

# The use of intermediaries for young defendants: overcoming barriers to young people's participation in criminal proceedings

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**Abstract** - The registered intermediary represents an important resource in supporting young people's participation in a criminal trial. However, in England and Wales there are significant disparities between the support provided by registered intermediaries to young witnesses and young defendants. Young defendants in criminal trials are offered much more limited support to participate in court proceedings. This paper employs Fineman's vulnerability theory and Nussbaum's capabilities approach to investigate the provision of intermediaries for young defendants in England and Wales and throughout Australian jurisdictions. We examine failings in the provision of intermediaries to young defendants and consider the further work needed to align this provision with the right of children to be heard in proceedings affecting them contained in Article 12 of the United Nations Committee on the Rights of the Child and the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights.

## INTRODUCTION

A registered intermediary facilitates communication in a criminal trial by assessing a vulnerable witness's communication needs and abilities and supporting communication between the vulnerable witness (including young witnesses) and criminal trial professionals.<sup>1</sup> Therefore registered intermediaries in England and Wales represent an important resource in supporting young people's participation in a criminal trial. Registered intermediaries are professionally approved, registered and employed by the Ministry of Justice (MoJ) and paid by the police or by the Crown Prosecution Service. However, in England and Wales there is a two-tier approach to intermediaries depending on whether they are supporting a witness or a defendant. When it comes to supporting a young defendant's participation in a criminal trial, the availability of support provided by an intermediary is significantly diminished. Intermediaries appointed for defendants are private sector intermediaries that do not

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<sup>1</sup> Office for Criminal Justice Reform, *Intermediary Procedural Guidance Manual* (Ministry of Justice, 2005).

need to be registered by the Ministry of Justice. These intermediaries are usually limited to supporting the giving of evidence at trial despite the fact that many young defendants require an intermediary to assist with communication and understanding throughout the trial, including youth court proceedings, and not just when giving evidence.

In this article we will examine how the role of the intermediary represents an important way of safeguarding young people's right to participate as defendants in criminal proceedings in England and Wales. We engage with Fineman's concept of vulnerability<sup>2</sup> to examine how the vulnerabilities young people experience throughout a criminal trial can be diminished by promoting children's resilience through the appointment of an appropriate intermediary. We will examine the broader theoretical context within which vulnerability has been used as a critical tool and explore the links between vulnerability and children's rights. Specifically we will use the concept of vulnerability to question the approach where the provision of an intermediary for a young defendant is considered a privilege rather than a right and argue that all young people involved in a criminal trial, whether as a witness or an accused, should have the same right to an intermediary throughout the duration of the involvement in a criminal trial. We also introduce the capability approach<sup>3</sup> by asking which capabilities children need for coping with the stressful circumstances of a criminal trial. We argue that children are entitled to gain those capabilities that promote their resilience against the adverse effects of a criminal trial. Drawing on perspectives from Martha Nussbaum's capability approach and Martha Fineman's vulnerability theory, this article will argue that emphasising more explicitly the individual inherent vulnerability of young people involved in criminal trials would re-direct the youth justice system to embrace a more nuanced understanding of what a fair trial really entails and towards a

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<sup>2</sup> For example M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 10; M Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133.

<sup>3</sup> R Dixon and M.Nussbaum 'Children's rights and a capabilities approach: the question of special priority' (2012) 97 *Cornell Law Review* 549.

normative framework better equipped to accommodate the realities of the child's experiences of vulnerability.

To explore how such a system might look, the article will examine the provision of intermediaries for young defendants throughout Australia. Much has previously been written about the approach to using intermediaries for young people in Northern Ireland and Scotland and the use of intermediaries for vulnerable adults in Australia.<sup>4</sup> Our original contribution to literature on the use of intermediaries will be to compare the English approach to intermediaries specifically for young defendants with Australia which has received scant academic attention in this regard. Australia has been chosen as a comparison as the approach in some Australian jurisdictions towards supporting young defendants in court proceedings has clearly been underpinned by embracing the spirit of Fineman's vulnerability theory. Intermediaries were largely introduced in Australia due to concerns that victims of child sexual assault were unable to effectively communicate in criminal trials because of their vulnerability and that this was leading to low conviction rates in such cases. This concern for vulnerable victims led to the adoption of intermediaries more broadly for vulnerable witnesses and, in some states, for vulnerable child defendants. There is notable variance in how intermediary programs have been implemented in Australian jurisdictions, with some more closely following the approach in England and Wales than others. Nevertheless, in most Australian jurisdictions the concern for the effective participation in criminal trials of vulnerable witnesses has been more fully extended to vulnerable child defendants and therefore provides important lessons that can be learned. In conclusion, the article will argue that young defendants are as vulnerable as young witnesses and their resilience is further depleted by their involvement in a criminal trial, even in the youth court. To remedy this

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<sup>4</sup> For example, see P Cooper & D Wurtzel, 'Better the second time around? Department of justice intermediaries schemes and lessons from England and Wales' (2014) 65(1) *Northern Ireland Legal Quarterly* 39; P Cooper and M Mattison, (2017). 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model' 21(4) *The International Journal of Evidence & Proof* 351; J Giuffrida and A Mackay, 'Extending witness intermediary schemes to vulnerable adult defendants' (2021) 33(4) *Current Issues in Criminal Justice* 498.

situation, all vulnerable young people involved in a criminal trial, whether as a witness or an accused, should have the right to an intermediary for the duration of their involvement in the criminal trial.

### **YOUNG PEOPLE EFFECTIVELY PARTICIPATING IN A CRIMINAL TRIAL**

The right to a fair trial, as protected by Article 6 of the European Convention on Human Rights, guarantees the right of all defendants to participate effectively in their trial.<sup>5</sup> Effective participation is reflected in the specific rights of the accused listed in Article 6(3) of the European Convention – ‘to defend himself in person’, ‘to examine or have examined witnesses’, and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’ In *SC v UK* the European Court of Human Rights accepted that a child defendant, as with an adult, did not need to be able to understand every point of law or evidential detail. However, the young 11 year old defendant, convicted for attempted robbery, should be able to follow what is said by the prosecution witnesses and to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.<sup>6</sup> In the joint cases of *V and T v the United Kingdom* the European Court of Human Rights determined that the Crown Court trial of a child aged as young as 11 does not in itself give rise to a breach of the European Convention, as long as the child’s effective participation is ensured.<sup>7</sup> These cases involved Jon Venables and Robert Thompson who had been convicted of murdering toddler James Bulger in 1993. Court procedures had been modified to a certain extent to recognise the defendants’ youth. For example both boys had been taken to the court room a number of times before trial with their social workers so that they might be more familiar with the setting; the court day was shortened to replicate a typical primary school day; they did not have to give evidence, instead their police interviews were played out; their names were withheld during trial; and a play-area was made available to them during adjournments. However despite these modifications, the European Court of Human Rights held that

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<sup>5</sup> *Stanford v United Kingdom* [1994] ECHR 16757/90 [22].

<sup>6</sup> *SC v United Kingdom* (2005) 40 EHRR 10 [29].

<sup>7</sup> [1999] ECHR 170.

Article 6 had been breached as the applicants had been unable to effectively participate in the proceedings. It was not 'sufficient for the purposes of Article 6 that the applicant was represented by skilled and experienced lawyers'.<sup>8</sup> In relation to Thompson, there was psychiatric evidence that he was suffering from post-traumatic stress disorder and that this, combined with the lack of therapeutic work after the offence, meant that he had limited ability to instruct his lawyers and to testify in his own defence. In Venables' case, there was evidence that he had the emotional maturity of a younger child, that he was too traumatised and intimidated to give his account of events to his lawyers or the court and that he was not able to follow or understand the proceedings. As the applicants were unable to engage with their lawyers, it was held that they were denied a fair trial. Thus the right to effectively participate in criminal proceedings recognises the young person as an independent holder of rights and reflects an appreciation of the autonomy of the child. Autonomy, in this context, is not simply a matter of comprehension, it is also a matter of the child's ability to make evaluative judgments based on personal choices, and motivations, and, more importantly, freedom from external manipulations, distortions, and coercions.<sup>9</sup> This judgment implies a need to develop structures to address inequality and disadvantage and to support young people to exercise legal capacity, including supported decision-making.

The youth court in England and Wales is a special type of Magistrates' Court which is designed to meet the specific needs of young people. The youth court is designed to be less formal than a Magistrates' Court and hence less intimidating. Some non-exhaustive examples of this informality are that magistrates and district judges are encouraged to sit on the same level as other people,<sup>10</sup> the youth court is closed to the public to protect the young defendants and they are addressed by their first names. Despite these accommodations to youth, and although there are significant differences

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<sup>8</sup> [1999] ECHR 170 [88].

<sup>9</sup> J Herring and J Wall, 'Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act' (2015) 35(4) *Legal Studies* 698, 711; I Kant 'Grounding for the Metaphysics of Morals,' in *Ethical Philosophy*, trans. J.W. Ellington (London 1785/1983).

<sup>10</sup> Judicial College *Youth Court Bench Book* (Judicial College, 2016).

between individual children when it comes to their capacities to effectively participate and exercise their rights during criminal trials, evidence shows that, in comparison to the general and adult population, young offenders exhibit much higher rates of learning disability; post-traumatic stress disorder; attention deficit hyperactivity disorder; speech, language and communication needs and language disorders.<sup>11</sup> These vulnerabilities raise serious concerns regarding young people's engagement with the criminal trial process. Whether or not young people involved in a criminal trial are suffering from these specific vulnerabilities, the criminal trial places the young person in a linguistically demanding situation in which adequate abilities in vocabulary, grammar, narrative discourse and figurative language are necessary.<sup>12</sup> Youth courts rely primarily on spoken interactions requiring the young person to be able to understand the linguistic content and structure directed at them, and also be able to formulate and articulate appropriate responses.<sup>13</sup> These interactions require young people to have an understanding of complex narratives; real-time responses to questions; narrative skills which meaningfully and clearly explain their perspective of what happened and for all of these to be present in a pressurised environment.<sup>14</sup> It is perhaps then unsurprising that research in England and Wales has found that young defendants often report feeling confused and unsupported throughout the court proceedings.<sup>15</sup> Research in Australia and the USA found that the communication and language skills of young people involved in court appearances can affect their comprehension of procedural rights and the legal protections afforded to them.<sup>16</sup> Ensuring a fair trial may require that

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<sup>11</sup> N Loucks, *No one knows: Offenders with learning difficulties and learning disabilities: The prevalence and associated needs of offenders with learning difficulties and learning disabilities* (Prison Reform Trust, 2007); N Hughes, WH Williams, P Chitsabesan, R Walesby and L Mounce, *Nobody made the connection: the prevalence of Neurodisability in young people who offend* (Children's Commissioner, 2012).

<sup>12</sup> NR Swain, PA Eadie and PC Snow, 'Speech and language therapy for adolescents in youth justice: A series of empirical single-case studies' (2020) 55(4) *International Journal of Language Communication Disorder* 458.

<sup>13</sup> SA Lount, L Hand, SC Purdy and A France, 'Tough talk: Youth offenders' perceptions of communicating in the Youth Justice system in New Zealand' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 593.

<sup>14</sup> PC Snow and D Sanger, 'Restorative Justice conferencing and the youth offender: Exploring the role of oral language competence' (2011) 46 *International Journal of Language & Communication Disorders* 324.

<sup>15</sup> A Wigzel, A Kirby and J Jacobson, *The Youth Proceedings Advocacy Review* (Bar Standards Board, 2015).

<sup>16</sup> PC Snow, K Bagglely and D White, 'Speech-language pathology intervention in a youth justice setting: Benefits perceived by staff extend beyond communication' (2018) 20 *International Journal of Speech-Language Pathology* 458; also G Rost and K McGregor, 'Miranda rights comprehension in young adults with specific language impairment' (2012) 21 *American Journal of Speech-Language Pathology* 101.

young defendants should be provided with support to assist their communication and understanding throughout the trial. The intermediary represents one pragmatic example of how such support could be fulfilled.

## **THE ROLE OF INTERMEDIARIES IN CRIMINAL COURTS IN ENGLAND AND WALES**

The Youth Justice and Criminal Evidence Act 1999 recognised that certain witnesses are vulnerable and marked them 'eligible for assistance on the grounds of age or incapacity'.<sup>17</sup> One such form of assistance is the Registered Intermediary. Registered Intermediaries are trained professionals with backgrounds such as psychology, speech and language therapy, social work, nursing and teaching. Intermediaries provide impartial assistance to police officers, lawyers and courts with the aim of ensuring complete, accurate and coherent communication with the vulnerable witness. The intermediary assesses the vulnerable witnesses' communication abilities and identifies recommendations for how to gain best evidence from the vulnerable person when they participate in criminal proceedings.<sup>18</sup> The recommendations identified by the intermediary are summarised to the judge and counsel in a ground rules hearing prior to the commencement of the trial. At this point the judge decides which recommendations will be implemented during the proceedings. The intermediary will facilitate communication between counsel and the witness and must intervene if complex questions are asked or if the agreed ground rules are not adhered to. During cross-examination they sit next to the witness and must be visible in the witness box or on camera if evidence is being given in a separate live link room.<sup>19</sup> A Registered Intermediary is matched to the particular witness based on expertise, location and availability by the Witness Intermediary Scheme (WIS), operated by the National Crime Agency. Intermediary appointments can be initiated by police, solicitors, counsel or

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<sup>17</sup> Section 16 of the Youth Justice and Criminal Evidence Act 1999.

<sup>18</sup> Ministry of Justice, *The registered intermediary procedural guidance* (MoJ, 2020).

<sup>19</sup> Criminal Practice Directions 2015 [2015] EWCA Crime 1567 Consolidated with Amendment No. 1 [2016] EWCA Crim 97.

judges and can occur at any stage of the process, including at trial.<sup>20</sup> All young witnesses under 18 years of age (other than the accused) are eligible for the assistance of a registered intermediary.<sup>21</sup>

Studies have found that intermediaries 'not only facilitated communication but also helped witnesses cope with the stress of giving evidence.'<sup>22</sup> For example, Joyce Plotnikoff and Richard Woolfson's study of 102 cases involving intermediaries found that '[a]lmost all those who encountered the work of intermediaries ... expressed a positive opinion of their experience and ... contributions'.<sup>23</sup> In *R v Dixon (Jordan)*<sup>24</sup> the court accepted the evidence of Dr Sinead Marriott, a consultant clinical psychologist, that intermediaries had successfully enabled ADHD sufferers to give evidence satisfactorily and control problems of suggestibility and compliance, and that the intermediary could help with language and the difficulties posed by a low IQ. Despite these advantages, the role of the intermediary is not uncontested. Some stakeholders have criticised the intermediaries scheme as 'unnecessary, a waste of resources and merely a band-aid solution to a more deeply entrenched issue'.<sup>25</sup> A more profound concern is that use of intermediaries 'may overshadow the problems faced by those who would struggle with participating'.<sup>26</sup> There is an assumption that a person with communication difficulties can and should participate if modifications, including the provision of intermediaries, are made,<sup>27</sup> even where there have been other shortcomings in the criminal trial.<sup>28</sup> Some also argue that it is the judge's

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<sup>20</sup> J Plotnikoff and R Woolfson, 'Making best use of the intermediary special measure' (2008) 2 *Criminal Law Review* 91.

<sup>21</sup> Section 16(1)(a) of the Youth Justice and Criminal Evidence Act, s 16(1)(a). An intermediary can be appointed for those over 18 years if the court considers that the quality of evidence given by the witness is likely to be diminished because of the circumstances listed in s16(2).

<sup>22</sup> J Plotnikoff and R Woolfson, *The Go-Between: Evaluation of Intermediary Pathfinder Projects* (Office for Criminal Justice Reform, 2007).

<sup>23</sup> *Ibid.*, 6. Also J Cashmore, I Latz, R. Shackel and K. Valentine, *Evaluation of the Child Sexual Offence Pilot Scheme: Process evaluation report* (SPRC Report 16/17, July 2017).

<sup>24</sup> [2013] EWCA Crim 465.

<sup>25</sup> N Antolak-Saper and H MacPherson, 'Vulnerable Witnesses and Victoria's Intermediary Pilot Program' (2019) 43 *Criminal Law Journal* 325, 326; M Powell, P Bowden and M Mattison, 'Stakeholders' Perceptions of the Benefit of Introducing an Australian Intermediary System for Vulnerable Witnesses' (2015) 48 *Australian and New Zealand Journal of Criminology* 498, 504.

<sup>26</sup> A Owusu-Bempah, 'The interpretation and application of the right to effective participation' (2019) 22 *The International Journal of Evidence & Proof* 321, 336.

<sup>27</sup> *Ibid.*

<sup>28</sup> *R v Dixon (Jordan)* [2013] EWCA Crim 465.



responsibility to ensure the fairness of questioning rather than that of the intermediary. Judges have the power to intervene if they perceive that improper (misleading or confusing) or leading questions are asked. As such, if judges are prepared to overcome the ‘traditional non-interventionist paradigm’<sup>29</sup> then ‘the role of the intermediary is made redundant’.<sup>30</sup> While there may be some weight in these arguments, the reality is that ‘neither counsel or judicial officers are likely to have the degree of knowledge about the capacities of particular witnesses that intermediaries can provide’.<sup>31</sup> Furthermore, it is ‘unrealistic to expect already time-poor police officers, lawyers and judges to become experts in the communication needs of vulnerable witnesses.’<sup>32</sup> It has been found that intermediaries are better at shaping/rephrasing questions for each witness compared to lawyers.<sup>33</sup> In *V and T v the United Kingdom* the European Court of Human Rights emphasised that representation by ‘skilled and experienced lawyers’<sup>34</sup> did not negate the need that many young people in court have for individualised support to exercise their right to effective participation. Using an expert intermediary can therefore ‘reduce the intensity of trial judges’ role in gauging and being alert to questions that may not be appropriate for the particular witness’.<sup>35</sup> It may also avert the danger that a judge appears to be partisan where they feel compelled to frequently intervene on behalf of the vulnerable witness.<sup>36</sup>

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<sup>29</sup> T Henning ‘Obtaining the best evidence from children and witnesses with cognitive impairments – “plus ça change” or prospects new?’ (2013) 37 *Criminal Law Journal* 155, 160.

<sup>30</sup> Antolak-Saper and MacPherson, n25 above.

<sup>31</sup> Henning n29 above, 164; see also K Hanna and E Henderson, ‘ “[Expletive], That was confusing, wasn’t it?” Defence lawyers’ and intermediaries’ assessment of the language used to question a child witness’ (2018) 22 *The International Journal of Evidence & Proof* 411.

<sup>32</sup> I Hepner, MN Woodward and J Stewart ‘Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries With Individuals With Intellectual Disability’ (2015) 22 *Psychiatry, Psychology and Law* 453 ,455. For a discussion of the challenges that lawyers face in providing young people with appropriate legal support see B A’Court and R Arthur ‘The role of lawyers in supporting young people in the criminal justice system: balancing economic survival and children’s rights’ (2020) 42(4) *Journal of Social Welfare and Family Law* 498.

<sup>33</sup> Hanna and Henderson, n31 above.

<sup>34</sup> [1999] ECHR 170 [88]

<sup>35</sup> Henning, n29 above, 164.

<sup>36</sup> Antolak-Saper and MacPherson, n25 above.

The role of the registered intermediary is clearly designed to assist vulnerable witnesses for the prosecution and for the defence, however the protection provided to young people accused of criminal behaviour is very different to that provided to young witnesses who are considered to be inherently vulnerable by virtue of their age. Section 104 of the Coroners and Justice Act 2009 creates a new section 33BA Youth Justice and Criminal Evidence Act 1999, providing an intermediary to an eligible defendant while giving testimony during 'the examination of the accused.' This is a significant development in supporting young people's participation while giving evidence during a criminal trial, however, crucially, the wording 'examination of the accused' in s.33BA means that assistance from an intermediary during the other parts of the trial process such as conferences with the defence solicitor and counsel, taking a proof of evidence, any hearing prior to the trial (including the Pleas and Case Management Hearing) which the defendant has to attend are not included.<sup>37</sup> The vulnerable defendant's eligibility criteria for an intermediary also differ from the eligibility criteria for the vulnerable witness, namely it must be necessary to enable the child defendant to participate effectively in the proceedings as a witness and also it must be established that it is in the interests of justice and a fair trial.<sup>38</sup> However the provisions of the 2009 Act have not yet been implemented and are awaiting 'full consideration ... [of] ... the practical and resource implications'.<sup>39</sup>

As the provisions of the Coroners and Justice Act 2009 have not been implemented, trial courts have interpreted their inherent jurisdiction to control the trial process and ensure a fair trial as authorising special procedures to accommodate a defendant's special needs, including directing that an intermediary be appointed, and funded, to assist a vulnerable defendant.<sup>40</sup> *R v Walls*<sup>41</sup> clarifies that the appointment of an intermediary is one mechanism which allows defendants to stand trial in

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<sup>37</sup> P Cooper and D Wurtzel, 'A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales' (2013) 1 *Criminal Law Review* 1.

<sup>38</sup> Section 33BA(2) Youth Justice and Criminal Evidence Act 1999.

<sup>39</sup> Ministry of Justice, *Government Response to the Justice Committee's Seventh Report of Session 2012-13: Youth Justice* (MoJ, 2013) 8.

<sup>40</sup> L Hoyano and A Rafferty 'Rationing defence intermediaries under the April 2016 Criminal Practice Direction' (2017) 2 *Criminal Law Review* 93.

<sup>41</sup> [2011] EWCA Crim 443.

circumstances where they may otherwise be unable to effectively participate and where the jury may not otherwise understand the defendant's limitations. In *R (AS) v Great Yarmouth Youth Court*<sup>42</sup> the court went further and held that in the interests of ensuring a fair trial young people had a right to, and the court had a corresponding duty to provide, the assistance of an intermediary to assist the young defendant to follow the proceedings and give evidence. These appointments have usually extended to the entire trial where the defendant's disabilities have gone beyond merely the capacity to express themselves whilst testifying, to understanding what is happening in the course of the trial. In *C v Sevenoaks Youth Court*<sup>43</sup> the defendant C was a 12-year-old boy with complex mental health issues. The court held that '... the Youth Court has a duty under the inherent powers and under the Criminal Procedure Rules to take such steps as are necessary to ensure that he has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for the trial.'<sup>44</sup> However in *R v Biddle*<sup>45</sup> the court held that ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary.

In the recent case of *TI v Bromley Youth Court*<sup>46</sup> Dame Sharp emphasised that, according to the Criminal Practice Directions 2015 (amended in April 2016), the appointment of an intermediary will be rare and extremely rare for the appointment to last for the entire trial.<sup>47</sup> Instead it was recommended that the court should adapt the trial process to address a defendant's communication needs. Nevertheless appointment of an intermediary would be made if necessary for the effective participation of a defendant throughout the entirety of the trial process. *TI v Bromley Youth Court* concerned a District Judge's decision not to grant an intermediary to a 14 year old boy with learning difficulties facing trial in the youth court. A psychologist found that the defendant would be unable to

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<sup>42</sup> [2011] EWHC 2059 (Admin) [6].

<sup>43</sup> [2009] EWHC 3088 (Admin) [17].

<sup>44</sup> *Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [17].

<sup>45</sup> [2019] EWCA Crim 86.

<sup>46</sup> [2020] EWHC 1204 (Admin).

<sup>47</sup> Criminal Practice Directions 2015 [2015] EWCA Crime 1567 Consolidated with Amendment No. 1 [2016] EWCA Crim 97 [3F.12].

concentrate and engage with the criminal trial. Having refused the appointment of an intermediary, the judge did not explain what steps would be taken to ensure that the defendant would be able to engage with the trial process generally. This decision was quashed by the High Court and an intermediary was appointed for the entirety of the boy's trial. The High Court made an explicit link to Article 3(1) of the United Nations Convention on the Rights of the Child 'identifying the rights of the child as being a primary consideration for any court taking a step in respect of a child.'<sup>48</sup> Dame Sharp accepted that although in most cases the appointment of an intermediary will be rare, this does not equate with there being a high threshold for such appointments 'if one is necessary for the effective participation of a defendant in the trial process.'<sup>49</sup> The court confirmed the need for a defendant to participate throughout the entirety of the trial, and not just the giving of evidence. Whilst it does not follow that this will lead to the appointment of an intermediary for the whole trial in every case, this judgment highlights the need for careful and thoughtful scrutiny of each young defendant's individual ability to effectively participate in a criminal trial.

The Criminal Practice Direction supplements, and should be read in conjunction with, the Criminal Procedure (Amendment) Rules 2021.<sup>50</sup> Together, the Criminal Procedure Rules and the Criminal Practice Direction govern the practice and procedures to be followed in all criminal courts. The latest Criminal Procedure Rules, which came into effect on 5th April 2021, stipulate that the court must exercise its power to appoint an intermediary to facilitate a defendant's effective participation in the trial where such participation is likely to be diminished by reason of either 'their youth<sup>51</sup> ... or mental disorder<sup>52</sup> ... or a significant impairment of intelligence and social functioning'.<sup>53</sup> In determining whether such an appointment is necessary the court must have regard to, amongst other things, the

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<sup>48</sup> [2020] EWHC 1204 (Admin) [23].

<sup>49</sup> Ibid. [39].

<sup>50</sup> The Criminal Procedure Amendment Rules 2021 (S.I. 2021/40) which amend the Criminal Procedure Rules 2020 (S.I. 2020/59).

<sup>51</sup> If the defendant is under 18.

<sup>52</sup> As defined in the Mental Health Act 1983

<sup>53</sup> Rule 18.27 of the Criminal Procedure Amendment Rules 2021.

likely impact of the defendant's age, if under 18, and their level of intellectual ability or social functioning on their ability to give evidence and understand what is said and done by the court and other participants. Unless the court otherwise directs, the appointment of an intermediary extends to facilitating the defendant's communication with their legal representatives for the duration of the hearing or part of the hearing.

In August 2021 the Ministry of Justice invited tenders for the provision of Court Appointed Intermediary Services (CAIS) to support vulnerable defendants in the criminal jurisdiction and vulnerable parties and witnesses in the civil, family and tribunal jurisdictions as part of its strategy for understanding the private sector's capacity and capability to provide these services. Two types of contract were advertised - Managed Service Provider (MSP) contracts for large companies who can provide their own training and quality assurance and Approved Service Provider (ASP) contracts were available for small companies and independent practitioners, many of whom are highly skilled and experienced intermediaries. The Ministry of Justice explicitly sees the CAIS as distinct from the registered intermediaries managed via the Witness Intermediary Scheme (WIS) and therefore it will fall outside the statutory scheme of the Youth Justice and Criminal Evidence Act 1999 and will be granted to defendants at the discretion of the court, based on the court's inherent jurisdiction to ensure that the defendant has a fair trial. A defence solicitor trying to help a young defendant therefore will not have the advantage of the experienced matching service of the WIS or access to the register of intermediaries.<sup>54</sup>

In summary, in England and Wales there is no presumption, statutory or common law, that a young defendant will be assisted by an intermediary. The assumption seems to be that young defendants are inherently less vulnerable than young witnesses and therefore young defendants must overcome more statutory and common law hurdles to qualify for the support of an intermediary. Even where an

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<sup>54</sup> Ministry of Justice, *The Registered Intermediary Procedural Guidance* (MoJ, 2020)

intermediary would improve the trial process their appointment is not mandatory.<sup>55</sup> Where the court invokes its inherent jurisdiction to ensure a fair trial and allow the use of an intermediary to assist a defendant for any portion of the trial, that person is called a 'non-registered intermediary' as they fall outside the statutory scheme of the 1999 Act. Although training is available, there is no accreditation process for non-registered intermediaries. Most non-registered intermediaries are provided by private sector organisations such as Communicourt and Triangle and these intermediaries usually also work as registered intermediaries. However non-registered intermediaries are not subject to a Code of Practice, Code of Ethics or required to undertake Continuing Professional Development.<sup>56</sup> The new CAIS appears to operate in a similar way. As seen in the previous section, young people in contact with the youth justice system are a vulnerable group in which neuro-disabilities and psychiatric disorders are over-represented and undiagnosed developmental language disorder is also highly prevalent.<sup>57</sup> The following section will examine the concept of vulnerability and challenge the assumption that young defendants are inherently less vulnerable than young witnesses.

#### **FRAMING THE NEED FOR AN INTERMEDIARY AS A MEASURE TO REDRESS VULNERABILITY**

Fineman's vulnerability theory is a well-grounded interdisciplinary framework for diagnosing problems and for evaluating social arrangements. In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences.<sup>58</sup> There is considerable discursive power in framing the need for an intermediary as a necessary measure to redress vulnerability despite it being a concept that is imprecise, contested, complex, vague and

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<sup>55</sup> S Fairclough 'It doesn't happen . . . and I've never thought it was necessary for it to happen: Barriers to vulnerable defendants giving evidence by live link in crown court trials' (2017) 21(3) *International Journal of Evidence and Proof* 209, 211.

<sup>56</sup> S Fairclough 'The consequences of unenthusiastic criminal justice reform: A special measures case study' (2021) 21(2) *Criminology & Criminal Justice* 151, 162.

<sup>57</sup> NR Swain, PA Eadie and PC Snow 'Speech and language therapy for adolescents in youth justice: A series of empirical single-case studies' (2020) 55(4) *International Journal of Language Communication Disorder* 458.

<sup>58</sup> S Currie 'Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework' (2019) *Public Law* 495, 498.

ambiguous.<sup>59</sup> Fineman has described the utility of using vulnerability as a heuristic device as being that it allows us to ‘examine hidden assumptions and biases folded into legal . . . practices.’<sup>60</sup> The basic premise of a vulnerable subject forms the foundation for the assertion that the state has a responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all, consistent with a realistic conception of the human subject.<sup>61</sup> Fineman argues that this generative capacity of vulnerability ‘presents opportunities for innovation and growth, creativity, and fulfilment as it encourages us to reach out to others, form relationships, and build institutions.’<sup>62</sup>

The concept of vulnerability can be more than a ‘mere rhetorical flourish’,<sup>63</sup> as Jonathan Herring argues, the acknowledgement of Fineman’s universal vulnerability creates a different image of the legal relationship between the individual and the state.<sup>64</sup> Recognition of human vulnerability mandates that the autonomous legal subject be replaced with the vulnerable legal subject.<sup>65</sup> It suggests that a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition.<sup>66</sup> Herring reasons that rather than seeing the obligations of the state as owed towards a few particularly vulnerable citizens to meet their needs, instead the institutions and provision of the state are used to meet the needs of all. Understanding vulnerability as a shared ontological experience allows us to begin to dismantle and question the legal and policy responses currently perpetuated in law<sup>67</sup> and to seek to re-examine the distribution of support to all young people involved in criminal trials whether as witnesses or defendants, in the Crown Court or the Youth Court. Thus using vulnerability theory allows us to frame

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<sup>59</sup> L Peroni and A Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11(4) *I•CON* 1056, 1058.

<sup>60</sup> M Fineman, ‘The Vulnerable Subject and the Responsive State’ 60 (2010) *Emory Law Journal* 251, 268.

<sup>61</sup> *Ibid.*

<sup>62</sup> M Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *The Elder Law Journal* 101. Also Peroni and Timmer, n.60 above.

<sup>63</sup> Peroni and Timmer, n.60 above.

<sup>64</sup> J Herring, *Vulnerability, childhood and the law* (Springer, 2018) 49.

<sup>65</sup> M Fineman, ‘Vulnerability and Social Justice’ (2019) 53 *Valparaiso University Law Review* 341.

<sup>66</sup> M Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4 *Oslo Law Review* 133, 149.

<sup>67</sup> S Kim, ‘Les vulnérables: evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights’ (2021) 41 *Legal Studies* 1.

the need for an alternative approach to children's right to a fair trial in terms that move beyond abstract discussions of autonomy and capability, to concrete proposals to reform the relationship between the state and young people involved in criminal trials in a more just way.

Care must be taken to ensure that the concept of vulnerability is not used in ways that perpetuate institutional harm, foster exclusion, deny autonomy, and constrain capacity.<sup>68</sup> It has been argued that emphasising vulnerability in relation to children undermines children's agency, downplays their abilities and justifies inappropriately paternalistic interventions in the lives of children.<sup>69</sup> However a key aspect of Fineman's theory is examining the failure to respond adequately to vulnerability due to a preoccupation with the liberal subject. This raises the question of the role and function of the vulnerability paradigm as a structural element of participation rights. As Herring argues, some of children's vulnerability does not rest in the nature of childhood, but the use of power by adults and that it is only by properly appreciating our vulnerable nature that the importance of children's human rights is appreciated.<sup>70</sup> Concerns have also been raised that the 'the management of vulnerability in practice might also be understood as a moral enterprise within a context of moves to responsabilise individuals.'<sup>71</sup> The aim of this article is to utilise the legal effects of vulnerability theory to draw attention to societal structures and institutions that have rendered already vulnerable children more vulnerable to specific harms and the need to rearrange these environmental factors in a way which reduces the effects of children's human vulnerability and facilitates autonomy. Kate Brown *et al.* note that vulnerability has a deep discursive connection with connotations of empathy, compassion and the pursuit of enhanced support for certain individuals or groups.<sup>72</sup> Thus notwithstanding the

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<sup>68</sup> C Mackenzie, W Rogers, and S Dodds, 'Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?' in C Mackenzie, W Rogers and S Dodds, (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) 2, 13, 20; V. Munro and J Scoular. 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) *Feminist Legal Studies* 20: 189.

<sup>69</sup> Herring, n 66 above, 49.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, see also Munro and Scoular, n 70 above.

<sup>72</sup> K Brown, K Ecclestone and N Emmel, 'The Many Faces of Vulnerability' (2017) 16(3) *Social Policy & Society* 49.



concerns expressed above, the recognition of vulnerability allows us to re-examine the distribution of support to young people involved in criminal trials to enhance meaningful participation which is critical to the child's experience of autonomy. It has been found that when people feel autonomous these feelings can support the development of resilience and capabilities by improving feelings of relatedness and emotional functioning and the construction of personal identity.<sup>73</sup> Conversely a lack of a subjective sense of autonomy may result in experiencing lower wellbeing and non-optimal functioning.<sup>74</sup>

The United Nations Convention on the Rights of the Child is founded on a concern for the embodied vulnerability of children. It promotes the view that all children, including those accused of offending behaviour, are invested with important rights, including the right to have their best interests as a primary consideration in all court actions involving them (Article 3) and the Article 40 right to be treated in a manner consistent with the promotion of the 'child's sense of dignity and worth ... and which takes into account the child's age'. Compliance with Article 40 of the Convention requires that where judicial proceedings are necessary the child should be able to participate effectively in them. The right to participate in decision-making is a core right under Article 12 of the Convention which requires States Parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. This right has been identified by the UN Committee on the Rights of the Child as a general principle with which all Convention provisions must be read.<sup>75</sup> Article 12 reflects the importation of the child as a liberal, rationalistic and, notwithstanding, vulnerable legal subject into the structure of children's rights. Vulnerability by itself does not create

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<sup>73</sup> B Oudekerk, J Allen, E Hessel and L Molloy, 'The Cascading Development of Autonomy and Relatedness from Adolescence to Adulthood' (2015) 56 *Child Development* 472; C Helwig, 'The development of Personal Autonomy throughout Cultures' (2006) 21 *Cognitive Development* 458.

<sup>74</sup> G Melton, 'Decision Making by Children: Psychological Risks and Benefits' in G Melton, G Koocher and M Saks (eds), *Children's Competence to Consent* (Springer, 1983).

<sup>75</sup> United Nations Committee on the Rights of the Child, *General Guidelines regarding the form and contents of Periodic Reports to be submitted by States Parties under Article 44, paragraph 1(b) of the Convention* (UNCRC, 1996).

new rights for the child, instead vulnerability functions as a tool to interpret the existing rights in a way that supports the participation rights of vulnerable young people in a criminal trial.

Theorists such as Amartya Sen, Rosalind Dixon and Martha Nussbaum have developed Fineman's theory to acknowledge the right of the child to recognition and protection of their vulnerability. These theorists have developed the Capability Approach as a model for measuring inequalities in relation to children's vulnerability. The capability approach can provide additional coherence to the concept of vulnerability's focus on people's capabilities. The capability approach was pioneered by Sen, an economist-philosopher, who argued that, in analysing well-being, we should shift to the 'actual opportunities a person has to choose valuable options, namely their capabilities'.<sup>76</sup> The capabilities approach aims at supporting the growth of agency and practical reasoning by urging a duty upon the state to help realise the capacity of each individual to think and reason in an informed and independent way. Drawing on Sen's work, Michael Watts and Hans Bohle argue that vulnerability is mediated by capabilities, shaped by institutional and environmental structures.<sup>77</sup> Fineman's stated objective is to foster resilience among individuals for them to obtain 'some means with which to address and confront misfortune'.<sup>78</sup> The capability approach begins from the premise that rights are not fully secured unless the related capabilities are actually present. The capacity of people to realise their legal rights in practice, and not just on paper, requires 'affirmative government action (and government expenditure) for their realization'.<sup>79</sup>

According to Dixon and Nussbaum, children come into the world with a variety of undeveloped capacities and there is a consequent moral need to protect them while these capacities develop.<sup>80</sup>

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<sup>76</sup> A Sen, *The Idea of Justice* (Penguin, 2009) 253.

<sup>77</sup> M Watts and H Bohle, 'The space of vulnerability: the causal structure of hunger and famine' (1993) 17(1) *Progress in Human Geography* 43; Also Brown, Ecclestone and Emmel, n 74 above, 497.

<sup>78</sup> Fineman, n 61 above; Fineman, n 68 above.

<sup>79</sup> R Dixon and M Nussbaum, 'Children's rights and a capabilities approach: the question of special priority' (2012) 97 *Cornell Law Review* 561

<sup>80</sup> J Bonvin and D Stoeklin 'Introduction' in D Stoeklin and J Bonvin (eds), *Children's rights and the capability approach: challenges and prospects* (Springer, 2014), 10.

Moreover they argue that it is because of their human vulnerability that the 'state has an obligation to ensure that all persons have access to a life worthy of human dignity'.<sup>81</sup> As such children should be afforded the maximum scope for decisional freedom consistent with their actual capacity for rational and reasoned forms of choice or judgment.<sup>82</sup> A particularly salient feature of the capabilities approach in the context of young people involved in a criminal trial is that it provides a normative framework for the evaluation of the development and well-being of individual persons as well as for the assessment of the quality of social arrangements.<sup>83</sup> The attention to what rights, goods, institutions or services can do implies the necessity to focus on real tangible, dependent and vulnerable human beings with their own biographies, specific needs and socially and culturally embedded ways of conducting their lives. As such the capabilities perspective commands a high degree of context sensitivity.<sup>84</sup> Therefore the capability approach, with its focus on human frailty and vulnerability, offers a helpful analytical tool to consider whether young people on trial in a criminal youth court without the assistance of an intermediary have the capacity to realise their legal rights to effective participation and a fair trial in practice.

The role of the intermediary represents a resource that promotes resilience and capabilities and mediates the power disparity between the state and the child to ensure that the treatment of children in the criminal trial is directly linked to their legal status as children under domestic and international human rights law. The United Nations Committee on the Rights of the Child *General Comment No. 24* encourages a capabilities approach to the issues of effective participation in a criminal trial by requiring that the child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct their legal representative, challenge witnesses,

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<sup>81</sup> Dixon and Nussbaum, n81 above.

<sup>82</sup> Ibid.

<sup>83</sup> H Otto, A Scherr and H Ziegler, 'On the normative foundation of social welfare – capabilities as yardstick for the critical social work' In H Otto and H Ziegler (eds), *Enhancing capabilities: the role of social institutions* (Barbara Budrich, 2013) 197.

<sup>84</sup> Ibid., 216.

provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.<sup>85</sup> Proceedings should therefore be conducted in an atmosphere of understanding to allow children to fully participate. Furthermore *General Comment No.12*<sup>86</sup> recommends that the context in which a child exercises her right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what she has decided to communicate.<sup>87</sup> *General Comment No.10* also encourages the development of youth justice policies that ensure respect for children's rights, and emphasises the principle that states must safeguard the child's dignity and the child's right to express themselves at 'every point of the justice process'.<sup>88</sup> In *General Comment No. 7* the UN Committee on the Rights of the Child stressed that the UN Convention 'requires that children, including the very youngest children, be respected as persons in their own right' and that listening to young people's views represents recognition of, and respect for, the child's separate identity.<sup>89</sup> These child-friendly justice provisions provide an impetus towards supporting the child at all stages of their criminal trial.

The UNCRC and the General Comments can be seen as turning-points in conceptualising and responding to young people who are struggling to effectively participate in their own criminal proceedings as they reinforce and reaffirm the importance of enforceable rights and entitlements. Aligning with these rights frameworks requires a focus on recognising the vulnerable legal subject, rather than the liberal legal subject, and promoting the capability of children to be involved in their criminal proceedings. A study of the approach to the use of intermediaries throughout the Australian jurisdictions provides some examples of how use of the 'heuristic device of the vulnerability

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<sup>85</sup> United Nations Committee on the Rights of the Child, *General comment No. 24 Children's rights in the child justice system CRC/C/GC/24* (UNCRC, 2019).

<sup>86</sup> United Nations Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard CRC/C/GC/12* (UNCRC, 2009).

<sup>87</sup> *Ibid.*, [42].

<sup>88</sup> United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice CRC/C/GC/10* (UNCRC, 2007).

<sup>89</sup> United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing child rights in early childhood CRC/C/GC/7/Rev.1* (UNCRC, 2005) [5].

approach'<sup>90</sup> presents an opportunity to capture more reliably and consistently the lived reality of individual children in a more substantive manner and develop a state response to this need to promote resilience and uphold the right to a fair trial.

## **INTERMEDIARIES IN AUSTRALIA**

Throughout Australia many reforms have been implemented in response to concerns about the low rate of child sexual assaults that proceed to court after being reported to police. The stresses of the trial process and the communication issues a vulnerable victim may experience were seen to be a major cause of the attrition rate.<sup>91</sup> This was noted to be a particular issue in relation to Indigenous victims, where 'Aboriginal and Torres Strait Islander child witnesses may face distinct difficulties in their interaction with the criminal justice system, resulting not just from language issues but from the particular socio-economic disadvantage experienced by indigenous communities'.<sup>92</sup> The groundswell of concern about the inadequacy of institutional responses to the sexual abuse of children and the 'loss of community faith in the way that governments and institutions had responded, and continued to respond, to child sexual abuse' led to the establishment of a national Royal Commission Inquiry in February 2013.<sup>93</sup> The report of the Royal Commission, published in December 2017, recommended in particular that: 'State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution'.<sup>94</sup> Such schemes should require that intermediaries have relevant professional qualifications, are provided with appropriate training for their role, are made available during the police interview and trial and are able to provide the

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<sup>90</sup> M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 10

<sup>91</sup> New South Wales Department of Communities and Justice, *Witness intermediary Procedural Guidance Manual* (NSWDCJ, 2019) 15.

<sup>92</sup> *Ibid.*

<sup>93</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Our Inquiry* (RCIRCSA, 2017) [1.1].

<sup>94</sup> *Ibid.* [59].

police and court with recommendations on how to effectively communicate with the witness.<sup>95</sup> In particular, the Royal Commission also noted that it saw ‘inherent fairness’ in including defendants within the intermediary scheme but did not make any recommendations in this regard given the nature of the terms of the Commission’s reference.<sup>96</sup> The Royal Commission inquiry and its report presented a considerable drive for Australian jurisdictions, which had not already done so, to introduce measures, including intermediaries, to improve institutional responses to child sexual abuse.

#### A. *Western Australia (WA)*

One of the earliest Australian jurisdictions to introduce intermediaries (called communicators) for children, which significantly preceded the Royal Commission inquiry, was WA in 1992.<sup>97</sup> In any proceedings concerning children the court may appoint any person that it considers suitable and competent to act as a communicator for the child under 18 years of age.<sup>98</sup> Where a communicator is appointed their function is to communicate and explain to the child any questions directed at the child and to communicate and explain to the court any evidence given by the child.<sup>99</sup> This broad provision does not limit who may be appointed as a communicator and it applies to child witnesses as well as defendants but does not apply to pre-trial proceedings. The approach in WA embraces Fineman’s vulnerability theory by acknowledging the link between the inherent and situational vulnerability of young people in the criminal justice system and the depletions of their autonomy. In particular, young defendants in the criminal justice system are inherently and situationally vulnerable as a result of the imbalance of power between themselves and the state.<sup>100</sup> Despite WA being the first state to

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* [99]

<sup>97</sup> Section 8 Acts Amendment (Evidence of Children and Others Act) 1992 (WA), inserting s 106F into the Evidence Act 1906 (WA).

<sup>98</sup> Sections 106A and F(1) Evidence Act 1906 (WA).

<sup>99</sup> *Ibid.*, section 106F(2).

<sup>100</sup> R Helm ‘Guilty pleas in children: Legitimacy, vulnerability, and the need for increased protection’ (2021) 48(2) *Journal of Law and Society* 179.

introduce intermediaries this provision was only used for the first time in 2011 and it does not appear to have been used very often thereafter.<sup>101</sup> The reason for this limited usage is, according to the Tasmanian Law Reform Institute, that the required infrastructure was not put in place.<sup>102</sup> This provides an important lesson, because, as Terese Henning has observed, ‘it is not enough to make statutory provision for intermediaries. The necessary infrastructure (a sufficient number of trained intermediaries and the availability of training programs) is essential to the success of this measure’.<sup>103</sup>

### *B. South Australia*

In response to public concern about child abuse at a Catholic School in South Australia in 2011<sup>104</sup> the South Australian government introduced a range of reforms in 2015 ‘to improve the position of vulnerable witnesses, namely children and persons with a disability, within the criminal justice system, both in and out of court’.<sup>105</sup> These measures have a wide application and are expressly designed to acknowledge the inherent vulnerability of young victims, witnesses, suspects and defendants and support their effective participation in criminal proceedings in order to prevent the deprivation of children’s fundamental human rights. A person is considered a vulnerable witness if they are under 14 years of age or have a cognitive impairment.<sup>106</sup> A court may order, on its own initiative or on application, that a witness who has complex communication needs is given ‘assistance of a kind to meet the needs of the witness with understanding and communicating with the court during proceedings’.<sup>107</sup> The reforms enacted in 2015 also enable the Governor to make regulations to provide

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<sup>101</sup> Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania, Issues Paper No. 2* (TLRI, 2016) [4.2.33].

<sup>102</sup> *Ibid.*

<sup>103</sup> Henning, n29 above, 165.

<sup>104</sup> This case was one of the case studies examined by the Royal Commission into institutional responses to child abuse (2017), available at <https://www.childabuseroyalcommission.gov.au/case-studies/case-study-09-st-anns-special-school>.

<sup>105</sup> South Australia, House of Assembly, Statutes Amendment (Vulnerable Witness) Act 2015, Second Reading (06.05.2015), The Hon Rau, Deputy Premier, Attorney-General, Minister for Justice Reform, Minister for Planning, Minister for Housing and Urban Development, Minister for Industrial Relations, Minister for Child Protection Reform.

<sup>106</sup> Section 4 of the Evidence Act 1929 (SA).

<sup>107</sup> Section 14A(1) of the Evidence Act 1929 (SA).

for suspects under 14 and people with ‘a disability that adversely affects the person’s capacity to give a coherent account of the person’s experiences or to respond rationally to questions’ to be provided emotional support, communication assistance or any other assistance by a person of a prescribed class during investigative interviews.<sup>108</sup> The type of assistance that may be given includes: that the witness be accompanied by a communication partner<sup>109</sup> or a person approved by the court to provide such assistance<sup>110</sup>; provision of a device to facilitate communicating; or the witness be allowed to give evidence in some particular way that will facilitate the giving of evidence.<sup>111</sup> The Hon Rau noted that: ‘It is contemplated that a communication partner will be a volunteer as part of a specialist scheme who will be trained to facilitate effective communication between members of the criminal justice system and the person with complex communication needs’.<sup>112</sup> Communication partners are formally registered under the communication partner scheme and are provided by the Uniting Communities, a non-government organization.<sup>113</sup> Communication partners can include a range of people, such as parents, carers, teachers or someone who knows the child and can assist them to communicate. The Deputy Premier noted in introducing the amending legislation that:

‘The communication assistant model ... draws on the familiar and long recognised role of a language interpreter and will be similar to that role... 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’.<sup>114</sup>

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<sup>108</sup> Section 74H of the Summary Offences Act 1953 (SA).

<sup>109</sup> Section 4 of the Evidence Act 1929 (SA): ‘a person, or a person of a class, approved by the Minister for the purposes of providing assistance in proceedings to a witness with complex communication needs’.

<sup>110</sup> Section 14A(4) of the Evidence Act 1929 (SA). The Hon Rau noted that ‘This scenario may well arise given a communication assistant may be a person who is closely associated with a victim and as a result may be required to give evidence at trial of facts in issue. As with existing language interpreters, any communication assistant will have to swear or affirm in court the impartiality and accuracy of their role’, South Australia, House of Assembly, Statutes Amendment (Vulnerable Witness) Act 2015, Second Reading (06.05.2015).

<sup>111</sup> Section 14A(3) of the Evidence Act 1929 (SA).

<sup>112</sup> South Australia, House of Assembly, Statutes Amendment (Vulnerable Witness) Act 2015, Second Reading (06.05.2015).

<sup>113</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report Parts VII-X and Appendices (RCIRCSA, 2017) 71.

<sup>114</sup> South Australia, House of Assembly, Statutes Amendment (Vulnerable Witness) Act 2015, Second Reading (06.05.2015), The Hon Rau, Deputy Premier, Attorney-General, Minister for Justice Reform, Minister for



The provision of such assistance is not mandatory and the order need only be made if such assistance is 'readily available and it is otherwise practicable to make the assistance available'.<sup>115</sup> This is a recognition that '[t]here may be logistical reasons that preclude such assistance'.<sup>116</sup>

### *C. New South Wales (NSW)*

Prompted by a 2014 report by the NSW Parliamentary Joint Select Committee on the sentencing of perpetrators of child sexual assault,<sup>117</sup> the NSW Government committed to a Specialist Child Sexual Assault Pilot Scheme designed to strengthen the criminal justice response to child abuse.<sup>118</sup> Part of this pilot scheme included provision to allow for the appointment of witness intermediaries [called children's champions], to facilitate communication with child witnesses through the trial process,<sup>119</sup> based on the Registered Intermediary scheme in England and Wales. Victims Services within the NSW Department of Justice administers the Sexual Offence Evidence Program and has established a panel of people suitable to act as children's champions.<sup>120</sup> To be included on the panel a person must have a tertiary qualification in psychology, social work, speech pathology, occupational therapy or teacher or other specified qualifications.<sup>121</sup> The role of the accredited children's champion is 'to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence'.<sup>122</sup> A court *must* appoint a children's champion for prescribed sexual offences<sup>123</sup> where the witness is less than 16 years old and it *may* appoint a children's champion for a witness 16 years or

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Planning, Minister for Housing and Urban Development, Minister for Industrial Relations, Minister for Child Protection Reform.

<sup>115</sup> Section 14A(1) of the Evidence Act 1929.

<sup>116</sup> South Australia, House of Assembly, Statutes Amendment (Vulnerable Witness) Act 2015, Second Reading (06.05.2015), The Hon Rau, Deputy Premier, Attorney-General, Minister for Justice Reform, Minister for Planning, Minister for Housing and Urban Development, Minister for Industrial Relations, Minister for Child Protection Reform.

<sup>117</sup> Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Every Sentence Tells a Story, Report 1/55 (NSW, 2014)

<sup>118</sup> For background to the child sexual offence evidence program see NSW Department of Communities and Justice, Witness intermediary Procedural Guidance Manual (Victims Services, 2019) 12.

<sup>119</sup> NSW Department of Communities and Justice, Witness intermediary Procedural Guidance Manual (Victims Services, 2019) 5.

<sup>120</sup> Schedule 2, cl 89(1) of the Criminal Procedure Act 1986 (NSW).

<sup>121</sup> *Ibid.*, cl 89(2).

<sup>122</sup> *Ibid.*, cl 88(2).

<sup>123</sup> Defined in section 3(1) of the Criminal Procedure Act 1986 (NSW).

older if satisfied the witness has difficulty communicating.<sup>124</sup> Despite this, the court does not need to appoint a children's champion if, among other things, 'it is unnecessary, inappropriate or not otherwise in the interests of justice to make such an appointment'.<sup>125</sup> The police may also make a referral to Victim Services for the appointment of a children's champion to be present when the child is interviewed if the officer in charge forms the view that this would help the child communicate.<sup>126</sup> A preliminary interview will take place with the child to assess their communication needs and abilities prior to the police forensic interview.<sup>127</sup>

While the legislative framework provides for children's champions in relation to sexual offences and only in Newcastle and Sydney, services can be provided 'Out-of-Program', for instance, in relation to matters outside Newcastle and Sydney or, more rarely, for offences other than sexual assault.<sup>128</sup> Outside of the program a children's champion may also provide 'a written assessment of the child's communication needs and recommendations for the language used during cross-examination'.<sup>129</sup> In cases where a solicitor of the Office of the Director of Public Prosecutions (ODPP) or a Witness Assistance Service Officer has identified that a complainant is vulnerable and an intermediary would be able to assist them to communicate more effectively the ODPP can apply for an order to allow the assistance of an intermediary.<sup>130</sup> 'Out-of-program' referrals are still made by Victim Services and follow the same rules and procedures as inside the program, however, they are engaged by the ODPP not the court.

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<sup>124</sup> Criminal Procedure Act 1986 (NSW), Sched 2, cl 89(3). In the latter case the court can make such an appointment of its own motion or on the application of a party.

<sup>125</sup> Schedule 2, cl 89(4) of the Criminal Procedure Act 1986 (NSW).

<sup>126</sup> NSW Department of Communities and Justice, *Witness intermediary Procedural Guidance Manual* (NSW Victim Services, 2019) 19 .

<sup>127</sup> *Ibid.*, 19-20

<sup>128</sup> *Ibid.*, 35

<sup>129</sup> J Cashmore, I Latz, R Shackel and K Valentine, *Evaluation of the Child Sexual Offence Pilot Scheme: Process evaluation report*, SPRC Report 16/17, (UNSW, 2017), [3.2.3].

<sup>130</sup> NSW Department of Communities and Justice, n 129 above, 35.

The children's champion program sits alongside existing law relating to the questioning of child witnesses as well existing provisions which support children and vulnerable witnesses. Aside from this pilot program a child or other vulnerable witness was already entitled to have a person assist them to give evidence if they ordinarily receive assistance to communicate from that person on a daily basis.<sup>131</sup> They may also use a communication aid to assist giving evidence if they use such an aid on a daily basis.<sup>132</sup> In 2018 the support person options for sexual assault complainants who are vulnerable (children and cognitively impaired) persons were further extended to cover vulnerable witnesses. Previously a complainant of sexual assault was entitled to have a support person present near them and in their sight when giving evidence in relation to prescribed sexual offences.<sup>133</sup> The support person could be 'a parent, guardian, relative, friend or support person of the complainant, or a person assisting the complainant in a professional capacity'.<sup>134</sup> In 2018 this provision was expanded to allow vulnerable persons access to support persons when giving evidence in criminal proceedings before any court, as well as certain other proceedings.<sup>135</sup> A vulnerable person is defined as a child under 16, or a person with a cognitive impairment.<sup>136</sup> For proceedings in a criminal court this definition extends to include a person aged 16 but under 18.<sup>137</sup> Importantly, these provisions apply also to a vulnerable person who is the accused or defendant.<sup>138</sup>

#### D. *Victoria*

In 2018 Victoria introduced an Intermediary Pilot Program,<sup>139</sup> also based on the scheme in England and Wales, in response to a recommendation from the Victorian Law Reform Commission (VLRC) in

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<sup>131</sup> Section 275B(1) of the Criminal Procedure Act 1986 (NSW).

<sup>132</sup> *Ibid.*, section 275B(2).

<sup>133</sup> *Ibid.*, section 294C.

<sup>134</sup> *Ibid.*, section 294C(3).

<sup>135</sup> *Ibid.*, section 294C(7) notes that where the complainant is a vulnerable person section 306ZK additionally applies.

<sup>136</sup> *Ibid.*, section 306M(1).

<sup>137</sup> *Ibid.*, section 306ZK(7).

<sup>138</sup> *Ibid.*, section 306ZK(6).

<sup>139</sup> Through the Justice Legislation Amendment (Victims) Act 2018 (Vic), amending the Criminal Procedure Act 2009 (Vic).

2016.<sup>140</sup> The Pilot Program provides that a court may appoint an intermediary for a witness (including the complainant but not the accused) who is under 18 or has a cognitive impairment<sup>141</sup> from a panel established by the Secretary to the Department of Justice.<sup>142</sup> As in NSW, to be included on the panel an intermediary must have a tertiary qualification in psychology, social work, speech pathology or occupational therapy, or other prescribed qualifications, training, experience or skills.<sup>143</sup> The appointment can be made by the court or on application of the parties<sup>144</sup> in relation to criminal proceeding.<sup>145</sup> While the legislation places no limits on the types of matters in which intermediaries may be used, the Pilot Program is limited in its operation to complainants who are vulnerable witnesses in sexual offence matters and in homicide matters.<sup>146</sup> The Program is also geographically limited to Courts in the Melbourne legal precinct and four police sexual offence and child investigation team sites.<sup>147</sup>

The primary function of the intermediary is ‘improvement of the quality of evidence and aiding the understanding between the Court, counsel and the witness’.<sup>148</sup> This is expressed in the Criminal Procedure Act 2009 (Vic) in similar terms to those in NSW: to communicate or explain to the witness questions put to them in a way that enables them to be understood by the witness and to communicate or explain the answers that the witness gives to a person asking the witness questions in a way that enables the answers to be understood by the person asking.<sup>149</sup> In doing so they may advise ‘on the formulation of questions so as to avoid misunderstanding’ and they may ‘actively assist

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<sup>140</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victoria Law Reform Commission, 2016), Recommendation 30.

<sup>141</sup> Section 389F of the Criminal Procedure Act 2009 (Vic).

<sup>142</sup> *Ibid.*, section 389J(1).

<sup>143</sup> *Ibid.*, section 389H.

<sup>144</sup> *Ibid.*, section 389J(1).

<sup>145</sup> *Ibid.*, section 389G.

<sup>146</sup> County Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (County Court of Victoria, 2018), [11.1]-[11.2].

<sup>147</sup> *Ibid.*, [11.3]-[11.4].

<sup>148</sup> *Ibid.*, [22.9].

<sup>149</sup> Section 389I of the Criminal Procedure Act 2009 (Vic).

and intervene during questioning'.<sup>150</sup> Where appointed by the Court the intermediary should write a written report for the Court and the parties containing recommendations on how to optimally communicate with the witness.<sup>151</sup> When appointed through referral by the police through the Intermediary Matching Service, the intermediary should assess the communication needs of the witness before police questioning and make recommendations on methods of communication which will improve the quality of evidence.<sup>152</sup>

### *E. Other Australian jurisdictions*

The Australian Capital Territory (ACT), Queensland<sup>153</sup> and Tasmania<sup>154</sup> have all recently established, or are about to establish, pilot intermediary schemes. These pilot schemes are broadly similar to the approaches adopted in Victoria, albeit with some differences. The ACT Intermediary Program began operation in January 2020, and the schemes in Tasmania and Queensland commenced in March and July 2021 respectively. The ACT program provides that a court can direct that a grounds rules hearing be conducted<sup>155</sup> and may appoint an intermediary in criminal proceedings for a witness with communication difficulties.<sup>156</sup> An intermediary must be appointed for a prescribed witness,<sup>157</sup> which includes a child complainant in sexual offence proceedings or a child in a violent offence proceedings involving a person's death.<sup>158</sup> Similar to Victoria, an intermediary can be appointed from a panel maintained by the intermediaries' administrator.<sup>159</sup> Unlike Victoria, an intermediary can be appointed

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<sup>150</sup> County Court of Victoria, n 149, [22.10].

<sup>151</sup> Ibid., [23.2].

<sup>152</sup> Ibid., [23.1].

<sup>153</sup> Clause 44 of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019. In Queensland the intermediary scheme began being piloted in Brisbane and Cairns from July 2021, see <https://www.justice.qld.gov.au/community-engagement/news/2020/intermediaries-to-assist-vulnerable-witnesses-to-give-their-best-evidence>.

<sup>154</sup> Evidence (Children and Special Witnesses) Amendment Bill 2020 (Tas).

<sup>155</sup> Section 4AB of the Evidence (Miscellaneous Provisions) Act 1991 (ACT) inserted through the Evidence (Miscellaneous Provisions) Act 2019 (ACT).

<sup>156</sup> Section 4AJ of the Evidence (Miscellaneous Provisions) Act 1991 (ACT).

<sup>157</sup> Ibid., section 4AK.

<sup>158</sup> Section 3B of the Evidence (Miscellaneous Provisions) Regulation 2009 (ACT).

<sup>159</sup> Sections 4AH and 4AL of the Evidence (Miscellaneous Provisions) Act 1991 (ACT). The qualifications to be included on the panel are similar to Victoria.

for the accused,<sup>160</sup> and an intermediary who is a designated person (for example a relative, friend or acquaintance of the witness or the accused) is not barred from acting as intermediary if there is no other suitable intermediary available and it is in the interests of justice to make such an appointment.<sup>161</sup> The functions of the intermediary are similar to Victoria.<sup>162</sup>

#### *F. Lessons learned from Australia*

The intermediary represents one way of supporting young people in criminal trials to exercise their right to participation in the court proceedings in their entirety. Australia offers some examples as to how the intermediary scheme could be reformed to better acknowledge the vulnerability of young defendants. Using intermediaries to promote the resilience of young defendants has allowed Australian jurisdictions to challenge the representation of young defendants as self-sufficient and autonomous and transform the standards and values governing the relationship between these young people and the state and its criminal justice institutions. The above review has shown that in Australia there has been a varied approach in when, whether and how the states and territories<sup>163</sup> have enacted intermediary schemes. These differences relate to what person can act as an intermediary and upon what basis, whether they are available for complainants, witnesses and defendants, whether they are available for a broad or limited range of offences and whether they are available only in court proceedings or the pre-trial phase of proceedings. It is notable that, most Australian jurisdictions, with the exception of the pilot programs in Victoria and NSW, have provided for the use of intermediaries for defendants as well as witnesses. At the heart of the Australian reforms is an appreciation of the importance of acknowledging children's vulnerabilities in the maintenance of this right.

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<sup>160</sup> Ibid., sections 4AA, 4AJ.

<sup>161</sup> Ibid., section 4AH.

<sup>162</sup> Ibid., sections 4AI .

<sup>163</sup> Section 51 of the Australian Constitution details the legislative powers of the Commonwealth Parliament; 'crime' is not one of those heads of power and therefore criminal law is largely the responsibility of the states and territories.

In England and Wales the statutory provisions providing for defendants to be assisted by an intermediary to ensure a fair trial are not in force because section 104 Coroners and Justice Act 2009 has yet to be commenced. Even when implemented section 104 would only provide statutory intermediary support for defendants during the giving of evidence. In the absence of legislative provisions being enacted in England and Wales, the courts have been directing the appointment of an intermediary to assist a young defendant in reliance on its discretionary inherent powers. However, there is no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process their appointment is not mandatory.<sup>164</sup> Arguably the disparities that exist in England and Wales, and some of the Australian jurisdictions, between the protections afforded to young vulnerable witnesses and young vulnerable defendants constitute a significant political, organisational, and moral failure that could be rectified by emphasising the importance of acknowledging children's vulnerabilities in the maintenance of their rights. Such an approach would re-direct the criminal justice system towards a normative framework better equipped to accommodate the realities of childhood and contain a clear foregrounding of the child's experiences of vulnerability.

## CONCLUSIONS

The House of Commons Justice Committee has recently expressed concerns that the youth court system in England and Wales 'does not adequately meet the need of children and is not fit for purpose'<sup>165</sup> and highlighted the role of Registered Intermediaries as representing a bridge between the youth court and vulnerable young defendants.<sup>166</sup> Similarly, the Royal Commission in Australia noted that it sees inherent fairness in including defendants within the intermediary scheme. Any problems regarding verbal communication, whether caused by impaired cognitive abilities or language

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<sup>164</sup> *R v Cox* [2012] EWCA Crim 549, para 39.

<sup>165</sup> House of Commons Justice Committee, *Children and Young People in Custody (Part 1): Entry into the youth justice system Twelfth Report of Session 2019–21, HC 306*, (TSO, 2020) [117]

<sup>166</sup> *Ibid.*, [122]

skills, risks undermining a young person's ability to participate fully in criminal proceedings and consequently their right to a fair trial. Cross examination that 'may confuse, manipulate or overwhelm a child' may well violate a child's rights.<sup>167</sup> The intermediary represents one way of supporting young people in criminal trials to exercise this right. From this article it is clear that there has been a varied response to the provision of intermediaries to children in England and Wales, as well as throughout Australia. In England there is a two-tier approach to intermediaries. Registered intermediaries supporting witnesses are professionally approved, registered and employed by the Ministry of Justice (MoJ) and paid by the Crown Prosecution Service or the police. But intermediaries appointed for defendants at the discretion of the court are private sector intermediaries that do not need to be regulated by the Ministry of Justice. Section 33BA of the Youth Justice and Criminal Evidence Act 1999 in England and Wales has not been implemented. Even if implemented the provision of intermediaries would be limited to if and when a defendant chooses to give evidence rather than for the whole trial proceedings. In Australia, there has been a more mixed response. The efforts to provide support to child witnesses to ensure that they can fully participate in the trial have also been extended to child defendants in several jurisdictions. However, this has not been the case in all Australian jurisdictions where efforts to extend the use of intermediaries to young defendants have been more muted. In Australia this may to an extent be because the impetus for reform came largely from reports exposing the inadequacy of institutional responses to child sexual abuse.

It is important not just to legislate for the provision of intermediaries but to also ensure that the infrastructure is there to ensure they can be engaged. Clearly, practical and resourcing issues may be hindering a wider roll out of the intermediary scheme in England and the Australian jurisdictions. Where resources are limited young vulnerable witnesses are prioritised and the needs of young defendants are considered less important despite the jeopardy that young defendants potentially face

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<sup>167</sup> Antolak-Saper and MacPherson, n25 above; also A Watts, *To Investigate Models of Intermediaries for Child Victim and Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway* (Winston Churchill Memorial Trust of Australia, 2014), 41.



if convicted and the concomitant need to ensure a fair trial and prevent wrongful convictions. The Ministry of Justice invitation for tenders for the provision of Court Appointed Intermediary Services (CAIS) does not suggest that there will be an increased budget to support this provision and it also continues to distinguish the CAIS from registered intermediaries. In *TI v Bromley Youth Court* the court specifically referenced the child's status as a rights holder under domestic and international law. If this status is to be realised then young defendants should have the same access as other witnesses to registered intermediaries.

The application of Fineman's vulnerability theory and the capability approach to young people in the criminal justice system allows for a critical review into what policies are needed to promote children's resilience and capability and reduce the deprivations and inequity that are a consistent feature of the lived reality of children in the criminal justice system. A vulnerability approach makes it possible to identify the "autonomy myths" that justify the (neo)liberal legal subject and open up the possibility to ponder whether what exists now could (or should) be otherwise'.<sup>168</sup> Building on this, the capabilities perspective places a responsibility on public institutions to ensure that individuals can, in reasonable and tolerable conditions, decide on their own in favour of the realisation of these capabilities.<sup>169</sup> The capabilities approach implicitly advocates political conceptions of social justice which are concerned with the cultivation, maximization and just distribution of access to the positive resources that people need in order to have these capabilities.<sup>170</sup> Therefore, the capabilities perspective implies the necessity to focus on what rights, goods, institutions or services vulnerable human beings need to ensure they are not 'mutilated and deformed' by their experiences.<sup>171</sup> According to Boram Kimhur the

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<sup>168</sup> F Serafim, 'Vulnerability theory as a tool against a banking model of legal education' (2021) 55(1) *The Law Teacher*, 68.

<sup>169</sup> *Ibid.*, 218.

<sup>170</sup> S Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford University Press, 2002) 2.

<sup>171</sup> Dixon and Nussbaum, n81 above.

primary focus of the capability approach is to expand the capabilities of people,<sup>172</sup> or as Sabina Alkire states ‘the capability approach’s fundamental objective is to create meaningful and fulfilled lives’.<sup>173</sup> The capabilities approach enhances a rights focussed approach by shifting the focus from formal rights to the practical considerations needed to support the ability of people to exercise those rights in practice.<sup>174</sup> The use of an intermediary represents one way of foregrounding considerations of young people’s vulnerability with the potential to encourage responses that foster and promote autonomy and which promotes their capabilities and reduces the effects of human vulnerability.<sup>175</sup> Vulnerability theory appreciates the potential of the state as a unique mechanism for the construction of a just society placing the vulnerable subject at the centre of law, displacing the autonomous, independent liberal, rational subject.<sup>176</sup>

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<sup>172</sup> B Kimhur, ‘How to Apply the Capability Approach to Housing Policy? Concepts, Theories and Challenges, Housing’ (2020) 37(3) *Theory and Society*, 257-277

<sup>173</sup> Alkire, n 174 above, 19

<sup>174</sup> R Lister ‘“Power, not Pity”: Poverty and Human Rights’ (2013) 7(2) *Ethics and Social Welfare*, 109.

<sup>175</sup> Mackenzie, Rogers and Dodds, n 70 above, 20.

<sup>176</sup> M Fineman, ‘Populations, Pandemics, and Politics’ (2021) 21(3) *International Journal of Discrimination and the Law* 194.