
Department of Justice

August 2015

Introduction

Legal Aid NSW notes that this consultation is taking place in the context of the NSW Government commitment to legislative reforms for the introduction of specialist measure in child sexual assault matters in NSW and specifically, for witness intermediaries (children's champions), based on the UK Witness Intermediary Scheme, and pre-recording of the entire testimony of child witnesses in child sexual assault proceedings.

The objective of this consultation is to assist the NSW Governments' Sexual Assault Task Force in advising the Government on the preferred legislative model for both the Pilot, which is to be confined to child witnesses of particular vulnerability, and the more substantial legislative scheme.

Legal Aid NSW supports the use of witness intermediaries and pre-recording of evidence as mechanisms to assist in obtaining the best evidence or account from a vulnerable or child witnesses and as measures which support and help protect the rights of the most vulnerable.

Legal Aid NSW thanks the Department of Justice for the opportunity to respond to the *Consultation Paper: Children's Champions and pre-recording of evidence* (Consultation Paper).

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Part 1: Pre Recording of whole of evidence

The benefits and disadvantages of pre-recording the evidence of vulnerable or child witnesses in advance of trial, including cross-examination and re-examination whole evidence, both in terms of the impact on the affected child and the impact on criminal procedure and procedural fairness, are well summarised on page 14 of the Consultation Paper.

Two of the most significant concerns about pre-recording of the whole of evidence for Legal Aid NSW relates to fairness to procedural fairness to the accused and potential cost implications.

Impact on accused

Pre-recording evidence may impact on continuity of legal representation. If the special hearing is heard in advance of the trial, it may be difficult to retain for the trial the counsel who was instructed at the special hearing. Changes in legal representation can significantly impact vulnerable defendants, and can reduce effectiveness of case management and advocacy.

Additionally, the requirement to prepare and present the defence case well in advance of the trial may not only place additional pressure on the defence in terms of the time constraints for preparation, but also impact on the defendant's right to a fair trial.

As Scott Corish explained:

An accused that is required to cross-examine a vulnerable witness at a pre-recording hearing is usually, in practical terms, required to 'put' his or her case many months before the prosecution opens its case to a jury and in doing so may disclose the substance of the defence case. On one view, there is nothing unfair about requiring an accused to declare (wholly or partially) his or her 'hand' months before a jury is empanelled as it sits alongside other contemporary examples of mandated defence disclosure.

However this de-facto defence case disclosure may also present opportunities for the prosecution to further investigate and mould or significantly change its case or respond to any impeachment of the complainant's reliability, in relation to truthfulness or accuracy or both."¹

Given the opportunities in the intervening period for further investigation and evidence, and for the prosecution to consider or adjust its case or strategy, 'fairness may dictate that some latitude is given to an accused in his or her obligation to put the detail of the defence case.'²

Cost implications

Pre-recording of evidence will have a range of cost implications for the criminal justice system, including implications for Legal Aid NSW in funding legal representation in these matters.

The NSW Ombudsman has "acknowledged that pre-recording evidence requires a duplication of the use of court resources"³, as well as the resources of other stakeholders.

¹ Corish, S. *Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses* (a paper submitted for publication in the Criminal Law Journal) p 2. And see also p 8.

² Ibid, p 11.

³ NSW Ombudsman Auditing the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities*, December 2012, 168.

Specifically, the process of pre-recording evidence at a pre-trial hearing requires a witness to give evidence via CCTV while the judge, prosecutor, defence lawyer and accused are present in the courtroom. As a result, it requires the use of a courtroom and the presence of a judge and prosecutor and defence lawyer on two separate occasions.⁴ In the interim, they all need to be available for editing the tape.

In addition, depending on the time between the special hearing and the trial, as noted in the Consultation Paper, there may be funding implications for the ODPP, Legal Aid NSW and privately paying defendants as lawyers may be required to effectively prepare their case twice.

For these reasons, consistent with the procedure for pre-recording evidence under the Victoria provisions, Legal Aid NSW favours a model in which special hearings are held during, as well as before, the trial.

Question 1

Whose evidence should be pre-recorded?

- a. all child witnesses (complainants and accused), including tendency witnesses⁶⁰
- b. children below a certain age
- c. only child complainants
- d. vulnerable witnesses as defined by the *Criminal Procedure Act 1986* (NSW) (that is, children under 16 at the time evidence is given and persons with a cognitive impairment)
- e. only children of particular vulnerability (noting the Pilot scheme will be limited to this group of witnesses), for example: child is particularly young, has mental health concerns, has demonstrated evidence of fear or intimidation, an unstable home environment, or study commitments
- f. Any child witness in respect of whom the prosecution makes an application on a case by case basis
- g. any other suggested categorisation?

The Consultation Paper states that the Pilot scheme will be limited to children of particular vulnerability. While not specified in the Consultation Paper, Legal Aid NSW assumes this includes all child witnesses of particular vulnerability, that is both complainant's and other witnesses. Legal Aid NSW agrees with this approach for the purpose of the Pilot.

In principle, we would support the pre-recording of evidence of all vulnerable witnesses as defined by the *Criminal Procedure Act 1986* (NSW), that is, children under 16 at the time evidence is given and persons with a cognitive impairment.

However, the scope of the scheme would need to be tailored to the amount of funding provided to agencies to implement these reforms. In the circumstances, for the purpose of the Pilot, Legal Aid NSW would not object to a legislative scheme consistent with the NSW Government commitment to the pre-recording of evidence of all child witnesses in child

⁴ Ibid, p 167, Footnote 532.

sexual assault proceedings, with a view to expansion to all vulnerable witnesses at some time in the future.

Question 2

For what proceedings should pre-recording be available?

- a. All criminal proceedings
- b. Only criminal proceedings for:
 - (i) prescribed sexual offences⁶¹ (so as to either include or exclude historic child sex offences)
 - (ii) sexual assault offences and serious offences of violence/offence involving violence where there is a familial relationship
 - (iii) sexual assault offences, serious acts of violence, domestic violence offences (where the child is the alleged victim of a domestic violence offence)
 - (iv) prescribed offences including sexual offences, homicide, kidnapping and child stealing, for example.

It is the vulnerability of the witness and the potential re-traumatising effect of the court process which give rise to the need for mechanisms to assist in obtaining the best evidence or account from a vulnerable or child witness.

However, it is no doubt the case that the more traumatic the offence itself is for the victim, the more potential for re-trauma by the court process. The high attrition rate of sexual assault matters is indicative of the perception, and no doubt reality, of potential re-trauma arising from proceedings in sexual assault matters.

For the purpose of the Pilot, Legal Aid NSW would not object to a legislative scheme consistent with the NSW Government commitment to the pre-recording of evidence of all child witnesses in child sexual assault proceedings only.

However, subject to appropriate funding, Legal Aid NSW considers that pre-recording should be available for all sexual assault offences and serious offences involving violence, including those where there was a familial relationship.

Question 3

In what jurisdictions should pre-recording provisions be available? That is, in any jurisdiction, or only in higher courts in respect of matters heard on indictment?

The expansion of the summary jurisdiction in NSW means that Local Courts and Children's Courts now hear serious offences involving violence. While there are clear arguments in favour of pre-recording of evidence in these courts, its introduction in would have considerable cost implications and an adverse impact on court resources and disposition rates.

The more serious offences are heard on indictment, and trials in the higher courts are more difficult for vulnerable and child witnesses because of the length of time it takes a matter to be heard and the length of the trial.

Legal Aid NSW would support a Pilot of pre-recording only in higher courts in respect of matters heard on indictment.

Expansion to courts of summary jurisdiction should be dependent upon the outcome of the Pilot and subject to funding to agencies for implementation.

Question 4

Timing of pre-recording

1. If pre-recording is limited to offences heard in the District Court, when during the prosecution process should pre-recording take place?⁶²
2. When should the need for pre-recording (or otherwise) be determined?
3. How should practice notes and legislation be amended to reflect this?

As set out on page 7 of the Consultation Paper, pre-recording of evidence as early as possible increases the reliability and accuracy of evidence and has clear benefits for the witnesses.

However, Legal Aid NSW notes the experience in Victoria where, in response to evaluation findings in 2006 as set out on page 8 of the Consultation Paper, the *Criminal Procedure Act 2009* (Vic) was amended in 2012 to allow the court to order that a special hearing is to be held during the trial as well as before the trial.

This approach would allow the flexibility of early pre-recording of evidence as well as allowing a special hearing to be held during the trial. We consider this is appropriate. There would be less duplication of the resources of the court and other stakeholders. This would decrease the cost implications for criminal justice system agencies, including the ODPP, Legal Aid NSW and the courts.

This approach would also reduce the impact on the accused in terms of continuity of representation and on the right to a fair trial, as discussed above.

The need for pre-recording should be determined at a directions hearing as soon as possible after arraignment.

The Criminal Procedure Act 1986 (NSW) and District Court Criminal Practice Notes 5 and 6 should be amended to reflect this procedure. The County Court of Victoria Practice Note (currently being updated), which proscribes the procedures for a special hearing and outlines steps to be taken at the directions hearing prior to the special hearing could inform the content of the NSW District Court Criminal Practice Notes 5 and 6.

Question 5

What is the appropriate model for pre-recording? Should it be:

- a. the default position (i.e. a legislative presumption in favour of pre-recording)
- b. mandatory
- c. discretionary?

Legal Aid NSW is of the view that pre-recording should be the default position.

Pre-recording should not be mandatory. A witness may not want their evidence pre-recorded and the model should accommodate witnesses who wish to give evidence at trial, as well as situations where pre-recording cannot occur, for example, due to technical difficulties.

A discretionary approach could yield perverse and unequal results.

Legal Aid NSW suggests consideration be given to the Queensland provisions.

Question 6

If discretionary, how should the issue be determined?

- a. by application of the prosecution
- b. by the court's own motion

If the model for pre-recording is discretionary, an order for a special hearing should be made on the application by a party to the proceedings who is calling the witness or by the Courts own motion, consistent with the WA model for special witnesses.

If the discretion was only available on application of the prosecution, the late allocation of a case to a Crown Prosecutor may mean that an appropriate application for pre-recording of evidence was not made, or not made in time.

Question 7

If discretionary, what factors should the court take into account, if any, in exercising its discretion (for example, any submissions made on behalf of the accused, the availability of necessary recording facilities, the availability of an early trial date)?

If discretionary, the following factors should be taken into account:

- The wishes of the witness
- Whether there are particular circumstances of the witness which warrant pre-recording, for example, young age, intellectual and emotional capacity, mental health concerns including trauma, an unstable home environment, or study commitments,
- Nature of the offence and the evidence to be given
- Whether the full brief of evidence has been served on the defence

- Preparation time available to the defence
- Submissions made on behalf of the defendant
- Availability of an early trial date
- Availability of trial counsel for the accused at the special hearing and trial
- Whether special arrangements can be made without prejudice to any party
- Interests of justice generally.

Question 8

Are additional administrative/legislative measures desirable to facilitate evidence being taken in a particular way so as to provide further support for child complainants (such as ordering extra breaks or that counsel and the court not wear a wig and gown)?⁶³

Additional measures which may help facilitate evidence being taken in a particular way so as to provide further support for child complainants include:

- No wigs and gowns
- An informal setting
- Breaks for witnesses, as necessary – the witness should know how to request a break without embarrassment
- Fair and simple questioning
- No ‘tag’ or leading questions
- Development appropriate tone and language for questioning
- Use of advance rulings (for example, about the need to follow the rule in *Brown v Dunn*)
- Witness intermediaries

Measures which may help facilitate evidence being taken in a particular way so as to provide further support for child complainants are considerations best addressed by child experts. There would be benefit in learning from both the UK experience and the practice of our own Clinicians in the Family Court family jurisdiction in Australia.

Whatever additional measure are settled on, it is desirable that there is flexibility for the Court to decide what will best assist in obtaining the best evidence or account from the child and minimising the traumatising effect of the court process.

Question 9

What safeguards are necessary to ensure the accused has a fair trial, for example through provisions regarding:

- a. service of evidence
- b. sufficient time for defence to prepare for pre-recording hearing
- c. continuity of legal representation
- d. orders for editing of recorded evidence in advance of the main trial
- e. limits on ability of prosecution to call additional evidence, and
- f. a defendant's ability to apply for the witness to give further evidence following pre-recording?

Safeguards regarding all of the above are necessary to ensure the accused has a fair trial.

In particular, there should not be a special hearing until the defence has been served with a full brief of evidence and has had sufficient time to prepare for the special hearing.

Continuity of representation for defendant, for the special hearing and the trial should be a factor that is taken into account in determining whether to hold a special hearing early or during the trial.

The rule in *Brown v Dunn* requires the defence to put its case to the witness in cross examination. If a special hearing is held before a trial, the intervening period will provide an opportunity for the prosecution to 'investigate the reliability of assertions raised in cross-examination or seek to bolster the witnesses' credit. New evidence may emerge; the prosecution has the opportunity to tune or adjust its case.⁵

Fairness may dictate that some latitude is given to an accused in his or her obligation to put the detail of the defence case. Fairness may also dictate limiting the ability of the prosecution to call additional evidence at trial.

In addition, the defence should be able to apply for leave to cross-examine the complainant. The test should be whether it is in the interests of justice that the complainant be recalled.

⁵ Corish, S. *Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses* (a paper submitted for publication in the Criminal Law Journal), p 8.

Part 2: Witness Intermediaries

At the 17th Australian Institute of Judicial Administration Conference on *Vulnerable Witnesses in the Administration of Criminal Justice* in September 2012, the Right Honourable The Lord Judge, Lord Chief Justice of England and Wales spoke about the role of witness intermediaries as follows:

“The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court ...their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial.”⁶

In terms of the practical impact of the use of witness intermediaries, the Criminal Bar Association of England and Wales BA has project-led the production of a short film on the questioning of children and/or vulnerable witnesses and defendants, *A Question of Practice: Responding to communication needs in the justice system*. In that film, Paul Mendelle QC observes:

“Working with intermediaries is useful in two separate but related ways. The first is, that it allows the advocate, whether prosecution or defence, to ask questions of the witness that are developmentally appropriate; that is, appropriate to the age and understanding of the particular witness. Secondly, it enables the witness...to give answers that the witness is confident are accurate and convey[s] what the witness wants to say. In this way the finder of fact.... can arrive at a conclusion that is soundly based on reliable evidence.”⁷

Terminology: Witness Intermediary

Legal Aid NSW considers that the term ‘witness intermediary’ is more appropriate than ‘children’s champion’. As an intermediary is not the child’s advocate or support person, they should not be termed ‘champion’. This may encourage misconceptions about the role of the intermediary.

Inclusion of accused in intermediary scheme

All participants in the criminal justice system can suffer from communication difficulties and vulnerabilities caused by young age and physical or mental disability. As a matter of fairness, the assistance provided to a vulnerable witness or victim should also be extended to a vulnerable defendant. It is in the interests of justice that all defendants be able to communicate and provide evidence effectively. This is of particular importance when matters involve family violence including sexual assault. The experience of Legal Aid NSW lawyers is that young people are often both perpetrator and victim. Legal Aid NSW notes that the UK system currently permits the court to allow for a non-registered intermediary for defendants.

⁶ The Rt. Hon. The Lord Judge, Lord Chief Justice of England and Wales, 7 September 2012, at the 17th Australian Institute of Judicial Administration Conference on ‘Vulnerable Witnesses in the Administration of Criminal Justice’.

⁷ Paul Mendelle QC, *A Question of Practice 2013: Responding to communication needs in the justice system* at < <http://www.theadvocatesgateway.org/a-question-of-practice>>, directed by Damien Goodwin, produced by Speakeasy Productions Ltd (‘A Question of Practice’).

Question 10

What should the role of the intermediary be?

Should they be available:

- a. only in court
- b. at the police interview stage, and/or
- c. prior to the police interview?

When in court, should the intermediary:

- d. act merely as an interpreter for questions asked of the witness and answers given by the witness?
- e. provide an advisory function to the court about the type of questioning that would be appropriate to the individual?
- f. be required to prepare a written assessment of the individual prior to the hearing, as occurs in the UK?

Legal Aid NSW notes the role of the witness intermediary under the Witness Intermediary Scheme in England and Wales as set out in the Consultation Paper at page 20, which includes involvement just before the police interview, at the police interview stage and/or in court.

However, in NSW, the Joint Investigative Response Team (JIRT) includes police officers who receive special training in interviewing children. While a comprehensive role for witness intermediaries based on the UK model may be ideal, the cost implications of the introduction and ongoing implementation of the scheme in NSW, and the existence of the Child Abuse Squad support the use of witness intermediaries when the matter has reached the court.

Legal Aid NSW would support a model in which the role of the intermediary at trial was to enable 'complete, coherent and accurate communication to take place' and which allowed an intermediary to explain questions and answers to the witness. This role could also include providing a written assessment of the witness before trial and using the intermediary at a pre-trial "Ground Rules Hearing" with counsel and the Judge to identify rules for examination of the witnesses.

Question 11

What category of witnesses should be able to access witness intermediaries:

- a. all witnesses with communication difficulties (as per s275B of the *Criminal Procedure Act 1986* (NSW))
- b. all children
- c. any vulnerable witnesses as defined by the *Criminal Procedure Act 1986* (NSW) (that is, children under 16 at the time evidence is given and persons with a cognitive impairment)
- d. only children with particular or complex communication needs (noting the Pilot scheme will be limited to this witness group), for example children who are:
 - i. particularly young (such as under 12 years or of primary school age)
 - ii. have a mental health condition or cognitive impairment
 - iii. children with complex communication needs
 - iv. another category?

The Consultation Paper states that the Pilot scheme will be limited to children with particular or complex communication needs. While not specified in the Consultation Paper, Legal Aid NSW assumes this includes all child witnesses with particular or complex communication needs, that is both complainant's and other witnesses. Legal Aid NSW agrees with this approach for the purpose of the Pilot.

In principle, we would support access to intermediaries for all vulnerable witnesses as defined by the *Criminal Procedure Act 1986* (NSW), that is, children under 16 at the time evidence is given and persons with a cognitive impairment.

However, the scope of the scheme would need to be tailored to the amount of funding provided to agencies to implement these reforms. In the circumstances, for the purpose of the Pilot, Legal Aid NSW would not object to a legislative scheme consistent with the NSW Government commitment to child intermediaries for all child witnesses in child sexual assault proceedings, with a view to expansion to all vulnerable witnesses at some time in the future.

Question 12

How would a scheme be best implemented in NSW:

- a. Will a legislative framework suffice?
- b. Should this involve a centrally coordinated register or panel?
- c. How can the logistical challenges for intermediaries operating in remote and regional areas in NSW be addressed?
- d. Who should have oversight of a scheme (noting Victims Services will administer the Pilot Scheme)?
- e. Can an existing body be adapted for use?

Legal Aid NSW is of the view that a legislative framework for the use of witness intermediaries in NSW is necessary but not sufficient. This has been borne out by the experience in other jurisdictions, such as Western Australia.

Legal Aid NSW is of the firm view that the scheme should involve a centrally coordinated register or panel of intermediaries. Consistent with the UK model, registered intermediaries should be professionals with appropriate qualifications, such as speech and language therapists, social workers, teachers or occupational therapists. They should be recruited, assessed and accredited by an appropriately appointed government department or agency. All intermediaries should be listed in the Intermediary Register, a NSW data base. When a request is made, the intermediary should be matched by the agency with the witness according to the child's needs and their qualifications.

This is necessary to support a role which is independent and neutral and confirms that the responsibility is to the court, and not to a party. It also promotes the consistency, quality, reliability and transparency of the scheme.

There will be logistical challenges for intermediaries operating in remote and regional areas in NSW. Given the particular or complex communication needs of the witnesses, intermediaries should be in the same room as the witness, dealing with them face to face rather than using audio-visual technology or telephones to communicate with the witness. Particular efforts will need to be made to recruit intermediaries in remote and regional areas in NSW. For areas in NSW where intermediaries have not or cannot be recruited, provision will need to be made to fund intermediaries to travel to provide their services.

Legal Aid NSW notes that Victims Services will administer the Pilot Scheme and considers that it is well placed to have oversight of a scheme in the long term.

If an existing body were to be adapted for use it should be one that employs qualified professionals. Legal Aid NSW does not support a scheme which uses unqualified volunteers.

However, adaptation of an existing body to provide witness intermediaries would not have the advantages of an independent accredited and registration scheme based on the UK model. It would not have the diversity of professionals that would allow matching of the intermediary with the witness according to the child's needs and their qualifications.

In addition, as most of the existing bodies are based in metropolitan areas, adaptation of an existing body to provide witness intermediaries would exacerbate logistical challenges for intermediaries operating in remote and regional areas in NSW.

Question 13

How would the role of intermediary interact with existing roles of agencies including the Joint Investigative Response Team, the Witness Assistance Service and Sexual Assault Services?

How the role of intermediary would interact with existing roles of agencies including the Joint Investigative Response Team, the Witness Assistance Service and Sexual Assault Services would depend on the model chosen for the scheme, and in particular, whether intermediaries would be engaged before the initial police interview or later stage when the matter had reached the court.

As noted in response to question 10, Legal Aid NSW supports the use of witness intermediaries when the matter has reached the court, given the cost implications of introduction of all of their functions under the UK scheme in NSW, and the existence in NSW of JIRT, with police officers specially trained to interview children.

If intermediaries were available before the matter reaches court, JIRT could request their assistance for the initial police interview where they identify a child with particular or complex communication needs. This may avoid the witness being required to provide numerous statements as a result of an inadequate initial interview. The need for more than one interview can give rise to apparent inconsistencies which may be caused by an inappropriate interviewing technique or miscommunication, rather than inherent unreliability of the witness.

In the UK, the *Vulnerable Witnesses: a Police Service Guide* produces a series of 'prompts' which assist the early identification of vulnerable witnesses. When police identify a vulnerable witness, they should, with consent of the witness, obtain as much information about as they can about their communication needs from teachers, doctors, social workers and carers, which can greatly assist the work of the intermediary.

The work of the intermediary may complement or even replace the roles of some existing agencies for some witnesses. These agencies could then target their services to other people who need them.

In addition, the intermediary could refer witnesses to appropriate agencies to meet identified needs, where appropriate.

Question 14

1. What qualifications would be necessary and appropriate for an intermediary?
2. How can the particular needs of indigenous witnesses be addressed in the recruitment, appointment and training of intermediaries?
3. Should intermediaries include suitable individuals with an existing association with a witness (as per the South Australian communication assistant model)?

Legal Aid NSW is of the view that a starting point for the necessary and appropriate qualifications for an intermediary would be to investigate the selection criteria for the UK WIS.

However, the following qualifications would seem appropriate:

- Professionals who have training and experience as speech and language therapists, social workers, teachers or occupational therapists
- Training in child development
- Training or expertise in communication, and
- Understanding of the criminal justice process

In addition, intermediaries should be required to undertake mandatory continuing education and training. There should be a code of conduct.

Ideally, an indigenous witness accessing the intermediary scheme should be assisted by an Indigenous intermediary.

The particular needs of indigenous witnesses should be addressed through the targeted recruitment indigenous intermediaries. Indigenous communities should be consulted and encouraged to apply. If necessary, specific training programs should be introduced to enable indigenous candidates to achieve accreditation.

All intermediaries should satisfy cultural awareness and communication training.

Legal Aid NSW is opposed to a scheme where an intermediary can be a person with an existing association with a witness. An intermediary with a prior association to a witness would be inappropriately vested in the matter. The existing relationship could give rise to an actual or perceived conflict of interest, particularly if the intermediary were to be a witness in the trial.

The existing relationship may also influence the evidence of the witness in a way an independent intermediary may not, through inappropriate comment or deliberate or inadvertent coaching of the witness.

In addition, it is inconsistent with the UK model which is among the most effective intermediary schemes internationally. The Registered Intermediary Procedural Guidance Manual 2012 clarifies that the intermediary:⁸

- is impartial and neutral, with a paramount duty to the court
- cannot express or offer opinions as to the guilt or innocence of the accused
- is not a witness supporter, and
- cannot be left alone with the witness at any point, and must be accompanied by a neutral third party when meeting with the witness.

Question 15

1. What organisation(s) is best placed to develop certification/training packages for registered intermediaries (noting Victims Services are responsible for this aspect of the Pilot Scheme)?
2. Who/what agency is best placed to assess applications by suitably qualified individuals to become a witness intermediary?

Victims Services will develop certification and training packages for registered intermediaries the Pilot Scheme and Legal Aid NSW considers it is well placed to continue to do this in the long term.

A starting point for the development certification and training packages for registered intermediaries would be certification/training packages developed for the UK WIS.

In addition, some guidance in developing certification and training may be provided by the Children's Court Clinic, a state wide, government funded scheme that employs experienced clinicians in Psychiatry, Psychology and Social Work to undertake assessments and provide reports to the Children's Court.

Additional organisation which may assist in training registered intermediaries include:

- the NSW Bar Association, the Law Society of NSW and Legal Aid NSW, which could provide training on criminal justice procedure
- Health NSW's Education Centre Against Violence. It trains all incoming Sexual Assault Service workers and has been invaluable in assisting Legal Aid NSW with Sexual Assault Communications Privilege work.
- Current registered intermediaries from other jurisdictions.

A selection committee should be established to assess applications by suitably qualified individuals to become a witness intermediary, chaired by Victims Services and including representatives from the courts and relevant justice agencies, such as ODPP and Legal Aid NSW.

⁸ The Registered Intermediary Procedural Guidance Manual 2012, 1.23.

Question 16

Intermediaries and case management

1. How should the role of an intermediary interact with the expansion of pre-recording provisions referred to in Part 1?
2. Should a ground rules style hearing (as occurs in the UK) be held in all cases to determine pre-trial issues such as the need and role of an intermediary and for a separate pre-recording hearing?

The Consultation Paper states that the Pilot scheme for witness intermediaries will be limited to children with particular or complex communication needs, while pre-recording will include children of particular vulnerability. It appears that children with particular or complex communication needs is a sub-set of children of particular vulnerability, and therefore the group that will be eligible to access witness intermediaries will be smaller than the group who will be eligible for pre-recording of their evidence.

For the purpose of the Pilot, it would seem appropriate that even for children of particular vulnerability, the witness intermediaries be available for the purpose of the court proceedings.

In all of these cases a ground rules hearing (as occurs in the UK) should be held to determine pre-trial issues such as the need and role of an intermediary and for a separate pre-recording hearing. This procedure should reduce stress to the witness and reduce time taken to cross examine the witness at trial, and thereby reduce costs.⁹

The intermediary could provide a written assessment of the witness before trial for the purpose of the pre-trial ground rules hearing with counsel and the Judge to identify rules for examination of the witnesses. To the extent required at trial, the intermediary would enable 'complete, coherent and accurate communication to take place'¹⁰ and where necessary, explain questions and answers to the witness.

⁹ A Question of Practice.

¹⁰ The Code of Practice for Registered Intermediaries, Registered Intermediary Procedural Guidance Manual, p45.

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through inhouse and private legal practitioners.

Legal Aid NSW provides legal representation to defendants in criminal trials, including sexual assault matters.

The Children's Legal Service (CLS) of Legal Aid NSW advises and represents children and young people under 18 involved in criminal cases in the Children's Courts. The CLS aims to ensure that children and young people have access to professional, face-to-face or telephone based legal advice at any stage of their legal proceedings.

Legal Aid NSW also runs the Sexual Assault Communications Privilege Service (SACPS). SACPS is a victims' legal service that helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences. SACPS provides legal advice and representation to victims of sexual assault and other "protected confiders" who want to prevent or restrict the disclosure of sensitive sexual assault communications in court.

As such we are well placed to comment on the needs and experiences of vulnerable and/or child witnesses and complainants.