



**OFFICE OF THE  
PUBLIC ADVOCATE**

Submission by the Victorian Office of the Public Advocate to  
the Victorian Law Reform Commission Inquiry into Supporting  
Young People in Police Interviews

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## 1. Executive Summary

- 1.1 This submission examines the role currently performed by Independent Persons in the criminal justice system with reference to the role performed by volunteers in the Independent Third Person (ITP) program, a program managed by the Office of the Public Advocate which assists people with cognitive disabilities and mental illness in their interactions with police. The principal points of difference between the two programs are three-fold: Independent Third Persons support people with cognitive disabilities and mental illness; Independent Third Persons assist adults as well as children; and Independent Third Persons assist not only alleged offenders but also witnesses and victims of crime.
- 1.2 The submission recommends that an Independent Person should continue to be required to attend any police interview of a young person where a parent or guardian is not present and where the person is suspected of involvement in crime. This submission further recommends that this requirement be extended to apply also to young people in police interviews who are witnesses to, and victims of, crime.
- 1.3 The submission notes the largely undefined nature of the role of Independent Persons and calls for this role, and the role of ITPs, to be legislatively articulated and mandated. The submission recommends that the specific role to be played by Independent Persons should be akin to that currently performed by Independent Third Persons. Such a role should not be the same as that performed by a legal advocate, but should require Independent Persons to ensure that young people being questioned are aware of their rights and that they are assisted where necessary to communicate with police.
- 1.4 The submission supports the establishment of a central referral agency which would oversee the provision of Independent Persons to police interviews throughout the state, and also calls for Independent Persons to undertake mandatory training before being able to fulfil their role.

## 2. List of Recommendations

**Recommendation 1.** An Independent Person should be defined in the *Crimes Act* as an adult who is not a parent or guardian of the young person being questioned, who is not involved in the case at hand, and whom the young person is willing to have present while he or she is being interviewed by police.

**Recommendation 2.** The role of Independent Persons should be clearly defined in the *Crimes Act*. This role should be similar to the role currently performed by Independent Third Persons (ITPs) and should be specified as being ‘to ensure that young people are aware of their rights and to assist them when communicating with police’.

**Recommendation 3.** A parent, guardian or Independent Person should be required to attend all police interviews of young people, whether the young person is an alleged offender, a witness or a victim of crime. When a young person does not wish for a parent or guardian to be present, then an Independent Person should have to be present.

**Recommendation 4.** The *Crimes Act* should be amended to provide that an ITP must be present at any police interview of a person whom police reasonably believe has a cognitive disability or mental illness. The role of ITPs should be specified as being ‘to ensure that people with cognitive disabilities or mental illness are aware of their rights and to assist them when communicating with police’. The legislation should provide that an ITP will play the role of Independent Person where the person being interviewed is under 18 years of age.

**Recommendation 5.** OPA would welcome any move to formalise the provision of Independent Persons throughout Victoria by the setting up of a central allocating agency, and OPA would encourage the allocation of sufficient resources to such a program to enable it to oversee the provision of Independent Persons to young people throughout the state.

**Recommendation 6.** Independent Persons should be required to undergo a minimum amount of twelve hours training, covering topics such as: conflict management, recording information, working in the criminal justice system, and communicating effectively with children and police. OPA would welcome any invitation to share its expertise on how best to provide this training.

## 3. Introduction

3.1 The Victorian Office of the Public Advocate (OPA) welcomes the opportunity to make this submission on the important topic of supporting young people in police interviews. The Victorian Public Advocate is an appointment made by the Governor in Council under the *Guardianship and Administration Act 1986* (Vic).

The Public Advocate, a statutory office, is independent of government and is uniquely placed to highlight occasions of exploitation, neglect and abuse of people with disabilities.

- 3.2 A high percentage of young people involved in the criminal justice system have a disability, which makes OPA an important contributor to debate on this topic. Corrections Victoria, for instance, has noted in relation to people released from prison that:

Overall, prisoners with an intellectual disability were younger and had three times the rate of youth detention episodes of non-intellectually disabled prisoners, and had a greater number of community corrections orders, prior sentenced terms of imprisonment and prior remand-only terms of imprisonment.<sup>1</sup>

- 3.3 OPA, through its management of the Independent Third Person Program, has particular expertise concerning the involvement of young people with disabilities in the criminal justice system.

## 4. Independent Persons

- 4.1 The *Crimes Act 1958* (section 464E) requires police, when they take a person younger than 18 years of age into custody (barring emergency situations), not to question the young person unless ‘a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present’.
- 4.2 The *Crimes Act 1958* (section 464K) also requires ‘a parent or guardian of the child or, if a parent or guardian cannot be located, an independent person’ to be present when a child between 15 and 17 years of age is being fingerprinted. The Act (section 464ZA (3)) also gives Independent Persons a role in the taking of forensic samples.
- 4.3 The *Children, Youth and Families Act 2005* (section 346) gives Independent Persons a role in relation to bail hearings.
- 4.4 Other pieces of legislation also use the term ‘Independent Person’. For instance, the *Disability Act 2006* (section 143) requires the involvement of Independent Persons in explaining to people with a disability the use of seclusion or restraint.
- 4.5 Despite its relatively widespread use, the term ‘Independent Person’ is not legislatively defined, nor is the role of an Independent Person particularly clear. It is not apparent what exactly is required for someone to qualify to be an Independent Person. In relation to police questioning, it is also unclear whether the Independent Person should play the role of advocate, or merely be a witness.

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<sup>1</sup> Corrections Victoria, ‘Intellectual Disability in the Victorian Prison System. Characteristics of Prisoners with an intellectual disability released from prison in 2003-2006’, Corrections Research Paper Series, Paper 02, September 2007, available at [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebcf34008fc263d/Intellectual\\_Disability\\_in\\_the\\_Victorian\\_Prison\\_System.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebcf34008fc263d/Intellectual_Disability_in_the_Victorian_Prison_System.pdf), at 27 August 2009, p. 6.

## 5. Independent Third Person (ITP) Program

5.1 The ITP program provides volunteer support for people with cognitive disabilities or mental illness who are being interviewed by police. The Victoria Police Manual (Instruction 103-9) provides that: ‘An independent third person must be present during any interview with a person suffering from an intellectual disability’. The Manual also provides (Instruction 112-3, par 6.2.1) that in interviewing suspects and offenders:

An independent third person must be present at the interview of any intellectually or mentally impaired person. This includes those who are intellectually disabled, mentally ill, brain damaged or suffering from senile dementia.

5.2 Finally, the Manual requires (Instruction 112-2, par 5.3) an ‘independent person’ to be present during the interview of ‘intellectually or mentally impaired persons’ who are witnesses to, or victims of, crime. The cross reference in this provision to Instruction 112-3 suggests that the term ‘independent third person’ was meant here rather than ‘independent person’.

5.3 OPA manages the ITP program, which currently utilises the services of 162 volunteers. In the year to 30 June 2009, OPA’s volunteer ITPs were involved in 1,432 police interviews. The large majority of these interviews (1,105, or 77 per cent) involved alleged offenders, 266 (or 19 per cent) involved victims and 61 (4 per cent) of the interviews involved witnesses. In the year to 30 June 2009 children constituted 20 per cent of the people assisted by ITPs.

5.4 OPA sets out the role of ITPs and the justification for their involvement in this way.

A person with a cognitive disability or mental illness may be particularly disadvantaged in their dealings with police, as they may experience difficulties with:

- comprehending complex ideas
- processing information quickly
- understanding legal rights
- maintaining concentration for extended periods
- increased susceptibility to suggestive questioning, or
- being submissive to people in a position of authority.

...

An ITP should be present when a witness, victim or suspect who has a cognitive disability or mental illness is to be formally questioned by police. An ITP may also be present during preliminary discussions or when a statement is being taken.<sup>2</sup>

5.5 The decision as to when an ITP should attend a police interview is determined by a number of factors, which include: a police determination that an ITP is needed; and a specific request by the person being interviewed or a family member or associate of the person being interviewed, or a service provider.

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<sup>2</sup> See <http://www.publicadvocate.vic.gov.au/Publications/Brochures/Independent-Third-Person-Program.html>.

5.6 OPA's public information about the ITP program states that:

Police will rely on their experience, observations of the person and general questioning (such as where a person lives, works or attends school, or contact with services) to determine whether a person may have a cognitive disability or mental illness. A person with a cognitive disability or mental illness can request police to arrange an ITP if they are going to be interviewed. A relative, friend or other person may also advise police if an individual requires the assistance of an ITP.<sup>3</sup>

5.7 Often the registrar of the Law Enforcement Assistance Program (LEAP) police database records the fact that a person has a disability, and this triggers police to request an ITP.

## 6. Differences and Overlap in the Roles of Independent Persons and ITPs

6.1 It is not just the titles of Independent Persons and ITPs that are likely to cause some degree of public confusion about the function performed by each.<sup>4</sup> The ITP program and the Youth Referral and Independent Persons Program (YRIPP) currently share a central call centre.

6.2 As already mentioned, ITPs differ from Independent Persons in that they also assist adults, as well as victims and witnesses of crime. In addition to this, there exist subtle differences in the roles of ITPs and Independent Persons.

6.3 While the term Independent Person is largely undefined in legislation, the Victorian Law Reform Commission's 'Supporting Young People in Police Interviews: Background Paper' argues convincingly (par. 34) that 'it is highly likely that one role' of the Independent Person 'is to permit the young person to seek and receive advice about what he or she should do in the face of police questioning.' This suggests something of an advocacy role, though the lack of clear definition of the role ensures that individual Independent Persons will perform their role differently to one another.

6.4 The case law quoted in the Background Paper (pars 35 to 37) also supports the argument that Independent Persons should at times 'be positive and active in assisting, protecting and supporting' the child being questioned.

6.5 The role of ITPs is somewhat clearer than is the role of Independent Persons. ITPs have the facilitation of communication as their primary role, rather than advocacy per se, and a substantial minority of ITP interviews involve the questioning of a witness or victim, rather than an alleged offender.

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<sup>3</sup> See <http://www.publicadvocate.vic.gov.au/Publications/Brochures/Independent-Third-Person-Program.html>.

<sup>4</sup> It is somewhat outside the boundaries of this particular submission's brief, but OPA notes here that it is not just the Independent Persons and ITP programs that have somewhat unclear boundary markers. The specific roles of volunteers in other programs – such as the bail justice program, the prison visitors program and OPA's community visitors program – are subject to some degree of overlap, and even entitle volunteers to different honorarium payment rates.

6.6 OPA defines the role of ITPs in this way.

The ITP goes to the police station to:

- facilitate communication between the person with a disability and the police
- assist the person with a disability to understand their rights
- support the person with a disability.

The ITP must be objective. The ITP is not an advocate and does not provide legal advice.<sup>5</sup>

6.7 The role of an ITP being to ‘facilitate communication’ will extend to assisting a person to understand their rights, but this is different to performing the function of an advocate, particularly a legal advocate.

6.8 OPA submits that the role of Independent Persons should be clearly defined in legislation, and that the role of Independent Persons should be similar to that performed by ITPs. This role should be distinguished from the function performed by a legal advocate.

Recommendation 1. An Independent Person should be defined in the *Crimes Act* as an adult who is not a parent or guardian of the young person being questioned, who is not involved in the case at hand, and whom the young person is willing to have present while he or she is being interviewed by police.

Recommendation 2. The role of Independent Persons should be clearly defined in the *Crimes Act*. This role should be similar to the role currently performed by ITPs and should be specified as being ‘to ensure that young people are aware of their rights and to assist them when communicating with police’.

6.9 OPA also submits that an Independent Person should be required to be present at all police interviews of young people when a parent or guardian is not present. This includes interviews when young people are witnesses or victims of crime. The reason for this recommendation is that young people are inherently vulnerable, and an obvious power imbalance exists when a young person is questioned by police, even if the young person is a witness to a crime, or is a victim of a crime. The required presence of a parent, guardian or Independent Person in all police questioning of young people will limit the likelihood of any deleterious effects of the experience of being questioned by police.

Recommendation 3. A parent, guardian or Independent Person should be required to attend all police interviews of young people, whether the young person is an alleged offender, a witness or a victim of crime. When a young person does not wish for a parent or guardian to be present, then an Independent Person should have to be present.

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<sup>5</sup> See <http://www.publicadvocate.vic.gov.au/Services/Independent-Third-Persons.html>.

6.10 OPA further submits that the skills required to perform the role of assisting people with cognitive disabilities or mental illness to communicate with police (while being cognisant of the person's rights), are quite specialised, and are not necessarily possessed in the case of young people even by their guardians or parents. OPA therefore submits that the presence of an ITP should be mandatory where a person with a cognitive disability or a mental illness is being interviewed by police. This should be so regardless of whether a parent or guardian is also present.

Recommendation 4. The *Crimes Act* should be amended to provide that an ITP must be present at any police interview of a person whom police reasonably believe has a cognitive disability or mental illness. The role of ITPs should be specified as being 'to ensure that people with cognitive disabilities or mental illness are aware of their rights and to assist them when communicating with police'. The legislation should provide that an ITP will play the role of Independent Person where the person being interviewed is under 18 years of age.

## 7. Gaps in the System

7.1 The Background Paper points out (pars 47, 48, 51) that the Youth Referral and Independent Persons Program (YRIPP) makes use of around 300 volunteers and is operating in 96 Victorian police stations. Other police stations rely on a range of other groups to provide volunteers to fulfil the Independent Person role. ITPs fulfil the role of Independent Persons when they assist young people with cognitive disabilities or mental illness, and indeed a significant number of ITPs also volunteer as Independent Persons.

7.2 The ITP program is a state-wide service, drawing on the resources of 162 volunteers throughout Victoria on a 24-hour-a-day basis.

7.3 OPA would support any move to formalise the provision of Independent Persons through, for instance, the establishment of a central allocating agency. But such a development would need to ensure that young Victorians throughout the entire state are able to receive the assistance of Independent Persons, whether the young persons are alleged offenders, victims or witnesses of crime.

7.4 Moreover, in view of Recommendation 4 above, OPA would seek to ensure that ITPs could continue to perform the function of Independent Persons for young people with cognitive disabilities or mental illness.

Recommendation 5. OPA would welcome any move to formalise the provision of Independent Persons throughout Victoria by the setting up of a central allocating agency, and OPA would encourage the allocation of sufficient resources to such a program to enable it to oversee the provision of Independent Persons to young people throughout the state.

## 8. Training

- 8.1 While Independent Persons are not required to have formal training, the Background Paper (par. 53) notes that YRIPP trains its volunteers for 25 hours, which incorporates a written element and in-person training.
- 8.2 OPA provides its ITPs with 14 hours of training. This is made up of two six-hour training sessions which cover five basic competencies: knowledge of cognitive disability and mental illness; communication between police and persons with disabilities; identifying and resolving problems; collecting and recording information; and working within the criminal justice system. This is followed by a practical assessment, which incorporates a role-playing scenario. OPA considers this is sufficient to ensure a high quality service is provided by its ITP volunteers, though further training opportunities and resources would always be welcome.
- 8.3 OPA recommends that training be mandatory for current and prospective Independent Persons. This training, which OPA estimates would take 12 hours, should cover topics such as conflict management, recording information, working in the criminal justice system, and communicating effectively with children and police. OPA also notes that ideally training should be provided in regional settings as well as in urban centres. OPA and YRIPP have experience in how best to provide such training. This knowledge could be drawn upon should training become mandatory for Independent Persons.

**Recommendation 6. Independent Persons should be required to undergo a minimum amount of twelve hours training, covering topics such as: conflict management, recording information, working in the criminal justice system, and communicating effectively with children and police. OPA would welcome any invitation to share its expertise on how best to provide this training.**

- 8.4 OPA also provides monthly presentations to trainee police, which serves to raise awareness about the need for ITPs when police interview people with cognitive disabilities or mental illness. Such training sessions, and comparable training sessions relating to interviewing young people, would likely become more important should the roles of Independent Persons and ITPs become legislatively articulated.