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Police interviews with vulnerable adult suspects

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Introduction

In this paper, some of the key issues police are likely to encounter when dealing with vulnerable adult suspects are considered and an overview of the Australian legislation and police policies governing police interviews in such circumstances is presented. This paper is concerned with vulnerable adults interviewed by the police as *suspects*. It is acknowledged, however, that many of the observations about good practice when interviewing witnesses continue to apply—perhaps to an even greater extent—when interviewing suspects. For example, interviewers' questions need to be matched to respondents' communicative abilities and suggestive/leading questions and other coercive practices should be avoided (Powell 2002). Smith and Tilney (2007), and Bull (2010) have described the following steps as a means of achieving the best evidence when dealing with vulnerable witnesses:

- establish good rapport, including establishing the ground rules and advising the interviewee that it is acceptable to say if they do not understand or know the answer;
- obtain as much free narrative as possible, encouraging the interviewee with prompts and open-ended questions such as 'tell me more about that' and 'what happened next?';
- ask questions of the right type in the right order. For example, open questions should precede specific questions and then closed questions. Leading questions should only be used as a last resort;
- have meaningful closure, including a summary of the interviewee's evidence and providing them with an opportunity to correct any errors; and
- evaluate the interview, in terms of both the information obtained and the interviewer's performance.

This paper does not consider issues relating to court processes and the admissibility of evidence; nor does the paper explore the literature in relation to child witnesses (eg see Powell, Wright & Clark 2010) or the specific issues of vulnerable witnesses as victims, for example, in the context of sexual assault matters (eg see Powell & Wright 2009), although these are all important linked areas of research.

Defining vulnerability

As Bull (2010) has noted, there is no internationally agreed definition of 'vulnerable' with regard to witnesses. The Tasmania Law Reform Institute (2006: 32) identified the following as 'groups that may require special protection during an arrest':

- (a) children and young people;
- (b) Aborigines and Torres Strait Islanders;
- (c) mentally ill or mentally disordered persons, and persons with developmental disabilities;
- (d) persons from non-English speaking backgrounds [NESB]; and
- (e) other persons, who by reason of some disability, are unable to communicate properly with the police (such as the seriously visually or aurally impaired, persons who cannot speak, and so on).

For the purposes of simplicity, this paper categorises adult vulnerability as physical disability, mental/intellectual disability, Indigenous status and NESB.

Challenges for police when dealing with vulnerable persons

As Smith and Tilney (2007) have commented in the English context, the importance of adequate police training in the identification of vulnerable witnesses cannot be overstated. Future research should therefore examine police effectiveness in identifying vulnerabilities, as well as ensuring appropriate training and procedures are in place to respond to witnesses' special needs.

Mental/intellectual disability

Ochoa and Rome (2009: 132) have observed that understanding the characteristics and rights of individuals with disabilities is critical for police officers, adding that

having a basic understanding of the common disabilities that they will encounter, police officers will be better prepared to respond to these individuals during the custodial interview process.

They noted in the context of intellectual disability that people with mental impairment are 'typically passive, placid, and, important for police to note, highly suggestible' (Ochoa & Rome 2009: 133). Other key challenges involve difficulties remembering information, focusing attention and regulating behaviour. Ochoa and Rome (2009: 134) also noted that people with learning disabilities may be 'misperceived by...law enforcement as purposefully uncooperative or confrontational', while some of the relevant challenges which may arise with a person who has autism include lack of eye-to-face gaze or eye-to-eye contact; difficulty with or complete lack of spoken language; an inability to understand consequences (including that they have broken the law); and an inability to understand basic social cues (which may include recognising the significance of a police officer's authority).

In a recent study of 262 electronically recorded interviews with suspects in New South Wales, Dixon and Travis (2007) found that police officers appeared to be insufficiently aware of the need for caution when interviewing mentally ill suspects. The authors acknowledged that part of the problem was that the suspect 'may well not raise the issue of their disability and illness' (Dixon & Travis 2007: 104). Dixon and Travis (2007: 105) suggested that custody officer should ask suspects 'who give any indication of vulnerability about their condition' for information, citing research by Gudjonsson (2003), who found that this approach had 'considerable success'. By way of comparison, writing in the UK context, Burton, Evans and Sanders found that recognition of potentially vulnerable witnesses by police and the Crown Prosecution Service was far below that identified by the researchers—the official figure was nine percent, compared with the researchers' 'very conservative estimate' of 24 percent, which rose to 54 percent of witnesses having a 'possible' vulnerability (2006: vi).

Physical disability

There are a range of physical disabilities which may impact on a suspect's ability to be questioned by police. One particular issue is hearing loss, with Ochoa and Rome (2009) arguing that the hearing limitations of deaf people put them in a uniquely disadvantaged position when taken into custody because they cannot hear spoken language and are therefore unlikely to understand the police officers; if they therefore become fearful, this increases the possibility that their fear might be interpreted by police officers as guilt. They argued that for people with such impairments, it is vital to have a translator who can communicate with the person; they also presented a number of other measures police officers should take in such circumstances.

Non-English speaking backgrounds

Suspects whose first language is not English may encounter difficulties when being interviewed by police. Dixon and Travis (2007) found that an interpreter was present in five of the 262 interviews they examined, but they suggested that there were further cases where it might have been of benefit to have an interpreter present. In one interview Dixon and Travis (2007) examined, for example, a suspect without an interpreter present did not understand the term 'free will', while another suspect did not understand the term 'promise'. Dixon and Travis (2007) observed that although people may be competent in everyday English conversation, they may not be able to deal with more complex or unusual words which may be crucial in police interviews.

Gibbons (2003) found in a study of NSW police officers that they were reluctant to call an interpreter for a number of reasons, including budgetary considerations, concerns the interpreter would serve as an advocate for the suspect and practical issues. In particular, interpreter availability can be a challenge, especially in rural or remote areas, or in relation to those belonging to less common language groups. Bull (2010: 18) also observed recently that there had been

almost no published research...[on] the role that interviewee or interviewer ethnicity is likely to play (eg witnesses from various ethnicities may well differ in their willingness to talk about sexual/familial matters) nor the related issue of the use of interpreters.

Aboriginal and Torres Strait Islanders

In Australia, the issue of hearing loss among Indigenous people has become an area of particular concern, with the Senate Community Affairs References Committee ((SCARC) 2010: 121) finding in its inquiry into hearing health in Australia that '[e]vidence presented to the committee strongly suggests that...it has a strong association with Indigenous engagement with the criminal justice system'. The Committee noted the High Court's finding in *Ebatarinja v Deland* (1998) 194 CLR 444, which 'suggests that undiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe' (SCARC 2010: 142). The Committee made several relevant recommendations, including that

guidelines for police interrogation of Indigenous Australians in each state and territory be amended to include a requirement that a hearing assessment be conducted on any Indigenous person who is having communication difficulties, irrespective of whether police officers consider that the communication difficulties are arising from language and crosscultural issues (SCARC 2010: Rec 31).

Another key issue for Aborigines and Torres Strait Islanders is language skills and English comprehension. In 2006, there were 517,000 Indigenous people in Australia, up from 459,000 in 2001 (SCRGSP 2009). Although the difficulties in obtaining accurate data were acknowledged, it has been estimated that there are about 55,000 speakers of Indigenous languages in Australia, the majority of whom would have 'poor, or limited, understanding of English' (Kimberley Interpreting Service 2004: 3). Notwithstanding this, Cooke (2004) conducted research in remote areas in the Northern Territory and found police reluctant to engage interpreters' services (Cooke 2004). Eades (2010, 2000, 1995, 1992) has written extensively on the cultural and linguistic issues many Indigenous people face in a legal context. An issue of particular

concern is 'gratuitous concurrence', that is, freely say 'yes' in response to a yes/no question, regardless of their understanding of the question or their belief in the truth or falsity of the proposition. As Eades noted recently (2010: 91), '[o]nce a person has agreed to a proposition in a context such as a police interview, it can have life-changing implications'. Other relevant issues include concepts of time and distance, deference to authority and customary law prohibitions (ALRC 1986).

In many Australian jurisdictions, questioning of Indigenous people is subject to the so-called Anunga Rules, which were introduced in 1976 by the NT Supreme Court to provide guidelines to police interrogating Aborigines. There are nine rules, including the need for an interpreter for Aboriginal suspects 'unless he is as fluent in English as the average white man of English descent', the desirability of having a 'prisoner's friend', that 'great care should be taken in administering the caution' and when formulating questions. The rules also suggest Aboriginal people 'should always be offered a drink of water...[and] should be asked if they wish to use the lavatory' (see *R v Anunga* (1976) 11 ALR 412: 412). Although the rules are somewhat paternalistic in nature, they remain of relevance and application today, as discussed further below.

Powell (2000) expanded on the Anunga Rules by developing a five-stage protocol for interviews with Indigenous people which is 'interviewee centred' and allows the interviewee to determine the vocabulary and content as much as possible. The protocol is in many respects the same as that proposed by Bull (2010) above for vulnerable witnesses generally. Importantly, Powell examined physical/environmental factors (eg does the person suffer hearing loss?), language/cultural factors (eg too much direct eye contact; see also Lincoln 2008) and psychological environment (eg is the person fearful of the consequences of the interview?). Powell (2000) also provided examples of non-leading questions to be used and types of questions to be avoided, as well as the need for meaningful labels for concepts related to time, distance and number. Powell's (2000) guidelines should be borne in mind by officers interviewing Indigenous suspects and when developing police policies, although Dixon and Travis (2007) criticised her suggestion that the interviewer ask 'How can I make it easier for you to talk?' (Powell 2000: 190), on the basis that it suggests the making of an inducement.

Legislation for dealing with vulnerable adults

The following discussion is focused on Australian legislative provisions which relate to the special needs of vulnerable persons interviewed by police. These provisions are in addition to the provisions which apply in relation to police interviews more generally, such as the use of cautions and the right to silence. Except for the Northern Territory, all Australian jurisdictions require a police officer to arrange for the services of an interpreter where a person's English is insufficient to enable them to understand the questioning or speak with reasonable fluency before any questioning or investigation commences (see *Crimes Act 1914* (Cth), s 23N, which applies in the Australian Capital Territory for offences carrying a maximum penalty of 12 months or more: s 23A(6); *Crimes Act 1958* (Vic), s 464D; *Criminal Investigation Act 2006* (WA), s 10; s 138(2)(d); *Criminal Law Detention and Interrogation Act 1995* (Tas), s 5; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 128; *Police Powers and Responsibilities Act 2000* (Qld), s 433; *Summary Offences Act 1953* (SA), s 79A(1)(b)(ii)).

The Commonwealth and Queensland provisions explicitly apply where the police officer reasonably suspects the person is unable to speak with reasonable fluency in English because of a physical disability, although the Commonwealth provision only applies where a person is under arrest or a 'protected suspect'. In South Australia, the provision is expressed as an entitlement to be assisted at the interview if English is not the person's native language and they 'so require'. The Queensland regulation (*Police Powers and Responsibilities Regulation 2000* (Qld), cl 39) prescribes that in deciding whether to arrange for an interpreter to be present, the police officer may ask questions not related to their involvement in the offence to determine whether the person is:

- capable of understanding the questions put to them, what is happening to them and their rights at law;
- capable of effectively communicating answers to questions; and
- aware of the reason the questions are being asked.

In Western Australia, the legislation also provides that where an officer is required to inform a person about any matter and that person is 'for any reason' unable to understand or communicate in spoken English sufficiently, the officer must, if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter (*Criminal Investigation Act 2006* (WA), s 10).

Some jurisdictions also have specific provisions in relation to foreign nationals and their right to communicate with their embassy or consular representative (see *Crimes Act 1914* (Cth), s 23P, which also applies in the Australian Capital Territory for offences with a maximum penalty of 12 months or more, pursuant to s 23A(6); *Crimes Act 1958* (Vic), s 464F; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 124; *Police Powers and Responsibilities Act 2000* (Qld), s 434; see also *Police Powers and Responsibilities Regulation 2000* (Qld), cl 40). The following jurisdictions have more extensive legislative provisions in relation to vulnerable persons.

New South Wales

The Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW) provides that a person who falls within one or more of the following categories is a 'vulnerable person':

- (a) children;
- (b) people who have impaired intellectual functioning;
- (c) people who have impaired physical functioning;
- (d) people who are Aboriginal or Torres Strait Islanders;
- (e) people who are of non-English speaking background.

Division 3 of the Regulations governs investigations and questioning of vulnerable persons (as defined in cl 24), and covers such issues as:

- the custody manager's obligation to help the vulnerable person (cl 25);
- the involvement of support persons, including who may be a support person (cl 26), that the support person may be present during any investigative procedure (cl 27) and the role of the support person (cl 30);
- the requirements to meet the specific care needs of a person with impaired physical functioning (cl 32(2));
- the requirement to contact the Aboriginal Legal Service (ALS) for Aboriginal and Torres Strait Islander (ATSI) detainees (cl 33); and
- the requirement to include information about the detainee's vulnerability in any application for a detention warrant (cl 36).

Queensland

The provisions in Division 3 of the *Police Powers and Responsibilities Act 2000* (Qld) are more extensive than most Australian jurisdictions, although they only apply in relation to indictable offences.

Section 420 applies where a police officer wants to question a person they 'reasonably suspect'

to be an Aborigine or Torres Strait Islander. In such circumstances, the police officer must inform the person that a representative of a legal aid organisation will be notified that they are in custody unless the officer is aware the person has arranged for a lawyer to be present (s 420(2)); however, the provision is deemed not to apply

if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally (s 420(3)).

In addition, the detainee may waive their right to a support person, with any such waiver to be recorded electronically or in writing (s 420(5)). If the police officer considers it necessary to notify a representative of a legal aid organisation as set out in s 420(2) of the Act, they must inform the person of this in a way which substantially complies with the terms set out in the regulation, namely

As you have not arranged for a lawyer to be present, a legal aid organisation will be notified you are here to be questioned about your involvement in an indictable offence (cl 36(3)).

Clause 36 of the Police Powers and Responsibilities Regulation 2000 (Qld) also applies in relation to questioning ATSI persons and provides that before a police officer questions a person they suspect to be Indigenous, they must, unless they already know the person, ask questions 'necessary to establish the person's level of education and understanding' (cl 36(1)). Pursuant to cl 36(2), this includes questions in similar terms to cl 39 in relation to the right to an interpreter described above.

Where the person indicates that they do not want a support person present, the police officer must inform the person of their rights substantially in the following terms—*Is there any reason why you don't want to telephone or speak to a support person and arrange for a person to be present during questioning? Do you understand that arrangements can be made for a support person to be present during the questioning? Do you also understand that you do not have to have a support person present during questioning? Do you want to have a support person present?* (cl 36(5)).

Clause 36(6) prescribes that if a police officer reasonably suspects the person is at a disadvantage by comparison with members of the Australian community generally, and they have not arranged for a support person to be present during the questioning, the police officer must arrange for a support person to be present. Clearly, the legislature have determined in such circumstances that it is in the interests of justice that the person's stated desires be overridden by a police decision and indeed the police officer does not have any discretion about exercising this decision.

Section 422 of the Queensland Act applies where the police officer reasonably suspects a person has impaired capacity, although there is no definition of what is meant by this. In such circumstances, a police officer must not start to question a person suspected to be of impaired capacity until they have, if practicable, allowed the person to speak to a support person without being overheard (s 422(2)(a)); and the support person is present during questioning (s 422(2)(b)). It is unfortunately not clear how it is to be determined whether it is practicable for the police officer to allow the impaired person to confer with their support person. Subsection (3) requires that a police officer suspend questioning and comply with subsection (2) if it becomes apparent that the person is of impaired capacity.

South Australia

Section 104(4) of the *Summary Procedures Act 1921* (SA) provides that where a witness is a 'person who is illiterate or suffers from an intellectual handicap', their statement may be taken in the form of a written statement or as a video- or audiotape record of interview. Subsections (b) and (c) govern when any such tape is to be played.

Tasmania

As set out above, the only specific provision on this issue in the Tasmanian legislation relates to the provision of an interpreter. However, the Tasmania Law Reform Institute (TLRI) is currently finalising a review on consolidation of powers of arrest. In its issues paper (2006: v), it sought comment on the following issues:

8. Should the police or other persons executing an arrest have a higher duty of care when arresting persons belonging to identified vulnerable groups?
9. What sort of protective rules or measures, regulating the arrest of persons belonging to identified vulnerable groups, ought to be considered for inclusion in a Consolidated Act?

The TLRI (2006: 33) suggested that

[t]he problems of vulnerability and susceptibility both for group members and for police suggests that the interests of vulnerable groups, the police and the wider community would be served with the advent of some pragmatic solutions or rules related to vulnerable groups in a code of arrest.

The final report on this issue was released in May 2011. The TLRI (2011) noted the current absence of protective measures in Tasmania's arrest legislation in relation to the arrest of vulnerable groups other than children. The TLRI recommended generally that all arrest powers in Tasmania be consolidated into one piece of legislation, to take the form of a new Act to

be known as the *Arrest Act*. It was then recommended that the proposed *Arrest Act* include provisions for vulnerable persons, to be defined as young persons, persons with impaired physical/intellectual functioning, Aborigines and Torres Strait Islanders and/or NESB people and that the protective provisions for such people should stipulate:

- (1) That the arresting officer must record in writing the reason for effecting an arrest rather than employing an alternative to arrest;
- (2) That a vulnerable person must be informed at the time of the arrest of his or her right to communicate with a friend, relative, parent/guardian, responsible person, legal practitioner and/or interpreter (relevant person) as is appropriate;
- (3) That when a vulnerable person is arrested there should be an obligation to inform a relevant person of the arrest:
 - (a) When a young person is arrested, there should be an obligation upon the police to inform a parent/guardian, responsible person or other relevant person of the arrest.
 - (b) When an Aborigine or Torres Strait Islander is arrested the Aboriginal Legal Service should be notified via the on-call Field Officer in accordance with Tasmania Police requirements (Aboriginal Strategic Plan).
 - (c) If a person with impaired intellectual or physical functioning is arrested, there should be an obligation upon police to notify a relevant person or responsible person as appropriate.
- (4) That the police must assist an arrestee who is a vulnerable person in communicating with a relevant person and the relevant person should be present during any interview.
- (5) That when a person from a non-English speaking background is arrested the police officer conducting the investigation must defer any questioning until an interpreter is present (TLRI 2011: 50).

As at June 2011, there had not been any response from the Tasmania Government to the report (T Henning personal communication 24 June 2011).

Australian Capital Territory

The provisions contained in Part IC of the *Crimes Act 1914* (Cth), which are discussed further in the following section, apply to ACT offences carrying a maximum penalty of 12 months or more—*Crimes Act 1914* (Cth), s 23A(6). In April 2010, the ACT Government released a discussion paper on its review of police criminal investigative powers, in which the following relevant questions were posed:

11. Are the rights and interests of Aboriginal and Torres Strait Islander people or people with a disability adequately protected in current Part 1C [*Crimes Act 1914* (Cth)] protections?

12. Is there a category of people who are particularly vulnerable, for whom enhanced protections should apply?...

39. Are there other measures that should be included in legislation in order to safeguard the rights and interests of vulnerable groups of people?

40. Are there groups of people whose rights to a lawyer or to other support during police questioning are not adequately protected?...

44. Are provisions relating to interpreters and consular officials adequate? (ACT Government 2010: 9, 11).

The discussion paper noted that

[i]t may also be appropriate for the legislation to focus on people who may be disadvantaged for a range of reasons, such as intellectual incapacity or lack of proficiency in spoken English (ACT Government 2010: 50).

Submissions on the discussion paper were due by 30 June 2010, with further work in this area currently underway (V Martin personal communication 7 January 2011; see also Mayfield 2011 for discussion).

Commonwealth

Part 1C, Division 3 of the *Crimes Act 1914* (Cth) relates to the obligations of investigating officials. Special provision is made for ATSI persons under s 23H, which requires the investigating official to notify the representative of an Aboriginal legal aid organisation where they believe on reasonable grounds that a person who is under arrest or is a protected suspect is of ATSI status, unless they are aware the person has arranged for a legal practitioner to be present (s 23H(1)).

In addition, the investigating official is not to question such a person or interview an ATSI person as a suspect (whether or not under arrest) unless an interview friend is present during questioning and the person has had an opportunity to confer with their interview friend in private, where practicable (s 23H(2)(c)), or the person has expressly waived their right to have such a person present (s 23H(2)(d)). Subsection (2A) provides that the ATSI person may choose their own interview friend unless they expressly and voluntarily waive the right, they fail to exercise their right within a 'reasonable period' or the interview friend does not arrive within two hours of the person's first opportunity to contact them. Where an interview friend is not

chosen under s 23H(2A), the investigating official must choose a representative of an Aboriginal legal aid organisation or a person whose name is included in the list maintained under s 23J(1) as an interview friend (s 23H(2B)).

Section 23J provides that the Minister must as far as is reasonably practicable, establish and update a list of people who are suitable to help ATSI persons under arrest and are willing to give such help and in doing so, must consult with any relevant Aboriginal legal aid organisation (s 23J(1); (2)). As in Queensland, investigating official is not required to comply with these provisions if they believe on reasonable grounds that, having regard to the person's level of education and understanding, the ATSI person is not at a disadvantage compared with the general Australian community (s 23H(8)). One provision which does not appear to be replicated in any other jurisdiction is that the burden of proof lies on the prosecution to prove the ATSI person waived their rights or had made contact as set out in s 23H(1) (ss 23H(4); (5)).

Police policies for dealing with vulnerable adult suspects

There is a wide disparity in the level of detail in police policies in relation to the questioning of vulnerable persons and the extent to which such policies are publicly available. The policies for New South Wales and Tasmania were available on the internet, as was the WA Code of Conduct. The relevant policies for Queensland, Victoria, South Australia, Western Australia and the Northern Territory were kindly provided by police representatives and these policies are also discussed in this section.

New South Wales

The NSW Police Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) is available on the NSW Police website and sets out detailed provisions in relation to vulnerable persons, including the requirement that the custody manager 'determine if the person falls into the category of a vulnerable person and take appropriate action regarding their vulnerability' and 'determine if the person requires an interpreter and arrange one where necessary' (NSW Police nd: 24). To a certain extent, the code replicates the provisions in the Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW) discussed above. It also states that if someone is visually impaired or unable to read, the manager is to ensure their legal representative, relative or support person is available to help check documentation. Where the detained person is required to give written consent or a signature, they should ask

the support person to sign instead, provided the detained person agrees. The support person or legal representative present during any interview is to be given the opportunity to read and sign any documentation. In addition, it states that when a vulnerable person is being charged, copies any court attendance notices are to be given to the support person.

The section on interpreters advises officers to use an interpreter if the person

is unable to communicate in English, has a limited understanding of English, is more comfortable communicating in their own language, [or] is deaf, hearing impaired or speaking impaired

and that

Just because someone can speak English to do everyday tasks does not mean they can cope with the added stress of a police interview. If in doubt, get an interpreter (NSW Police nd: 69).

The Code also sets out in considerable detail how interviews with interpreters should be conducted (eg the need to speak in the first person and maintain eye contact).

The NSW Police website also has a wealth of relevant information available under *Community Issues*, including in relation to *Aboriginal Issues*, *Cultural Diversity*, *Disabilities* and *Mental Health*. Finally, although not generally available to the public, police are also subject to the Guidelines for police when interviewing people with impaired intellectual functioning, which was developed in response to the recommendation of the NSW Law Reform Commission (1996) that NSW Police develop guidelines for police when interviewing people with an intellectual disability. The guidelines aim to improve communication between police and people with impaired intellectual functioning, particularly those with intellectual disability, mental illness, acquired brain injury, learning difficulties and dual diagnosis (Urquhart 2000).

Victoria

In October 2010, Victoria Police released a revised version of its police manual, following a major revision of the rules for responding to mental health and disability (Victoria Police 2010). A copy of the policy *Interviewing Specific Categories of Person*, which is subject to change and is updated regularly, was kindly provided by Victoria Police (2011). The policy relates to a broad range of people, including children and those outside of Victoria, as well as people affected by a mental disorder, alcohol or drugs and those who are deaf and mute and/or non-English speaking. Indigenous people are not mentioned in the policy.

The section on people with a mental disorder covers the pre-interview stage (including identifying whether the person has a mental disorder) and stipulates that an independent third person (ITP) is to be present at the interview. The ITP is to be a relative or close friend, or a trained volunteer from the Office for the Public Advocate. The policy sets out considerations in obtaining an ITP and the role they are to perform, as well as instructions for conducting the interview, such as '[t]ake particular care to ask questions which are understood by the person being interviewed' (Victoria Police 2011: 4).

The section relating to persons affected by drugs and/or alcohol requires that before police interview 'a person known or suspected to be alcohol or drug affected (including prescription drugs and methadone treatment program)' (Victoria Police 2011: 5), they are to consider the possibility that the presence of the substance or withdrawal from it may have an effect on the person's mental state or ability to be interviewed. The policy also makes provision for engaging a sign language interpreter for deaf and mute people and sets out the process for arranging for an interpreter for non-English speakers, as well as making reference to the relevant legislative provisions set out above.

In addition, the Victorian Department of Health and Victoria Police (2010) have developed a protocol for mental health, which provides that if police believe a person has a cognitive impairment, they must arrange for an independent third person to be present during the interview. Means of identifying the person's impairment and the role of the independent person are set out in the policy.

Queensland

The Queensland Police Service (QPS nd) *Vulnerable Persons Policy* is available online. The brief document sets out recent initiatives in dealing with vulnerable people (eg improved police training) and resources. It sets out a non-exhaustive guide of 14 somewhat overlapping categories for identifying a vulnerable person, including 'any infirmity, including early dementia and disease', 'mental illness', 'intellectual disability' and 'persons with impaired capacity', as well as separate categories for ATSI persons and those with 'cultural, ethnic or religious factors including those related to gender attitudes' (QPS nd: 1). The policy states in relation to defendants that they

must be given procedural fairness or natural justice—the ability to participate in the defence of the charges brought against them, the ability to understand what is happening and being given the opportunity to be heard and present a defence (QPS nd: 2)

but does not set out any specific provisions for dealing with vulnerable defendants.

More detail on this issue is found in the *Special Needs* section of the Operational Procedures Manual, a copy of which was kindly provided by QPS (2010). The document, which is almost 90 pages long, refers to the legislation and sets out the general policy and specific areas of vulnerability, namely cross-cultural issues, specific physical, intellectual or health needs and mentally ill persons. The manual considers such issues as the factors an officer must consider in determining whether a person has special needs, the policy and procedure for interviewing a person with special needs, including 'phrasing questions in a manner which compensates for a lack of comprehension or understanding' (QPS 2010: 4) and the role of support persons. The section on ATSI people notes that any person who claims to be an ATSI person 'should be treated as such until the contrary is shown' (QPS 2010: 6). Officers are advised to refer to the Anunga Rules and the *Indigenous Language and Communication* section of the Supreme Court of Queensland—Equal Treatment Benchbook.

The section on interpreters sets out in considerable detail the different levels of classification by the National Australian Association of Translators and Interpreters and the policy for selecting an appropriate interpreter, including where an Australian Sign Language interpreter is required. The manual also considers the process of arranging an interpreter and the process of conducting interviews with interpreters. In addition, the Queensland manual is the only one sighted which makes special provisions in relation to homeless people, including that the officer refer the person to an agency for assistance and ensure the person is not recorded as a missing person.

The policy on intellectual disability states that officers should

note the distinction between procedures affecting people who are mentally ill and those affecting people who are intellectually disabled. Where an officer is unclear if a person is intellectually disabled, advice should be sought from an appropriate source (QPS 2010: 31).

When dealing with a suspect with a mental illness, the policy sets out six factors for police officers to consider in determining what action to take, including the seriousness and nature of the alleged offence, the severity and nature of the person's apparent mental illness and their apparent capacity to take part in any interview.

South Australia

The South Australian Police (SAPOL 2010: 1) *General Order, Interpreters* outlines 'the process to mobilise and use interpreters when necessary for interviews and statements from suspects, victims or witnesses'. The order (SAPOL 2010: 1) states:

Prior to commencing an interview with a person, if the member doubts the ability of that person to understand or speak English, or if the person requests it, the member must arrange for an interpreter to be present before continuing with the interview. The interpreter must be independent of the people involved, professionally trained and formally qualified. Do not use a fellow employee of the suspects, victims or witnesses or a member of their family.

The order also sets out the process for requesting an interpreter and the interview procedure.

Western Australia

The Western Australia Police Code of Conduct (WA Police 2008) is available publicly online and states that people with disabilities can expect the right to be treated with dignity and respect and to have all reasonable attempts made to accommodate the needs of their disability; the right to understanding of their disability and their legal rights protected accordingly; and, for those with a psychiatric or intellectual disability, the right to an advocate when dealing with police. The code notes that police 'need to be mindful of their obligations when interviewing people with special needs, which include people with physical, intellectual or psychiatric disabilities' (WA Police 2008: 9–10). The Code does not make any specific reference to Indigenous or Aboriginal people or the provision of interpreter services.

WA Police also kindly provided a copy of their policy entitled *Questioning Children and People with Special Needs* (WA Police nd: [1.2.5]), which defines people with special needs as children, people with physical, intellectual or psychiatric disabilities, people with a specific cultural need or people who are not proficient in English, 'including full blood aboriginals' (WA Police nd: [1.2.5]: 1). Incidentally, it might be timely for WA Police to update their terminology to reflect contemporary standards; it should also be clarified that the provisions apply to all Indigenous persons. The policy notes that in such circumstances

more persuasive evidence is generally required to prove that a confession was voluntarily made and that it was obtained in circumstances that were fair to the accused' (WA Police nd: [1.2.5]: 1).

The policy sets out indicators of intellectual disability, the provision and role of interview friends (including the need to record any refusal to have an interview friend) and the need to arrange an interpreter 'for suspects not proficient in English' (WA Police nd: 2). The policy also states that '[w]hen dealing with aboriginals, particularly those of a tribal background, not proficient in English' police officers are to endeavour to observe the principles of the Anunga Rules, a copy of which are attached to the policy (WA Police nd: 2).

Tasmania

The Tasmania Police Manual (TDPEM 2010), which was revised in November 2010 and is available to the public online, is very detailed in relation to the needs of vulnerable persons. For example, it includes general information about the existence of a register of disability service providers to assist police in their interactions with people with intellectual impairment or cognitive disability. The manual also sets out examples of questions officers should ask to determine if a person has a reduced capacity for comprehension, noting that

[i]f the person has difficulty in communicating or comprehending speech, an interpreter should be arranged (if being interviewed as an offender, an independent interpreter should be sought) (TDPEM 2010: [2.37.4]).

In relation to communication, the following comments are made:

(1) People with intellectual and sensory disabilities often display an 'acquiescent response bias', or a tendency to give an affirmative response to all questions. Deaf people often simply nod in response to a question that they may not have understood. These tendencies are greatly increased in times of stress or anxiety.

(2) All efforts should be made to minimise stress and anxiety as these contribute to the acquiescent bias.

(3) A nod or a 'yes' response is often not sufficient to ensure that a person has understood the caution.

(4) A simplified version of the 'caution' should be considered when interviewing suspects, or writing the caution down.

(5) People with intellectual disabilities have a tendency to 'tell a story' rather than provide a direct response to a question. They also have difficulties with the perception of time and other numerical data (TDPEM 2010: [2.37.5]).

In relation to questioning, police are advised to be aware of interviewees' 'reduced capacity to understand, and ask questions in a logical sequence with minimal interruptions to the flow of questioning' (TDPEM 2010: [2.37.6]). It is also suggested that the interviewing of intellectually or cognitively impaired persons should not be undertaken without an independent person present.

When Aboriginal (or, presumably, Torres Strait Islander) persons are detained, a relevant officer 'is responsible for making every effort' (TDPEM 2010: [7.10.2]) to notify a relative or friend, as well as the ALS, take all reasonable steps to make the necessary

arrangements for any of these people to attend and advise the District Aboriginal Liaison Officer or Tasmania Police Aboriginal Liaison Co-ordinator of significant matters, although it is not stated what such matters might be. The manual also states that police should not hesitate to seek the advice or assistance of the ALS. The ALS can be expected to respond positively and helpfully. Contact telephone numbers should be displayed in all stations, Charge Rooms and Watch-Houses (TDPEM 2010: [7.10.2]).

Furthermore, if the Aboriginal person requests that the ALS not be provided with their personal details, the police officer responsible for notification should advise the ALS that an Aboriginal person has been arrested and detained, and that the person has requested non-intervention by the ALS. The ALS should be provided with details of the person's sex, age, physical condition and offence(s). The officer is also to record the person's request that the ALS not intervene and ask the person to sign the record to that effect.

Other issues considered in the manual include the need for consistency when dealing with recurring behaviour by an individual, the suitability of access to facilities and the need to record any illness, injury or treatment provided. As noted above, the TLRI is currently finalising a review which considers the protections for vulnerable witnesses.

Northern Territory

Copies of *General order Q1—Questioning and investigations* and *General order Q2—Questioning people who have difficulties with the English language—the 'Anunga' guidelines* were kindly provided by the NT Police. The first of these states that:

[w]here a person who is apparently a vulnerable suspect, that is, they may have limited mental capacity or by reason of age, education or ethnicity are disadvantaged, measures must be taken to ensure a fair interrogation. Such measures will include engaging a support person while the suspect is in police custody (NT Police 1998a: 3).

Reference is also made in *General order Q1 to General order Q2* (NT Police 1998b), which provides that the rules extend to migrants 'and possibly other groups as well', although 'not all aborigines, or persons of aboriginal descent, fall into this category' (NT Police 1998b: 1). The Anunga guidelines are summarised in *General order Q2* and officers are advised to read the full judgment, a copy of which is included in *General order Q2*, and 'be fully conversant with it' (NT Police 1998b: 2). The order also notes that courts will consider the

lengths to which Police have gone in order to comply with the guidelines...non-compliance... [with] the guidelines will be more likely to result in exclusion of evidence (NT Police 1998b: 3–4).

The order also clarifies the role of the ‘prisoner’s friend’ and the requirement that this person be informed about their role. Where a suspect is to be interviewed about a ‘serious matter’—although this is not defined further—they may have a second prisoner’s friend present, if desired. Finally, the order states that an interpreter must be used where responses are given in a language other than English.

Conclusion

Powell (2002: 44) observed that ‘the greater the communication and social barriers, the more vulnerable the interviewee is to providing information that is misleading, unreliable and self-incriminating’. Notwithstanding the importance of reliable evidence being obtained in police interviews from vulnerable witnesses and, in particular, vulnerable suspects, there is a paucity of Australian research on this issue, especially in the context of police identification of vulnerability.

A brief overview has been presented of the key issues police may encounter when questioning suspects who may be vulnerable due to their Indigenous status, cultural and linguistic diversity and/or physical, mental or intellectual disabilities. In addition, the relevant Australian legislation in relation to police interviewees was examined, which revealed significant differences in approach. The need for more comprehensive and compatible legislation should accordingly be explored.

The legislation in all jurisdictions except the Northern Territory makes some provision for police to arrange an interpreter where the interviewee’s English is limited and some jurisdictions have explicit provisions in relation to foreign nationals. The legislation in New South Wales is the most extensive and makes special provision for a range of vulnerable persons. Queensland’s legislation relates to Indigenous people and those of ‘impaired capacity’, while the Commonwealth provisions are limited to Indigenous people. The issue of protections for vulnerable witnesses is currently being considered by the Tasmania Law Reform Institute and the ACT Government.

Examination of the relevant police policies and manuals indicated that New South Wales and Tasmania provide detailed instruction to officers in relation to their dealings with vulnerable witnesses and suspects, with such information readily available online. Queensland and Western Australia have some

information available publicly and more detailed policies were kindly provided for the purposes of the present paper. The Northern Territory also provided copies of its policies, which require the use of an interpreter for suspects and witnesses who give responses not in English. The policy provided by Victoria Police relates to deaf and mute and non-English speaking people and those with a mental disorder or affected by drugs or alcohol, but does not refer to the specific circumstances of Indigenous people.

It was beyond the scope of the present paper to assess compliance or otherwise with the relevant legislation and policies. In evaluating police policies and practices in this area, future research should therefore consider the practical effects of such measures in terms of police training, the management of police interviews and ultimately, the impact on criminal investigations. Key research issues in this context are:

- to what extent are policies on interviewing vulnerable adults—where they exist—applied in practice? and
- does the use of these guidelines actually assist in producing more satisfactory outcomes for all parties?

In examining this issue, the international experience should be taken into account. For example, Gudjonsson (2010: 165) has observed that ‘England has taken the lead in improving the police interview process and the protection of vulnerable interviewees’, although ‘there still remains a huge unmet need among vulnerable witnesses with regard to identification and implementation of the special measures’. Future Australian research should therefore build upon these developments (eg see O’Mahoney 2010; Smith & Tilney 2007; UKHO 2008).

Finally, any policy initiatives in this context should not only adopt contemporary terminology, but also comply with Australia’s requirements under the *Convention on the Rights of Persons with Disabilities* to ‘promote appropriate training for those working in the field of administration of justice, including police and prison staff’ (Article 13) to ensure effective access to justice for persons with disabilities.

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Legislation

Convention on the Rights of Persons with Disabilities (UN)

Crimes Act 1914 (Cth)

Crimes Act 1958 (Vic)

Criminal Investigation Act 2006 (WA)

Criminal Law Detention and Interrogation Act 1995 (Tas)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW)

Police Powers and Responsibilities Act 2000 (Qld)

Police Powers and Responsibilities Regulation 2000 (Qld)

Summary Offences Act 1953 (SA)

Summary Procedures Act 1921 (SA)