This submission goes to the following:

1. Availability of appropriate services and supports;
2. Dealings with the police;
3. The operation of the courts;
4. Consideration as to whether the findings of the inquiry have broader application to people with a disability other than an intellectual disability, for example those with an acquired brain injury or neurological condition leading to cognitive disability.

Communication Rights Australia

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About Communication Rights Australia

Communication Rights Australia is the only specialist advocacy and information service for people with little or no speech within Australia. It has been working with and on behalf of people with little or no speech for over 30 years. It is funded by the Department of Human Services and is grounded in a Human Rights framework.

Speech Pathology Australia’s estimates 14% of all Australians living with a communication disability equates to an estimated 645,694 Victorians who had a communication disability in 2001. 2006 Census data (ABS, 2006a) reports that there were 4,932,422 people residing in Victoria at that date. Using the same percentage as was used in 2001, this equates to approximately 690,539 Victorians living with a communication disability at that time. These estimates demonstrate a large discrepancy between the number of Victorians living with a communication disability and those estimated by Perry et al. (2004)\(^1\) to have a disability and Complex Communication Needs, 0.2% equating to 9865 Victorians having a disability and Complex Communication Needs.

People with little or no speech, although not homogenous, are a distinct group and are eligible for Communication Rights Australia’s services. These people include people with impairment in the following areas of communication:

- Expressive language
- Speech

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• Pragmatics
• Fluency
• Voice

It is not clear what percentages of the people have an intellectual disability because assessments rely on their ability to communicate.

Definitions

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<thead>
<tr>
<th>Acronym:</th>
<th>Meaning:</th>
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<tr>
<td>AAC</td>
<td>Alternative and Augmentative Communication²</td>
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<td>CCN</td>
<td>Complex Communication Needs³</td>
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<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
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<td>VCHRR</td>
<td>Victorian Charter of Human Rights and Responsibilities</td>
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² [http://www.asha.org/public/speech/disorders/AAC.htm](http://www.asha.org/public/speech/disorders/AAC.htm) Augmentative and alternative communication (AAC) includes all forms of communication (other than oral speech) that are used to express thoughts, needs, wants, and ideas. We all use AAC when we make facial expressions or gestures, use symbols or pictures, or write.

People with severe speech or language problems rely on AAC to supplement existing speech or replace speech that is not functional. Special augmentative aids, such as picture and symbol communication boards and electronic devices, are available to help people express themselves. This may increase social interaction, school performance, and feelings of self-worth.

AAC users should not stop using speech if they are able to do so. The AAC aids and devices are used to enhance their communication.

Executive summary:

When access to justice is considered much of the focus is understandably given to the communication required to ensure vulnerable individuals understand their position, options, and the process being undertaken. However as important as such understanding is, for true participation in the system it is equally important that individuals are afforded their best chance of communicating to the system as well as having it communicate to them.

The justice processes within society necessarily involve many steps. Any of these steps can present a daunting challenge to individuals with complex communication needs (CCN). In proceeding though these steps an individual must communicate with many people which can include police, specialists, solicitors, prosecutors, judges, tribunals, and juries. Failures in communication at any point have the potential to undermine the chance of a just outcome.

Presently there is concern among many individuals with CCN that the police are either unwilling or unable to access systems allowing these individuals to communicate with the police in a full and timely manner. The establishment and official recognition of a system for quickly obtaining the services of appropriately qualified people and the education of the police force about the system could greatly reduce the barriers faced by individuals with CCN who have reason to approach the police force.

There is presently a lack of clarity in what safeguards the law provides to ensure individuals with CCN can communicate fully with courts and tribunals. Incorporation of a specific right to utilise an augmentative and alternative communication method of the witness’s choice would reduce legal the possibility for legal argument around the current provisions
and encourage judges to use their discretion in a way that makes formal hearings more accessible to individuals with CNN. Establishment of a system for registering and contacting independent communication support workers would also encourage their use in court.

The need for legal clarity is even more pronounced in the tribunal system where the exclusion of the law of evidence risks stripping the already uncertain safeguards from this already vulnerable group.

Many injustices are the result of ignorance or misunderstanding rather than malice, which can often be resolved through communication without requiring the involvement of the formal justice system. Without the ability to access independent communication support workers for issues outside of the formal justice system, individuals with CCN will be forced to either unnecessarily suffer the stress of the formal justice system or abandon their attempts to obtain justice.
First Contact

The first contact with the police can be a hard step for many to take, however it is even more daunting for those with difficulty making themselves understood. Unless they can have confidence that there is a system in place to ensure that they can communicate promptly, effectively and without necessarily relying on people close to them, there is an unacceptable risk that they will not even try.

Presently many individuals with CCN who approach the police are left with a strong impression that dealing with their grievance has been deemed 'to hard' and has therefore not been investigated thoroughly or sometimes even at all.

Those individuals who do approach the police successfully do so through their carers, who are often also family. In close relationships, particularly family relationships, people are often wary of revealing issues that they might consider shameful or embarrassing and this can effect their openness with police if they cannot communicate with them in confidence from the people they have to deal with in their everyday lives. Even more concerningly there is the risk that the behaviour of the carer/family member is the source of the individual's grievance meaning that without a widely-known and easily accessible system for accessing independent communication support workers being available to the police, there is an unacceptable risk that victims of this kind of betrayal of trust will be left unable to seek assistance.

An established system for accessing independent communication support workers would also provide a valuable tool for police investigations. The more rapidly a communication
support worker can be brought in, the fresher the individual's recollection will be when it is communicated to the police. Additionally it could reduce the uncertainty that police may face in determining how to use their discretionary powers in situations involving people with CCN.

Case example

An individual with cerebral palsy and little speech alleged sexual abuse and sought access to the criminal justice system. The absence of an independent communication support worker service meant that the individual's first statement to the police was made with their parent providing the communication support. Due to the individual's embarrassment over the subject matter, incomplete evidence was given which then became problematic, requiring further statements to be made and explanations to be given in court.

Courts:

Many of the issues of justice that arise in the real world are effectively dealt with by the police without requiring court proceedings, and with a properly prepared and equipped police apparatus this would hopefully hold true for people with CCN too. However particularly serious issues will always involve the courts.

Formal legal proceedings provide yet another daunting set of challenges to someone with CCN. Even before any formal appearance they must deal with explaining themselves once again to the relevant barristers and/or solicitors, quite possibly multiple times as the
process of building a case usually involves returning to questions a number of times to ensure that nothing has been missed, by the lawyers or by the witness.

If a formal appearance is required then people with CCN must deal with a number of challenges in addition to the trepidation felt by nearly all people involved in the court system. The adversarial system can be especially daunting to those who have experience of trouble making themselves understood, particularly as our legal system is built upon the primacy of oral evidence and the unquantifiable measure of whether a witness is 'credible', which will often become a focus of opposing barristers.

As such it is vital that the court does everything practical to ensure that people with CCN can express themselves to the best of their ability and are not left unfairly vulnerable to opposing counsel on the basis of their communication requirements.

**Case example 1**

An individual with no speech alleged significant theft of their money by a carer who was in possession of the individual's bank book. They sought an intervention (stalking) order against the carer pending police investigation. However with no communication support worker service to assist them it was impossible to negotiate the magistrates court nor to convey the messages typed on their communication device to the courtroom.

**Case example 2**
An individual who was the alleged victim of a serious assault was cross examined in front of a jury. Although cross examination was originally estimated to last two days, the speed of the individual’s answers provided through Alternative and Augmentative Communication (AAC) and the approach of the defence resulted in cross examination extending for seven days. The absence of a communication support worker booking service meant that neither the court nor the OPP was able to book support workers directly for this period. Great logistical difficulties were encountered in the effort to ensure that the individual had communication support on a day by day basis as the trial extended.

Current Law:

Legally the courts are bound by the rules and regulations found in various statutory instruments (including the uniform evidence act and rules of court) and by accumulated common law, with some level of additional input from international conventions and other general sources of law.

Statutory:

Section 30 of the Uniform Evidence Act provides that:

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A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

This provides a right to an interpreter so long as the court accepts that an individual with CCN ability to speak English is insufficient. It is unclear however on whether “interpreter” includes an AAC specialist interpreting a different mode of English, or whether the witness has a right to choose the mode of communication used for interpretation.

Section 31 of the Uniform Evidence Act provides that “A witness who cannot speak adequately may give evidence by any appropriate means.”\(^5\) however this is qualified by a judicial discretion to “give directions concerning [...] the means by which a witness may give evidence under subsection (2)”.\(^6\) This also provides a relevant right, however the interpretation of “adequate” raises similar issue to that of “sufficiently” in section 30, and additionally the discretion to give directions makes it unclear whether the right applies to the witnesses preferred mode of communication or merely a mode they are capable of communicating through.

**Common Law**

Determining the position of interpretation for an individual with CCN under the common law is more difficult as the precedents available almost uniformly deal with translation of language and therefore tend to focus on communication to the individual rather than from the individual. It could even

\(^5\) *Evidence Act 2008 (Vic)* s 31(2).

\(^6\) *Evidence Act 2008 (Vic)* s 31(2).
be argued that interpretation does not cover AAC on the basis of points such as the separate consideration in sections 30 and 31 of the Uniform Evidence Act (discussed above) however precedents dealing with mute witnesses suggest that interpretation between modes of English fall within the common law concept of interpretation,\(^7\) although these once again tend to deal more with communication to rather than from the individual. Of uncertain impact is the judicial conversation regarding the input of the interpreter.\(^8\) Unlike most foreign language interpretation, most forms of AAC do provide the potential for a form of word-for-word mechanical translation, this would be a positive aspect for the use of AAC in court,\(^9\) however it also presents an opportunity for AAC to be distinguished from interpretation and therefore deprive individuals with CCN of the benefit of the common law accumulated around the use of interpreters in court.

Should Alternative and Augmentative Communication be considered equivalent to interpretation, it is still controversial that there is no automatic right to an interpreter,\(^10\) however failure to allow one when one is required could be grounds for appeal.\(^11\)

The problem then becomes the exact form of communication. Many people with CCN are capable of multiple modes of communication, however the stress and consequence of court proceedings makes it critical that those individuals are allowed to provide testimony via their preferred mode if at all possible and not merely the mode that is convenient to the court. It is difficult

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7 Grudidge v Grace Bros Pty Ltd (1988) 93 FLR 414
9 Filios v Morland (1963) 63 SR (NSW) 331
10 Dairy Farmers Cooperative Milk Co Ltd v Acquilina (1963) 109 CLR 458
to predict how common law precedent would view this, if a particular mode
was considered the standard (analogous to English) then a witness could not
have recourse to their preferred mode if they were passably capable of
communicating through the standard mode.

**General Sources of Law**

There are further sources of law of broad application that may apply, notably
the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and international
instruments such as the *Convention on the Rights of Persons with Disabilities* which
Australia has ratified.

The *Charter of Human Rights and Responsibilities* is quite clear that defendants in
criminal matters are entitled to be “informed promptly and in detail of the
nature and reason for the charge in a language or, if necessary, a type of
communication that he or she speaks or understands”\(^\text{12}\) (though this noticeably
fails to mention communication to the court) and “to have the free assistance
of assistants and specialised communication tools and technology if he or she
has communication or speech difficulties that require such assistance”\(^\text{13}\). Note
that this does not extend to parties other than criminal defendants or non-
party witnesses. More generally everybody has a right to freedom of
expression “in any other medium chosen by him or her”\(^\text{14}\) however the more
general phrasing of this provision means it is vulnerable to extensive
interpretive debate. Additionally the Charter is subject to continuing

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\(^{13}\) *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(j).
uncertainty regarding its mechanism of application to many areas, adding another level of uncertainty.

The recently ratified *Convention on the Rights of Persons with Disabilities* states that the parties agree to take all appropriate measures to ensure freedom of expression including:

> Accepting and facilitating the use of sign language, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;¹⁵

Of particular note in this article is the specific mention of official interactions, which incontrovertibly includes court proceedings and should also include interactions with officials such as the police. Another important aspect is the use phrase “accepting and facilitating” implying an agreement to go beyond merely allowing such communication systems to be used and instead actively supporting their implementation and use. Although ratification officially indicates that Australia has agreed to implement the convention in domestic law, the direct influence of the convention on domestic law is limited to an unclear level of influence on the interpretation of statutes and/or common law concepts.

Ultimately the lack of clarity in all the above sources of law means that without an explicit provision being incorporated within a statutory instrument that provides a right to access their preferred mode of AAC individuals with CCN run a real risk of

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¹⁵ *Convention on the Rights of Persons with Disabilities* article 21(b).
having the justice system become sidetracked when dealing with them as these issues are either thrashed out or compromised over. This uncertainty is likely to increase the already significant stress on the individual and the inevitable delay will prolong its duration, potentially leading to a failure of justice if the individual cannot handle the increased burden.

What is certain from the considerations above is that judges already possess the discretionary power to implement appropriate systems to accommodate for individuals with CCN, however there are real concerns as to whether there is presently the awareness of the systems available, let alone the ability to use them. For instance the Federal Magistrates Court policy on “speech impaired clients”\textsuperscript{16} only envisages supporting AUSLAN and CART (a form of shorthand typing), both of which are woefully inadequate for many people with complex communication needs. For judicial discretion to properly enable access to justice in this area there must be an increased understanding of the availability of alternative and augmentative communication (AAC); confidence in the ability to access competent and independent experts; and confidence that the law supports such use of this discretion.

**Tribunals**

While the courts are likely to deal with the most significant individual matters of justice for individuals with CCN it should not be forgotten how much of the volume of access to

\textsuperscript{16} Federal Magistrates Court Interpreter and Translator Policy s (5) \<http://www.fmc.gov.au/services/html/interpreters.html>
justice occurs through the tribunal system, most notably the Victorian Civil and Administrative Tribunal (VCAT). A great deal of what is relevant to courts (above) is also relevant to VCAT, however VCAT is expressly “is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures”\(^{17}\) although it is “bound by the rules of natural justice”\(^{18}\). As this excludes the application of section 30 and 31 of the uniform evidence act, which presently represent the strongest argument for the rights of people with CCN, individuals must rely on the common law construction of “natural justice”, which leads back to the common law uncertainty described above. This uncertainty can be even more perilous in the context of tribunals as they are less likely have the combination of time, expertise and confidence to undertake a court-like review of esoteric concepts and apply them to the matter at hand.

Section 102 of the \textit{Victorian Civil and Administrative Tribunal Act 1998} (Vic) states that “The Tribunal must allow a party a reasonable opportunity to […] give evidence and […] to make submissions to the tribunal”\(^{19}\). This provision presents an opportunity to provide individuals with CCN recourse to their required assistance, however as with “natural justice” the common law construction of “reasonable opportunity” is far from simple and is subject to the same concerns as above.

It is also notable that although VCAT can hear all or part of a hearing on the basis of documents rather than oral testimony (which could at least present a preferable alternative for many individuals with CCN) this is limited to where both parties agree, and is therefore vulnerable to obstruction by opposing side.\(^{20}\)
Case example

An individual with no speech was taken to VCAT by a landlord who alleged outstanding money for repairs, which the individual was disputing. The absence of a communication support worker service meant that VCAT had no direct means of ensuring the individual could communicate at the Tribunal. A speech pathologist agreed to provide the services but this was an ad hoc arrangement for the day.

Ancillary Requirements

Surrounding the pivotal institutions of the justice process are many smaller aspects, both required and merely helpful. These can be as significant as mediations or formal assessments by specialists or as simple as dealing with administrative issues with court staff outside of hearings. It is critical that these are included in any consideration of access to the justice system as they are vital for making full use of the system as a whole.

Whereas in interpretation before a court or tribunal there are reasons for trying to avoid using an interpreter with an ongoing relationship with a witness, in the myriad of small interactions that may be required to seek justice around and outside of courts or tribunals it would be a significant burden on an individual with CCN if they had to seek a new communication support worker for each interaction. Often family or existing carers can perform this role admirably, but it would be unfair to assume this is always the case, and, as noted above, there may be instances where pre-existing relationships have been the source of the grievance for which justice is sought.
The ability to access an independent and ongoing communication support worker if required would greatly assist those people unwilling or unable to have people close to them act in this role. Recourse to an independent communication support worker could also enable individuals to engage more fully in seeking justice through methods other than the formal justice system, such as presenting their position directly to lawyers, trustees or others they may have a difference of opinion with. Enabling this sort of engagement has the potential to both avoid the stress the formal justice system inflicts on all parties and also prevent otherwise avoidable cases ending up in the hands of police, courts or tribunals because they could not be solved earlier through independent communication.

**Proposals:**

1. Inclusion in statute of a clear and specific right for individuals with complex communication needs appearing before a court or tribunal to utilise an augmentative and alternative communication mode of their choosing.

2. Establishment of an official system for registering and contacting people qualified to facilitate augmentative and alternative communication methods. Run either by a specifically created body or under the auspices of an appropriate existing body such as the Communication Resource Centre.

3. Education of police, judicial officers, tribunal members, ombudsmen and other official office holders of the existence of augmentative and alternative communication methods and of how to access qualified practitioners (whether through the system mention above or otherwise).
4. Establishment of a system entitling individuals with complex communication needs to access an appropriate independent communication support worker when required.