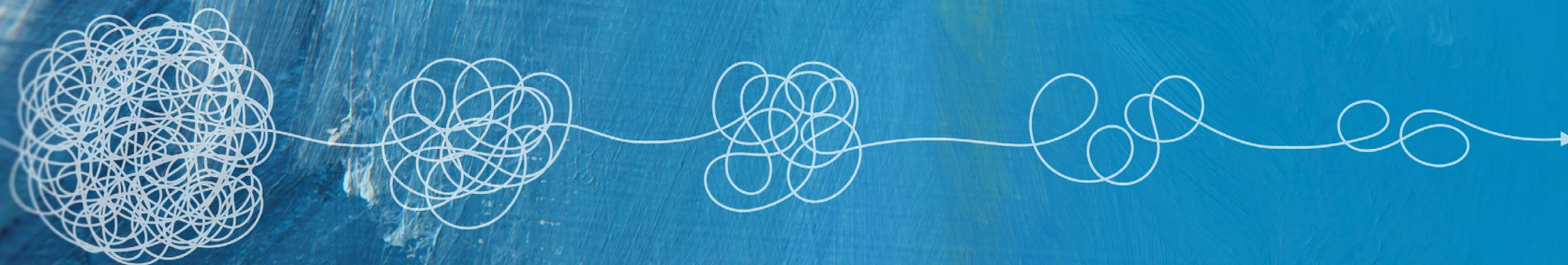


Communication Assistance Quality Framework

July 2021



MINISTRY OF
JUSTICE
Tāhū o te Ture

Foreword

Te Tiriti o Waitangi sets out the right of equality before the law. This right is also protected under the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993, and it is recognised in United Nations Conventions for the rights of the child and the rights of people with disabilities.

To enable fair access to justice, and honour our responsibilities to Māori, we recognise that some participants in our justice system face more barriers than others in achieving equitable outcomes. “Communication assistance” is a key tool for our courts to help participants with communication difficulties access justice.

Communication assistance is available to child and adult defendants and witnesses who may struggle to participate in court proceedings. The service is delivered by communication specialists who assess a participants’ communication abilities and help the court ensure that defendants can understand what is happening in court, and defendants and witnesses can give evidence to the best of their ability.

This quality framework is a resource for all those involved with communication assistance. It sets out who can provide the service, how it should be delivered and how communication assistants and other professionals will work together to ensure that a participant’s day in court is fair and upholds their mana.

As we implement Te Ao Mārama, communication assistance will be key to ensuring that participants with communication difficulties feel they are heard, seen, understood, and are able to meaningfully participate in court proceedings.

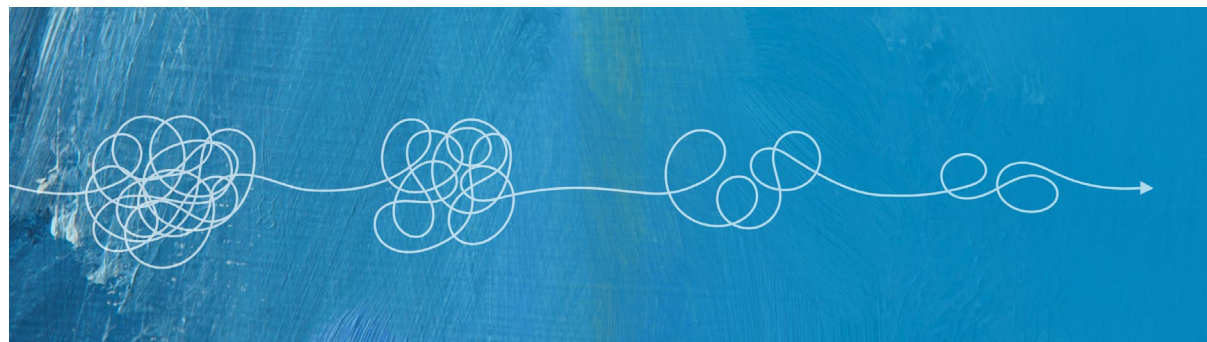
I acknowledge Michelle Bonetti (Moretalk), Sally Kedge (Talking Trouble) and all the current communication assistants for their passion for ensuring access to justice for vulnerable participants and their kaitiakitanga over the quality of the communication assistance service in New Zealand since 2014.

E kore e taea e te whenu kotahi te whāriki te raranga. Heoi anō mā te mahi o ngā whenu, mā te mahi tahi o ngā kairaranga. Ka oti tēnei whāriki.

The tapestry of understanding cannot be woven by one strand alone. Only by the working together of weavers, will such a tapestry be completed.

Andrew Kibblewhite

Tumu Whakarae
Secretary for Justice



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Disclaimer: Information contained in this quality framework is not intended to be considered legal advice and you should seek independent legal advice from a qualified professional should you require it.

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Introduction

This chapter sets out the legislative framework and outlines roles and responsibilities across the justice sector for communication assistance.

1.1 Background

To enable fair access to justice, a person needs to be able to sufficiently understand what is happening in a court proceeding and comprehend and respond to questions.

Understanding the court process and giving evidence can be challenging for many people, particularly when the situation is stressful or emotional. For children and young people, people with neurodiversity,¹ disability, physical or mental health conditions, or whose language and communication skills are not well developed, communication difficulties can be a barrier to effective participation in court proceedings.

Communication difficulties are frequently underestimated. Some people do not recognise they have a difficulty; others may attempt to conceal their difficulty out of embarrassment. A person who can read does not always understand what they are reading. Trauma and anxiety can impact a person's ability to understand what is being asked and to communicate well verbally in a stressful situation such as a courtroom. Misunderstanding can lead to unjust outcomes.

Communication assistance is one of the services available during a court proceeding to enable effective participation and access to justice.

1 Neurodiversity (or neurological diversity) is a term used to describe differences in how the human brain works.

2 We use the term "participant" to describe the defendant or witness who is receiving communication assistance in a court proceeding.

Communication Assistants (CAs) are specialists and they can assist defendants or witnesses whose communication vulnerabilities are such that they would not be able to effectively participate without that specialist assistance.

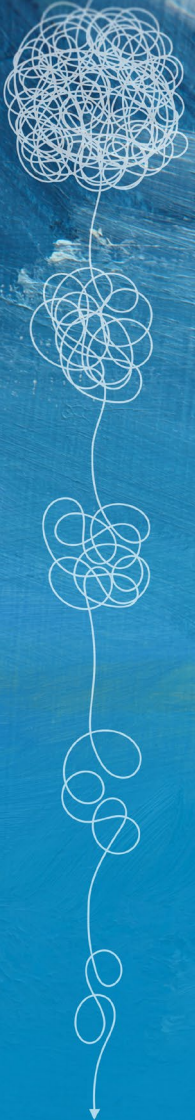
CAs facilitate communication between participants² in the justice system and counsel, police prosecutors and judges. CAs assist defendants to understand the process and evidence in court proceedings and defendants and witnesses to give evidence to the best of their ability.

1.2 Purpose and scope

Purpose

This document sets out the Ministry of Justice's (the Ministry's) quality framework for court-appointed communication assistance services.

This quality framework aims to increase access to justice for participants by ensuring communication assistance is delivered in a nationally consistent manner by well-qualified and well-trained professionals.



Scope

The quality framework covers:

- qualifications and training for CAs
- service delivery guidance for communication assistance services
- performance monitoring and ongoing quality improvement.

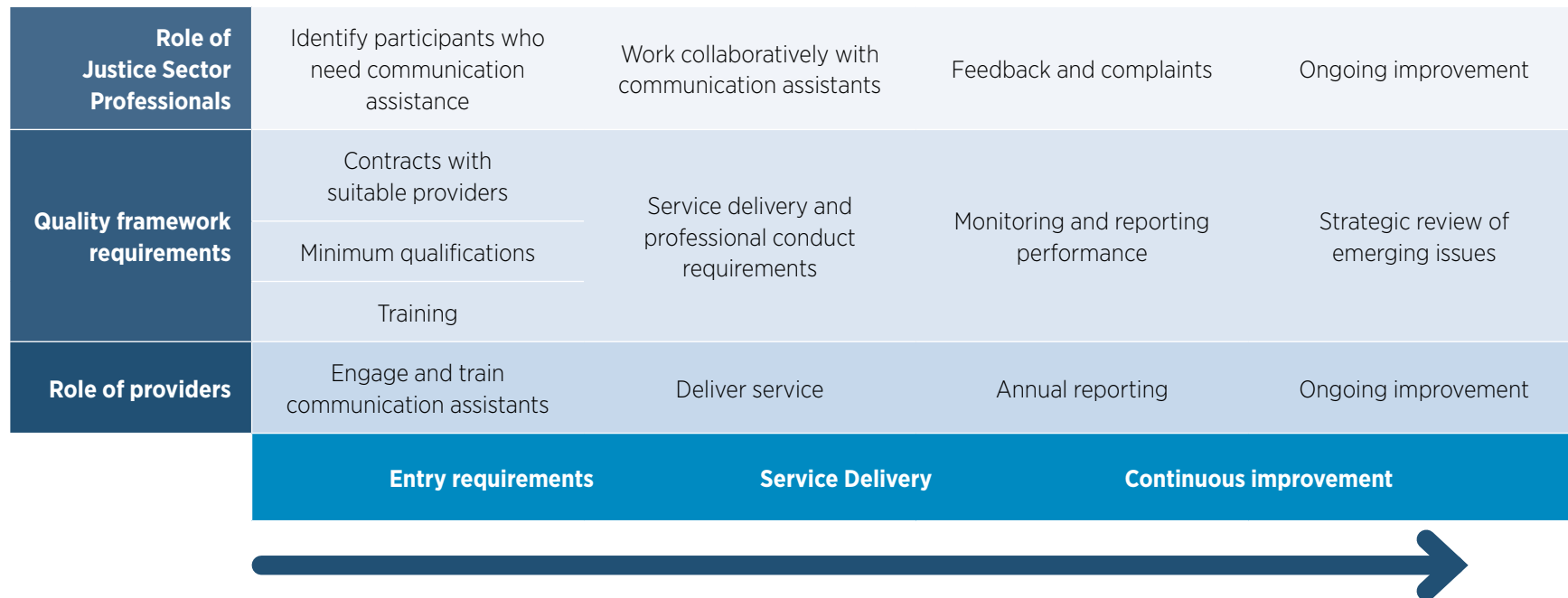
This quality framework primarily focuses on the use of communication assistance in criminal proceedings under the Evidence Act 2006 (the Evidence Act). Many aspects of this quality framework will also be applicable to civil proceedings and should be used as a guide to the use of communication assistance in such cases.

The quality framework does not cover the following:

- The communication assistance service used by Oranga Tamariki. Oranga Tamariki has its own policies and procedures for communication assistance to assist a child or young person to participate and express their views in family group conferences and other out-of-court parts of a court proceeding that it is responsible for.
- Use of the communication assistance by the Police. Police may engage communication assistance if a need arises (for example, a witness has a disability) and does so under its own processes. In addition, the Police use specialist witness interviewers to facilitate communication with children and adults during police investigations.
- Interpreters.

Quality framework overview

Figure 1: Quality framework overview



How this document fits with other resources

The primary audience for this document is communication assistance providers and the CAs they employ or contract to provide communication assistance in court proceedings. It will also be used by the Ministry and court staff and legal and justice sector professionals to guide the operation of the communication assistance service.

The Benchmark website (benchmark.org.nz) provides guidelines and other resources about communication assistance including relevant case law.

The Ministry's outcome agreement for communication assistance requires providers to deliver services in line with this quality framework.

This is a living document and will be updated over time.

1.3 Legislative framework and scope of the service

The communication assistance service aims to achieve equal access to justice as envisaged in the:

- Tiriti o Waitangi
- New Zealand Bill of Rights Act 1990
- Human Rights Act 1993
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
- United Nations Convention of the Rights of the Child (UNCROC)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The use of communication assistance is provided for in the Evidence Act. CAs are appointed under section 80 of the Evidence Act to act as communication specialists in court proceedings. See Appendix A for the relevant provisions in the Evidence Act.

Court participants who can use communication assistance

Communication assistance is available for defendants and witnesses in criminal cases. Defendants are entitled to communication assistance in accordance with the provisions in the Evidence Act to enable them to understand the proceedings and to give evidence.

Witnesses are entitled to communication assistance under the Evidence Act but only to enable them to give evidence³. A witness means a person who gives evidence and is able to be cross-examined in a proceeding. A witness may be a complainant (victim), defence witness, or a prosecution witness.

The Evidence Act also entitles witnesses in civil cases to communication assistance.

³ Evidence Act 2006, section 80.

Courts where communication assistance can be used

The provisions about communication assistance affect those courts and tribunals to which the Evidence Act applies. This may include the Supreme Court, the Court of Appeal, the High Court and the District Court. The District Court includes the Family Court and the Youth Court.

Definition of court proceeding

Communication assistance can apply to criminal or civil proceedings. The judge may direct what kind of communication assistance is to be provided.

The court proceeding encompasses the period from the start of the case (filing of a charging document or statement of claim) until its conclusion. While not intended as an extensive list, communication assistance may be directed by a judge to help participants:

- instruct their counsel and to make informed decisions about how their defence is conducted
- participate in any proceeding conducted in a court or in any application to a court connected with a proceeding
- participate in the preparation of a pre-sentence report or a restorative justice conference.

If, as part of a court proceeding, the participant is being assessed under the Criminal Procedure (Mentally Impaired Persons) Act 2003, and/or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR), a judge has the ability to direct a CA to help the health assessor, or specialist assessor, determine if communication assistance could help the participant to understand the court proceedings.

Understanding the role of communication assistance

Communication assistance is available for participants who would be otherwise unable to effectively communicate with their lawyer or understand and answer questions in a court environment. While a participant does not need to have a clinically diagnosed disability to access the service, many participants who need communication assistance have:

- an intellectual or learning disability
- autism or are neurodiverse
- a brain injury
- are experiencing mental distress
- have under-developed language or communication skills.

The service is available for children, young people and adults who need assistance to communicate in the court environment.

CAs are specialists in assessing a participant's communication abilities and identifying strategies and tools to improve their ability to understand what is happening and be understood when answering questions. CAs use their specialist skill to facilitate communication between the court and the participant by using tools such as simple plain language questions and visual aids.

It is not the CA's role to give evidence (as an expert witness) in a case in which they are providing communication assistance. They cannot give an opinion on a participant's accuracy, reliability or competence.

The CA is engaged by the court to facilitate communication. CAs do not have a role in advocating for the participant, and do not act as a support person other than what is required to assist the participant to communicate to the best of their ability.

The relationship between communication assistants and interpreters

CAs are not interpreters. The interpreter's main task is to interpret statements, evidence, and legal exchanges for those who find it hard to understand or respond in English. Interpreters ensure participants can communicate by converting what the participant, court staff and legal professionals say in English to the participant's preferred language and vice versa. Some participants may require communication assistance and an interpreter to facilitate communication if their needs go beyond interpretation between languages.

1.4 Roles and responsibilities

Justice sector roles and responsibilities for communication assistance

A range of people have a duty to ensure that the communication assistance service effectively and equitably increases access to justice for vulnerable participants.

The Ministry is responsible for:

- setting operational policy and overseeing that services are delivered
- monitoring the quality of service delivery, demand for the service, equitable service access, service coverage, and budgetary impacts
- liaising with the judiciary, counsel, Police, Oranga Tamariki, the Department of Corrections and other government agencies
- management of communication assistance referrals and payment
- operational advice.

The judiciary is responsible for:

- approving the use of communication assistance in court proceedings
- directing what type of communication assistance will be provided, the scope of the assistance and any limitations on this
- setting training priorities through the Institute of Judicial Studies.

Communication assistance providers are responsible for:

- delivering communication assistance services in line with Ministry requirements
- engaging with participants and their whānau in a culturally safe way
- working collaboratively with other professionals involved in the case including interpreters, counsel, psychologists and court staff
- supporting ongoing quality improvement and service development improvements
- providing ongoing professional development for CAs
- managing all employment and contracting arrangements required to deliver the service.

Legal counsel, Police and police prosecutors are responsible for:

- being aware of the communication assistance service and when to use it
- initiating applications for communication assistance as required
- working with CAs to arrange assessments and attending communication assessments
- implementing the judge-directed special measures before and during trial to ensure participants can understand the court process and evidence and answer questions in court.

Other professionals and people involved with the participant (including lay advocates, forensic health nurses, social workers, whānau, court victim advisors, youth justice coordinators and other professionals in the justice sector) are responsible for:

- being aware of the flags that can indicate communication assistance may be required
- bringing the potential need for communication assistance to the attention of the participant's counsel or officer in charge
- supporting CAs to find out more about the participant's communication abilities
- acting as support people, or a responsible third person, during communication assessments where appropriate.

Qualifications and training

2

This chapter sets the required professional qualifications and training for CAs.

2.1 Who can provide communication assistance?

To be eligible to deliver communication assistance in New Zealand courts, a person must:

- a) be employed or engaged by a communication assistance provider that holds a current outcome agreement with the Ministry to provide communication assistance in New Zealand; and
- b) have a professional qualification as a speech-language therapist, psychologist, occupational therapist, mental health specialist nurse, or specialist teacher; and
- c) have a current annual practising certificate with the relevant New Zealand governing/professional body; and
- d) hold a current membership (or become a member within six months of beginning training as a CA), of the relevant professional body; and
- e) complete, or be working towards completing, Ministry endorsed communication assistance training modules.

Communication assistance providers will engage CAs who can demonstrate:

- a) at least three years' full-time equivalent work experience⁴ that involved assessing and improving people's communication
- b) competency in working in at least one of the following areas: child development, speech and language difficulties, intellectual disability, acquired brain injury, physical disabilities, developmental disorders, mental health, complex trauma or other communication needs
- c) expertise in the assessment of communication capacity in children and/or vulnerable adults
- d) a detailed knowledge and understanding of the nature and impact of trauma (or the ability to quickly acquire such knowledge and understanding)
- e) high level communication skills including the capacity to provide clear and concise written and verbal advice to specialists and non-specialists, and the ability to engage in effective and positive interactions with a broad cross-section of people, including legal professionals
- f) sound judgment and the appropriate exercise of discretion
- g) high levels of personal integrity and the promotion of high standards of behaviour.

⁴ Any current CA who does not have three years' work experience at the time of publication of this quality framework does not need to meet this requirement. This requirement applies to all new CAs engaged after the publication of this document.



If communication assistance providers wish to engage a CA with skills outside of these requirements, they must discuss this with the Ministry. The Ministry may approve appointment of CAs with alternative skills and experience on a case by case basis.

Appendix B sets out specific requirements for each professional group's qualifications and professional membership or registration and regulatory framework.

2.2 Training

The Ministry is supporting development of communication assistance training modules that are mandatory for all CAs working in New Zealand courts. The training modules cover the foundation learning needed to work as a CA in New Zealand courts.

In addition, communication assistance providers will have their own induction, mentoring and training programmes that they provide for CAs. The Ministry may make additional training modules available from time to time.

As a CA works through training and gains experience, they can advance from trainee CA to CA, supervising CA and then lead CA. Progression through the levels is assessed and approved by the CA's employer or communication assistance provider to which they are contracted.

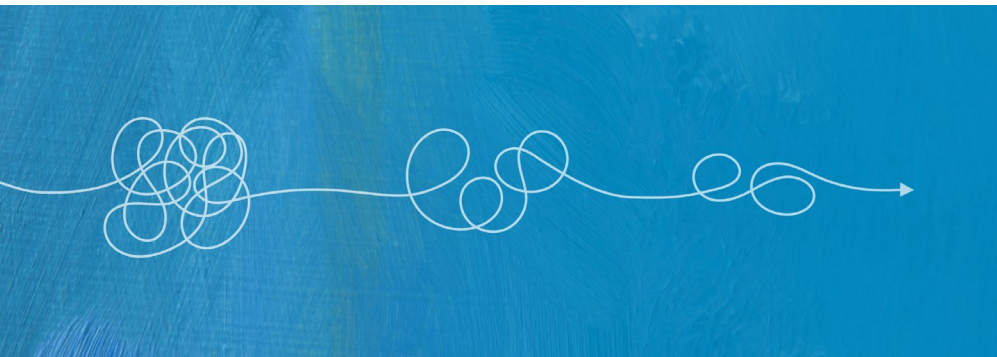
- Trainee CA – works under supervision as they complete training and gains experience
- CA – has completed training and has the skills and experience to work without supervision
- Supervising CA – has sufficient experience to mentor and train others
- Lead CA – has expertise in a specific area of communication assistance and responsibility for disseminating best practice in areas of expertise across the workforce.

The Ministry (or its delegate) will review each communication assistance provider's training and induction procedures at least every three years to ensure they are effective. Review of training and induction is likely to be at least annual during the first three years of implementation of this quality framework and will take a continuous improvement approach.

The Ministry and the communication assistance provider will work together to address any issues that are found on review, and to share good practice with other providers.

2.3 Police vetting and criminal history checks

It is the communication assistance provider's responsibility to comply with any obligations under the Children's Act 2014, and to ensure that CAs providing services to the Ministry are police vetted on employment, and have regular safety checks every three years.



Professional conduct

This chapter sets out the conduct the Ministry expects of all CAs.

Communication assistance providers must ensure that any CA they employ or contract to provide communication assistance in court proceedings is aware of the professional conduct expected of them.

If a matter relating to professional conduct arises, the CA must raise any issues or matters requiring clarification with their

employer/communication assistance provider to which they are contracted to in the first instance.

Local Court Registry Officers can provide guidance on appropriate professional conduct if the situation is unclear. The Court Registry Officer will liaise with the Ministry communication assistance contract manager for advice as required.

3.1 Conduct expected of communication assistants

3.1.1 Personal conduct

Disclosing a conflict of interest

A conflict of interest arises when a person's independence, objectivity or impartiality can be called into question. A conflict of interest may occur if a CA has:

- any personal knowledge or involvement with the case
- personal involvement with the participants or other people involved with the case such as a lawyer
- an appearance or perception of a conflict of interest.

An example could be assisting in a hearing where a witness is a relative or close personal friend of the CA.

A CA must address any actual, potential or perceived conflicts of interest in a transparent way.

Where possible, CAs must disclose any known conflict of interest to the Court Registry Officer before confirming availability for a case. If the CA becomes aware of a conflict of interest after taking the case, they must talk to the Court Registry Officer or the judge who will work with them to determine whether they can continue with the case.



Being impartial

A CA's primary responsibility is to the court. The CA's responsibility to the court overrides their duty to the person they are assisting, or to other people involved in a case. They must not act as an advocate or give legal advice to participants.

A CA must not interfere with or prejudice the independence of the judiciary by:

- attempting to involve, lobby or influence individual judges about decisions or matters that are the responsibility of the Ministry or the judiciary (except where such communication is required to deliver the services a CA is providing)
- behaving inappropriately with the Judiciary, such as attempting to discuss with a judge the details of a case, unless required to do so for work purposes
- having unnecessary contact with participants, jurors, and parties to the case, including their families/whānau and lawyers. This should not limit appropriate contact, such as what's needed to adequately prepare for an assignment.

The CA must not express a personal opinion on the case before the court. They must set aside any personal, religious, or cultural beliefs or circumstances that may influence their impartiality. If a CA considers their objectivity may be compromised, they must withdraw from the assignment.

Keeping information private and confidential

CAs have a duty to use information only for its intended purpose and comply with all legislative requirements, including those set out in the Privacy Act 2020 and the Oranga Tamariki Act 1989 (in particular s37, s38 and s438).

The Ministry's outcome agreement with communication assistance providers requires the providers to manage information in a way that is consistent with legislation and the Ministry's Privacy Guidelines for providers of Justice services ([Privacy Guidelines for providers of justice services](#)).

CAs must keep all details relating to a case confidential. There may be a "suppression order" in place that restricts publication of certain details (for example, the participant's name or evidence given at trial). CAs could face legal action (including fine or imprisonment) if they breach a suppression order by disclosing any of the suppressed details.

CAs may hear legally privileged information when they facilitate communication between a participant and their counsel. The CA must be aware of what information is subject to legal privilege and ensure they do not intentionally or unintentionally disclose the information that they hear. Where a CA is assisting both defence counsel and the prosecution to communicate with the same participant, they must ensure that information about the case or the questioning strategy heard when working with defence counsel is not shared with the prosecution and vice versa.

A CA may disclose information relating to a case if ordered to by a court. The CA should be mindful that section 37 of the Oranga Tamariki Act prevents disclosure of information about the proceedings of a family group conference.

If a CA is unsure whether a person requesting information is lawfully entitled to receive that information, they should ask the Court Registry Officer for written confirmation that they can release information.

The communication assistance provider must have written policies and procedures for storing, archiving and disposing of records. It must demonstrate that all case files, both current and closed, are stored securely; archiving and disposal processes are in keeping with relevant legislative requirements; and when appropriate, information is disposed of securely.

Before disposing of material, the CA should consider whether it could be required for any future appeal.

Any notes a CA takes must be kept secure to ensure information about the case remains confidential. Information can be kept secure by:

- using a password or encryption on their computer
- not leaving confidential documents where other people might see them or steal them (for example, leaving them in a car or on public transport)
- not discussing case details in public places such as court waiting rooms
- making phone calls or having discussions about a case at a time and a place where they will not be overheard.

If a CA thinks someone who is not entitled to, has seen documents or information relating to a case, they must:

- try to get the documents or information back, or stop the information spreading
- evaluate the risk of the breach – has the information been recovered or destroyed, how many people’s information is involved, how sensitive is the information, could anyone be harmed by the misuse of the information?
- report the breach to the Ministry as soon as practicable after becoming aware that a notifiable breach has occurred, and work with the Ministry to investigate the incident and mitigate any potential harm
- analyse what caused the breach and take steps to prevent it happening again.

Sharing information

When considering whether to share information, communication assistance providers must act in accordance with the Ministry’s Privacy Guidelines for providers of justice services, the Privacy Act 2020 and any other relevant obligations.

It is best practice to seek the person’s consent before sharing their information, but this is not always necessary if immediate action is needed to keep someone safe or uphold the law.

Sharing of court information is at the discretion of the court.

Information is not to be used for personal gain

A CA must not take advantage of knowledge obtained when acting as a CA or through access to court information, facilities or privileges, for their own personal gain or to benefit another person.

If a CA feels their role as a CA is being misused by any party, they must inform the Court Registry Officer.

Unauthorised payments or gifts must not be accepted

The Ministry will authorise payment for the communication assistance provider's services. A CA must not accept any other payment (remuneration), gift or gratuity.

If anyone offers to pay a CA (outside of the normal payments process) or give a CA a gift, they must inform the Court Registry Officer.

Protecting the reputation of the court

CAs must exercise good judgement based on integrity and honesty in every action taken when representing the court and in all situations where their actions could reflect on the court.

It is important that CAs respect other professionals and the roles they are required to do. If a CA disagrees with a decision of another professional, it should not be debated in public or in front of the participant and their whānau.

CAs are expected to act lawfully during work and in their private life. Any actions that break the law can harm the reputation of the communication assistance provider.

CAs must inform their employer/communication assistance provider to which they are contracted, and the Ministry, if they are subject to any Police investigation, charged with or convicted of any criminal offence (except an infringement offence) or become subject to any court order in relation to a criminal matter.

All breaches and alleged breaches of the law by CAs are of concern, particularly where they involve dishonesty, breaches of trust or violence.

Respect for participants and cultural safety

Many people who require communication assistance may face stigma and discrimination. CAs should behave in a manner that respects the participant's dignity. All participants must be treated with respect regardless of their mental health status, disability, age, cultural or ethnic identity, socio-economic status, language, religious or spiritual belief, sexual orientation or gender identity.

The CA must engage in ongoing self-reflection and self-awareness of their own views and biases to understand how they can impact on the delivery of their work. The CA must commit to acknowledging and addressing any of their own biases, attitudes, assumptions, stereotypes, prejudices, structures and characteristics to create a culturally safe environment for all participants.

Ethics

CAs must comply with the Code of Ethics or similar issued by their professional body or registration body.



3.1.2 Court protocol

Conduct in court

When necessary, a CA must bring matters of immediate concern to the attention of the court at the time they occur. The manner in which this is done needs to be agreed with the judge before the hearing or trial.

A CA should be mindful not to unnecessarily impede or obstruct the pace and flow of court proceedings. Where possible, make use of appropriate pauses and breaks in the court process to raise any matters of concern about the participant's communication of evidence or their understanding of court proceedings.

The CA should also be mindful not to disclose information about the participant and their assistance needs where the jury might overhear them.

Dress standard is formal

It is expected that CAs will maintain the appropriate dress standard to reflect the function of the court. No hats, sunglasses, jeans or casual clothes are to be worn.

Arrive on time

CAs must arrive on time for the start of the hearing. This includes returning from breaks on time. Please arrive at least 30 minutes before the hearing is scheduled to begin. More time may be required if the CA is to assist counsel before the hearing.

Talking to a judge

All judges of the District Court and Senior Courts are addressed as "Your Honour", "Sir" or "Ma'am".

A CA must not interrupt the judge when they are speaking.

Unless told not to, a CA must stand when speaking to a judge, or when they are spoken to by a judge.

Referring to a judge

A judge of the High Court, Court of Appeal, and Supreme Court is referred to as "Justice" followed by their surname.

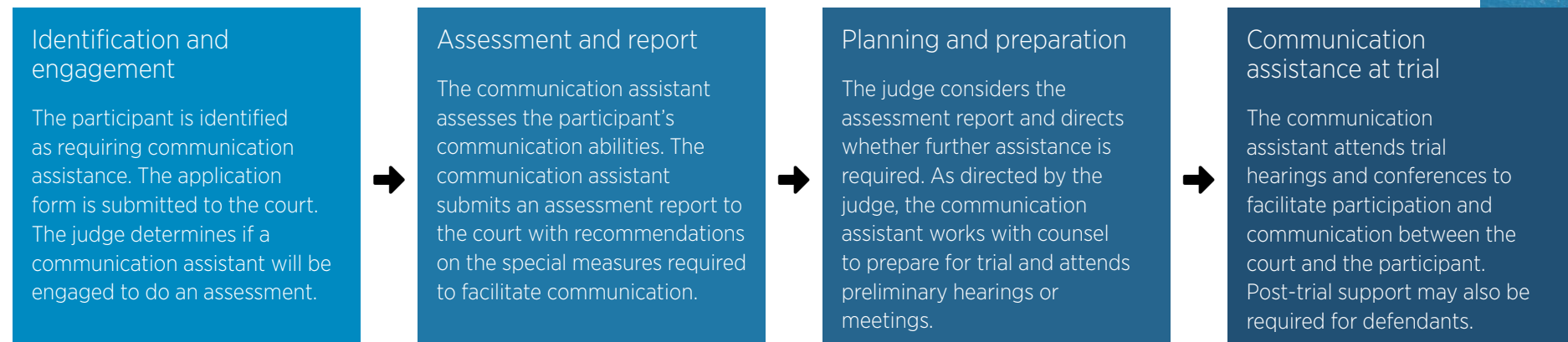
A judge of the District Court or other court (such as the Employment Court or Environment Court) is referred to as "Judge" followed by their surname.

Providing communication assistance

This chapter sets guidance on delivering the communication assistance service.

4.1 Communication assistance service overview

Figure 2: Key steps in communication assistance service delivery



4.1.1 Principles for communication assistance

The communication assistance service is intended to facilitate equitable access to justice for all participants, regardless of their communication abilities.

The communication assistance service should be delivered in a way that:

- enhances a participant's mana through recognising and respecting their abilities and contributions
- supports a participant's rangatiratanga (self-determination/autonomy) by ensuring they are seen, heard and able to meaningfully participate in court proceedings
- enhances fairness by reducing barriers to effective communication between the participant and the court.

4.2 Identification and engagement

4.2.1 Who identifies communication assistance needs

Judges, Police, prosecutors, counsel, social workers, defendants, witnesses, whānau, forensic health nurses, court victim advisors, victim support, youth justice coordinators, forensic health nurse professionals, nominated persons, lay advocates and any other professionals in the justice sector have a role in recognising the need for communication assistance.

Anyone who considers that a participant may require communication assistance should tell defence counsel (for defendants and defence witnesses) or the officer in charge (for prosecution witnesses). Defence counsel or the officer in charge can then complete the application process as set out in section 4.2.4 below.

For self-represented defendants, the defendant or any amicus curiae, standby counsel or other professional associated with the case can identify the need for communication assistance and tell the court that they expect an application should be made. The Court Registry Officer could complete the application form if necessary.

The need for communication assistance can be identified at any time during a proceeding, but early is best.

A participant does not need to have an existing “diagnosis” or known condition to be eligible for communication assistance. The main criteria to be met when making an application for communication assistance is concern that the defendant may struggle to understand the proceedings and comprehend and respond to questions without assistance, or that a witness may struggle to give evidence without assistance.

A participant may have been involved in the justice system several times. It cannot be assumed that because a participant is familiar with the justice system that they can participate effectively without a CA. Communication assistance needs may not have been available or identified previously.



4.2.2 Investigating and sharing existing information about a participant's communication assistance needs

Before making an application for communication assistance, defence counsel, or the officer in charge, may wish to ask the participant, their whānau, or social worker about the participant's history, educational history and achievement or previous assessment or diagnosis of neurodiversity, disability or mental health condition. Any relevant information can be included in the application form as a summary of the participant's communication abilities.

Existing information (such as previous assessments or diagnosis) can be shared with the participant's consent or their parent or guardian or permanent caregiver's⁵ consent if they are unable to give it themselves.

The absence of any previous reports or diagnosis does not mean that the participant does not have a communication assistance need, just that their needs may be undetected.

Previous assessment reports can be shared between courts at the discretion of the court. This includes previous communication assessment reports, assessments of a participant's fitness to plead or stand trial and reports from Regional Youth Forensics or Forensic Mental Health.

When the participant is involved with multiple matters or has used a CA before

In the event that a participant is involved in more than one case at a time, but only has communication assistance for one case, counsel or the CA (with the participant or their guardian's consent) may notify the Court

Registry Officer who will seek the judge's direction on whether counsel or the judge involved in the other case(s) should be made aware of the participant's communication assistance needs.

If a participant has worked with a CA in previous matters, previous assessment reports and other useful information related to communication can be shared with the relevant parties in the current matter.

4.2.3 When to make an application for communication assistance

An application for communication assistance should be completed when court proceedings involve a defendant or witness who presents with objective and/or subjective grounds.

"Objective grounds" are when a participant is aged under 12 years, has a known condition that affects their communication abilities, or a health professional suspects communication assistance may be required. See Figure 3 for more information.

"Subjective grounds" require defence counsel or the officer in charge (alongside others working with the participant) to look for any comprehension, expression, behavioural, sensory or literary flags that may indicate that an application for communication assistance is necessary. A participant may present with one or more of these flags. See Figure 3 for more information.

⁵ Guardian is defined in section 15 of the Care of Children Act 2004 and a permanent caregiver is defined in section 2 of the Oranga Tamariki Act 1989. Consent to share private information may also be given by another person with the legal authority to do so, such as a welfare guardian as defined in section 2 of the Protection of Personal and Property Rights Act 1988.

Figure 3: When to make an application for communication assistance

Objective grounds

There are relatively clear reasons that the participant may require assistance.

The participant:

- is a child aged 12 years and under
- has a known or suspected disability or impairment or is neurodiverse (for example, has autism, a brain injury, dyslexia, Fetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, or other condition that affects their ability to communicate)
- has a mental health condition, dementia, is experiencing mental distress, trauma induced anxiety or stress that impacts their communication
- has a recent psychiatrist's or psychologist's report, including a Fitness to Plead Report or a Mode of Evidence Report that indicates communication difficulties, intellectual disability, poor processing speed, high suggestibility or high stress
- has hearing impairment or is deaf or has a visual impairment or is blind.

Subjective grounds

The reasons for making an assistance application are less clear and require those working with the participant to recognise and respond to the flags below.

Comprehension flags

The participant:

- doesn't appear to understand questions or is confused by what is happening
- can't repeat back what is being said in their own words or follow instructions
- focuses on irrelevant small points or expresses strange ideas
- doesn't understand common everyday expressions
- is eager to please/says 'yes' quickly and frequently without seeming to understand.

Expression flags

The participant:

- gives vague, un-detailed responses to questions or is off the topic
- repeats what was said to them, or parts of what was said
- forgets or contradicts their previous accounts
- takes a long time to respond, frequently reformulates their sentences
- talks too much or not enough – uses short, simple sentences or rambles
- has no speech or limited speech or is difficult to understand
- uses signs and gestures or augmentative (low or high technology) methods to communicate.

Behavioural and sensory flags

The participant:

- does not make eye contact, appears disengaged or physically withdrawn, covers head, eyes or ears with hands or clothing, or fidgets
- gives inappropriate or unusual emotional responses such as smiling, laughing, humour or cockiness
- appears to have a short attention span, is easily distracted or restless when listening
- says they do not remember or "I don't know" a lot or repeatedly changes the subject
- is sensitive to light and noise, including background noise, lots of activity and people
- is easily frustrated, very defensive, verbally or physically aggressive or appears over-excited/exuberant.

Literacy flags

The participant:

- does not read or write well.

Other notes about making an application for communication assistance

There is no internationally agreed and consistent naming system for the wide range of neurodiversities and learning or intellectual disabilities that are present in our community. The conditions listed in Figure 3 and in the [application form](#) are not intended as a full range of conditions, names for conditions or flags that may lead to an application for communication assistance. The purpose of the service is to increase access to justice for vulnerable participants and communication assistance should be engaged for people who need assistance to understand and answer questions in court proceedings, regardless of their diagnosis (or lack of diagnosis).

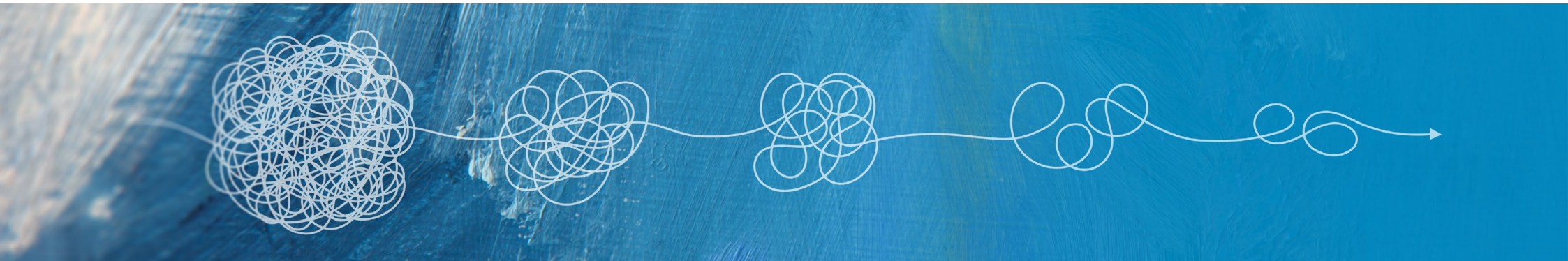
When considering whether to make an application for communication assistance, it is useful to consider the participant's life experience and risk factors that could lead to underdeveloped language and communication skills. This includes their educational history (for example if they left school early, moved schools frequently, or had poor attendance), if they have a history of transience, homelessness, involvement with Oranga Tamariki, trauma or experience of family violence (which is a known cause of brain injury and developmental delays).

Young participants are more likely to have difficulty in telling the court they are experiencing communication problems. Young participants older than 12 years do not automatically require communication assistance, but people working with young participants are encouraged to consider communication assistance, especially if the young participant has communication difficulties or has experienced trauma.

Some participants may require communication assistance and an interpreter to improve their access to justice. Interpreters are available separately for participants who have insufficient proficiency in the English language.

Communication assistance need not be provided to a defendant in a criminal proceeding if the judge considers that the defendant can sufficiently understand the proceeding; and if the defendant elects to give evidence, can sufficiently understand oral questions and can adequately respond to them.

Communication assistance need not be provided to a witness if the judge considers that the witness can sufficiently understand oral questions and can adequately respond to them⁶.



⁶ Evidence Act 2006, section 81.

4.2.4 Making an application for communication assistance

Applications for communication assistance should be made using the [communication assistance application form](#) and submitted to the court.

The application form ensures that the judge has enough information to determine whether to approve the assessment, and that the communication assistance providers have enough information to proceed with an assessment.

If the court requires a written notice of application for communication assistance, the application form can be used as, or submitted with, the written notice of application. When an oral application is being made, the application form can be provided to the court at the time the oral application is made, or any time ahead of the hearing where the oral application will be made.

For defendants, defence counsel is responsible for making the application. For witnesses, the officer in charge, police prosecutor or Crown prosecutor are responsible for making the application. The person making the application should let the participant (and their whānau if relevant) know that they are making the application.

In family and civil cases, applications for communication assistance can be made by the participant, their lawyer or directed by the judge.

For self-represented defendants, the defendant may apply for a communication assistance themselves, or a judge may appoint a CA. The court may also appoint an amicus curiae or standby counsel who could work with the CA to facilitate communication between the court and the self-represented defendant.

Engagement of communication assistance in court proceedings is at the judge's discretion. The judge also directs what type of communication assistance will be provided, the scope of the assistance, and any limitations on this.

In the event that a judge directs the use of communication assistance without an application submitted by counsel, the Court Registry Officer will complete the application form.

What to include in the application form

The application form includes a brief description of the charges – this allows the CA to ensure the assessment covers the information required (for example, names for body parts in sexual cases). In family and civil cases, include a brief description of the type of case.

The application form should not include any substantive information regarding the facts of the case (for example, the summary of facts). This is to ensure the communication assistance provider's assessment is neutral and impartial and that information relating to the case is not disclosed inappropriately.

The application form should include a summary of any relevant previous assessment reports or information that is available about the participant's communication abilities. Only health, education, development or communication related information should be included here. Information of the participant's educational history, literacy skills, involvement with Oranga Tamariki and whether the participant is receptive to using communication assistance is relevant information.

If the participant's iwi is known, include this information.

If a fitness to plead or stand trial assessment is also being requested or has been done, this should be identified on the application form. Where relevant, the CA will collaborate with the person doing the fitness assessment to share information as required and work out whether the assessments can be done collaboratively, or which assessment should be done first.

If a CA has been involved during a police interview, note this on the application form so the same CA can be appointed.

Keeping a witness's identity confidential

Where defence counsel wishes to call a witness, but do not wish to divulge the identity of their witness to the prosecution prior to the hearing, counsel should file the application form seeking approval for communication assistance on a without notice basis. It will then be for the court to determine whether, and if so on what basis, the application should be disclosed to the prosecution. The judge will usually respond to the without notice application by way of minute directing how the communication assistance recommendation is to be implemented.

Subject to the judge's directions, any assessment report will be shared only with defence counsel prior to the point at which the witness is called to give evidence. Once the witness is called to give evidence the assessment report is likely to be shared with prosecuting counsel.

If the CA assists the defence witness in court, and the prosecution opts to cross-examine the witness, the trial judge will determine how the CA can best assist the witness during cross-examination. This may include an adjournment to allow the prosecutor time to plan their questions with the CA.

Payment for communication assistance services

Communication assistance must be engaged only when a judge approves the use of communication assistance.

Impartiality and neutrality are central to the CA role; as such, communication assistance providers are paid by the Ministry for the services they provide to the court through a contractual arrangement.

No other payment method for communication assistance is permitted – this includes payment for communication assistance via legal aid, private payment or through a lawyer's disbursements.

Only communication assistance providers who hold a contract with the Ministry for communication assistance services can be engaged by a court to provide these services.

Legal aid grants for cases involving communication assistance

Legal aid lawyers working on a case where a CA has been engaged may apply for an amendment to grant if significant additional work is required. The additional work includes the time taken to work with the CA to attend a communication assessment, plan trial questions and other work to enable the participant to communicate effectively in court proceedings.

More information can be found in the Ministry's [Legal Aid Services Grants handbook](#).



4.2.5 When the communication assistance provider receives a referral

After an application for communication assistance is made and the judge approves the referral, the Court Registry Officer will send the communication assistance provider a copy of the application form. The application form serves as a referral for communication assistance.

On receipt of a referral, the communication assistance provider should check that their organisation has the required experience to assist the participant and is available on the key dates noted. If the referral includes substantive information regarding the case, the CA must contact the Court Registry Officer to discuss.

4.2.6 Responding to a referral

The communication assistance provider should email the Court Registry Officer to acknowledge receipt of the referral within one working day.

The communication assistance provider should respond to the Court Registry Officer to either accept or decline the referral within three working days of receiving the referral.

Once the communication assistance provider accepts the assignment, they should schedule the required dates into the organisation's scheduling system.

Where possible, the provider should take into account the participant's culture and specific communication difficulties when assigning a CA to a case. An appropriate match of culture and skills will support high quality and culturally safe service delivery.

Urgent referrals are not recommended but may be required in special cases. The communication assistance provider can agree timeframes for responding to urgent referrals on a case by case basis with the Court Registry Officer at the time of the referral.

The communication assistance provider can decline the referral if they do not have the available expertise, have a conflict of interest, or if there are any other circumstances that prevents their organisation from completing the assignment to a high standard.

Where a communication assistance provider declines a referral, the Court Registry Officer will be responsible for reallocating the assignment to an alternative provider.

Assigning multiple CAs to ensure separation of information relating to defence and prosecution

In some cases, there may be multiple participants that require communication assistance. To avoid inadvertent disclosure of legally privileged information, and to ensure that the CA is able to assist each participant to the best of their ability, different CAs may need to be assigned for different participants.

In summary:

- where more than one defendant in the same case requires communication assistance, different CAs should be assigned to each defendant
- one CA should not assist participants for the defence and prosecution in the same matter
- in scenarios where the same CA may assist more than one participant, two or more CAs may be necessary to ensure the CA does not get too fatigued and can best assist all the witnesses.

Figure 4: When to assign different or the same CA to assist multiple participants

	Defendant	Defence witness	Crown/prosecution witness
Defendant	Different CA	Different CA	Different CA
Defence witness	Different CA ⁷	Same CA	Different CA
Crown/prosecution witness	Different CA	Different CA	Same CA

CAs who are working on the same case (one assisting a participant for the prosecution, and the other assisting a participant for the defence), must not discuss the case, access or share information about the participants or provide peer review of each other’s work. This includes where both CAs are engaged by the same communication assistance provider.

In the event that a participant gives evidence in court and is cross-examined by opposing counsel, the same CA may assist the participant when giving evidence and being cross examined.

When a CA has been involved with police interviews

If a CA has been involved with the police investigation for the case, they can continue to assist the same participant through the court proceedings. A CA that has been involved with the defendant or defence witnesses during a police investigation should not later assist a prosecution witness in the same case.

⁷ Two CAs are required in this scenario because the first CA needs to assist the defendant to understand the evidence being given by the defence witness, and the second CA needs to ensure the defence witness can give their best evidence.

4.3 Doing an assessment and preparing an assessment report

4.3.1 Assessment arrangements

Making initial contact

Once the CA has accepted the referral, they do **not** contact the participant directly to arrange the assessment session.

For defendants or defence witnesses, the CA should contact the defence counsel, youth advocate, youth justice coordinator, or youth justice social worker to arrange the assessment. For prosecution witnesses, the CA should contact the officer in charge.

For self-represented defendants, the CA should contact the amicus curiae or standby counsel (if they have been appointed). If there is no alternative, the CA can contact the self-represented defendant directly.

When the defence counsel, youth advocate, youth justice social worker or officer in charge arranges the assessment, they should explain to the participant that a judge wants them to meet with a CA and seek their agreement to involve a CA.

When setting up the assessment, the CA can ask the defence counsel or officer in charge additional questions about the charges and who is involved to ensure that they have enough information to do the assessment. This may include finding out more about:

- the nature of the charges
- whether there were single or multiple events
- where the event(s) happened
- if the event(s) are recent or historical
- topics to avoid during the assessment to avoid causing stress for the participant
- whether the participant is also being assessed for fitness to plead or stand trial.

Location of the assessment

The assessment session should take place in a formal setting. Locations to consider include:

- a meeting room at a court
- a lawyer's office
- a private room in a community facility
- communication assistance organisation offices or meeting rooms
- police interview suite, including those set up with couches and coffee tables to provide a more comfortable environment
- Oranga Tamariki facilities, which may include a specialised interview suite for children or meeting rooms that the participant is familiar with
- youth justice facility or prison (when the participant is being held in the facility).

Be mindful that the location of the assessment (especially police and court venues) could induce increased anxiety for the participant and decrease their engagement in the assessment process. If possible, ask the participant where they would be most comfortable to meet. Also consider

that transport or other costs might be a barrier for the participant or their whānau to attend the assessment, and seek to limit costs for the participant or their whānau.

It is not recommended that the assessment take place in a participant's home, school or workplace except in exceptional circumstances. This is because it is difficult to ensure that home, school and workplaces are free from distraction, and it is preferable that these places remain a "safe space" away from court matters. Exceptional circumstances may include when no other option is suitable or when the participant's disability or emotional state makes it difficult for them to easily access other locations.

If the assessment will take place at a youth justice facility or a prison, the CA will need to work with the defence counsel or youth advocate to make an application to the relevant agency to visit the facility and to get permission to use any equipment such as electronic devices.

Other people to be present

Responsible third person

The assessment should be done with the CA, the participant and at least one other responsible person present.

For complainants or prosecution witnesses, the responsible third person could be a police officer, police representative or forensic interviewer.

For a defendant, the responsible third person could be defence counsel, a youth justice coordinator (for a young defendant) or another person selected and approved by defence counsel.

For defence witnesses, the responsible third person should not be anyone associated with the prosecution or defence counsel (this is to avoid the risk of defence counsel becoming a witness if information is disclosed about the case).

The third person is there to:

- monitor that the substance of the case is not discussed
- ensure that the CA is not required to be a witness in the case if new information is disclosed during the assessment
- follow up on information about the case that may be disclosed during the assessment (for defendants, any follow up should be approved by defence counsel)
- help gather historical information relating to the participant's communication skills from whānau or other support people if appropriate
- help ensure everyone's safety during the assessment.

Being present at the assessment will assist the officer in charge or defence counsel to gain further insight into the participant's communication difficulties and how they should adapt their questioning.

Should the officer in charge or defence counsel not be present, then the CA assessment should be audio or video recorded in full. This allows for verbatim recording of the assessment and any information that may be disclosed. If the assessment is to take place in a secure facility, the CA will need to arrange permission to bring in recording equipment. See also section 4.6 of this document.

If there are issues arranging assessments or having a suitable third person present, ask the Court Registry Officer to seek guidance from the court.

Support people

The participant should be encouraged to bring a support person of their choice to the assessment.

The support person should not also be a witness in the case. For child witnesses where their parent/guardian is also a witness or defendant, an alternative support person should be used where this is possible. In cases where there is no other support person available, the CA must audio or video record the assessment and be clear to the parent/guardian that their role is to support and observe only.

For young defendants, a youth justice coordinator, youth justice social worker, other Oranga Tamariki staff or a lay advocate would be appropriate support people if parents, guardians or caregivers are unable to attend.

Support people may be able to share useful information about the participant's existing successful communication strategies.

Introduction letter

Once the assessment appointment is made, the CA can send a letter of introduction to the participant via the defence counsel or officer in charge.

The letter should tell the participant:

- what the assessment is for
- what will be done at the assessment
- the date, time and location of the assessment
- that the CA will not discuss the reason why the participant is involved in a court case.

Be mindful that the letter should be easy for the participant to read and understand.

Introductory letters can also be sent to both counsel, the officer in charge or other parties involved in the case so that they understand the CA role.



4.3.2 At the assessment session

Introductions and consent

The CA should be mindful of tikanga or other culturally appropriate practices when meeting the participant and their support person. Whanaungatanga is built by establishing good rapport with the participant. The CA promotes the concept of rangatiratanga by ensuring the participant fully understands what is happening.

When the CA meets the participant, they explain their role, how they might be able to help them and others involved in the case, and what they will do during and after the assessment. The CA informs the participant that they cannot discuss details of the legal case with the CA.

The CA must seek the participant, or their support person's, informed written consent to conduct and record the assessment and share the assessment report with the court. Once received by the court, the assessment report will most likely be shared with the prosecution and/or defence lawyers as appropriate.

The CA must explain that they may share private information in accordance with the Privacy Act.

The CA should explain to the support person that their role is to support and to observe, but not interact in the formal part of the assessment. The CA can discuss the participant's communication abilities with the support person.

It is the participant's right to not consent to do the assessment or not cooperate. The CA is appointed by the court to increase access to justice for the participant. In the interest of providing the court with the information that they need to communicate with the participant, the CA can write a short report to the court based on the limited observations they have made. This report can be supported by information provided by whānau or guardians if available.

Keeping notes or recording the assessment

The CA must keep detailed notes of the assessment and preferably, it should be audio or visually recorded (with the participant or their guardian's consent) to keep an accurate and detailed record. If the participant or their guardian does not consent to record the assessment, the CA should make detailed notes.

Notes or recordings made for the purposes of preparing an assessment report deal only with the CA's assessment of the participant's language and communication abilities. They do not form part of the court record and do not need to be included with the assessment report. These notes and the recording of the assessment session will be stored in accordance with the Privacy Act, and the communication assistance provider's contractual obligations with the Ministry.

What the assessment should cover

The CA will carry out a specialist analysis of the participant's communication abilities and difficulties. The assessment is not a formal diagnostic assessment but will aim to understand how the participant is likely to function in justice contexts in relation to their ability to understand and interact. It will also assess how to best facilitate communication with the participant in the court proceedings.

The CA should ensure that the assessment itself does not make the participant feel bad about their communication abilities or make them worry that they have a communication problem that they were previously unaware of.

The assessment session will usually take around an hour to an hour and a half. For some complex communication issues, it is recognised that multiple sessions may be needed.

Communication assessment sessions should (at a minimum) contain tasks for analysis of the participant's:

- attention, listening and concentration
- understanding of spoken language and ability to respond to oral questions
- spoken expression for example, the participant's vocabulary use, sentence length and structure, ability to recount or describe events
- speech sound intelligibility, including what strategies improve this and use of non-verbal communication
- reading and writing and response to visual aids
- management of stress, anxiety and fatigue.

If the case involves sexual violence and violence charges the assessment should include evaluation of the participant's vocabulary for body parts, actions and understanding of prepositions.

For defendants, the CA could consider assessing if the participant understands and can use legal terms that would be common for a lawyer to bring into a discussion: for example, "charged", "deny", "victim".

At the end of the assessment, the CA summarises for the participant the information they will be writing in their report for the court.

To complete the assessment, with the participant's or their guardian's consent, the CA may also gather other information such as the participant's social, health, literacy skills, medical background, level of education and development. The court, lawyer and officer in charge can help the CA access existing information where this is available and can be shared.

The CA can engage with the lay advocate (if appointed for a young participant involved in the Youth Court) to ensure that any relevant cultural or language factors are identified.

4.3.3 Sharing the preliminary assessment

If counsel urgently needs assistance communicating with the participant, a CA may give preliminary advice and may assist counsel before completing the formal assessment report.

Preliminary advice can be given in a preliminary written report and/or an oral briefing. The preliminary report/briefing can inform the planning for, and conduct of, pre-trial interviews, including lawyers advising and taking client's instructions.

A preliminary report may also be necessary if there are additional steps required before a full assessment can be completed – for example, someone with hearing issues may need a full audiological assessment and hearing aids fitted before the assessment.

4.3.4 The assessment report

The CA will write an assessment report for the court with recommendations on how to facilitate communication with the participant to the fullest possible extent.

The assessment report should be set out in a way that assists the lawyers and the judge. It should be clear and concise. The CA should assume that the report reader will have had little or no training on developmentally appropriate questioning, or how to communicate with vulnerable witnesses or people with learning disabilities. The assessment report recommendations should be specific and well-explained. The report needs to clearly outline what should be done and why.

The assessment report:

- a) includes a statement about the CA's neutrality and independence and ultimate responsibility to the court
- b) contains only information that is relevant to the assessment report and not personal data or information about the participant that other parties should not already know
- c) includes a summary of the assessment process
- d) explains the conclusions about the participant's functional communication abilities, giving examples of actual communication
- e) outlines the participant's communication assistance needs in the context of the demands on communication that are likely during the upcoming proceedings (for example, the demands of attending a hearing to determine variation to bail conditions)
- f) comments on the extent to which various adaptations (special measures) in court or use of support tools will likely be effective in establishing effective communication
- g) identifies specific risks for miscommunication and what should be done to prevent that
- h) makes recommendations that cover:
 - i) whether a CA is necessary at court to facilitate a participant's communication and how the CA should operate at trial (for example, whether they sit next to the witness)
 - ii) special measures or accommodations (besides a CA being present) that are necessary at trial to facilitate communication with the participant
 - iii) how to modify questions and if the CA should help counsel prepare questions
 - iv) any other arrangements or accommodations which are necessary to assist effective communication, such as the witness meeting the judge or counsel before trial, or how breaks and the timing of court sessions might be managed
 - v) how a participant's skills relating to concentrating, managing sensory stimuli, and how fatigue, health and emotional wellbeing should be managed.

The assessment report provides recommendations in a format that enables special measures/accommodations to be checked off at the pre-trial hearing/directions conference/ground rules hearing.

Once completed, the CA sends the assessment report to the Court Registry Officer for distribution to appropriate parties, including a youth justice coordinator where the court has directed a family group conference.

The judge will use the assessment report to inform their decision on whether communication assistance is required and what the scope of that assistance will be. There may be cases where the assessment report concludes that communication assistance is not likely to help the participant communicate during court proceedings.

If the assessment report does not recommend that a CA attend court proceedings, it will usually provide the judge and both counsel with enough information to be able to assist the participant appropriately.

If it could assist the participant in future communications, the CA may prepare a "communication passport" or similar that can be given to the participant to use in other circumstances. The communication passport provides a short summary of the participant's communication abilities and how other people can help them communicate more easily.

Addendum Reports

The CA may be asked by the court to complete an addendum to the original assessment report, particularly if the assessment report has become outdated or the participant's circumstances have changed since the initial assessment. The addendum report is not a critique of the original assessment report and should not be regarded as such.

Ideally, the same CA will do the addendum report. If this is not possible, the new CA can liaise with the original CA, then conduct their own brief assessment with the participant and write a report. Usually, only a short addendum is required.

4.3.5 After the assessment report is filed

Once the judge has considered the assessment report, the judge will direct whether further assistance is required. The Court Registry Officer will contact the CA to let them know what further involvement they will have in the case.

The CA may be asked to assist during the pre-trial phase (for example, to help a defendant in interviews with their lawyer or to prepare questions for a witness) and/or during and after a trial.

If the CA is not asked to assist in the case, they can request a copy of the court's decision to understand the grounds upon which this decision was made.

4.4 Planning and preparation for trial

4.4.1 Meeting with counsel

The CA, prosecutor and defence counsel (either together or separately) should meet to discuss the assessment report recommendations. The purpose of this meeting is to ensure both counsel understand how to facilitate communication with the participant.

This meeting takes place prior to trial. The court may consider adjournment to enable this meeting to take place.

For self-represented defendants, the CA will meet with the defendant and any amicus curiae or standby counsel that has been appointed.

Consultation on questions

Counsel should consult with the CA when planning their trial questions if the CA is assisting a participant who will be giving evidence. The CA can help counsel prepare the questions in a way that can best be answered by the participant. This can ensure the trial runs smoothly as the CA will not need to intervene as much.

The format of the questions will vary depending on the participant's communication abilities. Questions ought to be single concept and not include double negative. Avoid complex questions. If the CA knows that a defendant or defence witness will give evidence, they should not tell the prosecution. If the CA knows a prosecution witness will give evidence, they should not tell defence counsel.

Assisting communication between counsel and defendants before trial

The CA may assist communication between a defendant and counsel to ensure that a defendant understands the evidence or charges and can give instructions to their lawyer.

The CA may need to prepare "easy-to-read" documents to assist counsel in their interactions with the participant. This can include preparing an easy-to-read brief of the evidence.

The draft easy-to-read documents, or visual aids, should be sent to the relevant counsel for comment and critique before finalising for use with the participant.

If the participant is the defendant or a defence witness, the Crown prosecutor or police prosecutor must not be given access to any materials prepared to help the participant give evidence that relate to the details of the case.

4.4.2 Pre-trial hearings/directions conferences/ ground rules hearing

To prepare for trial, the court will ordinarily hold one or more hearings to set the “rules” for the trial. Courts refer to these meetings with different terminology – they may be called directions conferences, pre-trial hearings, or ground rules hearings.

These hearings are to record the judge’s directions in writing and have all parties agree how the trial will be run and precisely what the role and actions of the CA will be. This avoids misunderstanding at trial.

The CA should attend these hearings to discuss the assessment report and ensure that the special measures agreed will meet the participant’s needs. The CA can attend the hearing in person or by tele or video conference. If the CA is in court for the hearing, they should sit in the body of the court, but independently of the Police, Crown or the defence counsel.

The pre-trial hearing needs to be held at least four weeks in advance of the trial. This allows counsel to have adequate time to absorb the directions and adapt their practise and questioning as required. It will also give the CA time to prepare any visual aids, and complete any necessary consultation with counsel regarding questioning, and if appropriate, to have watched any pre-recorded evidential interviews.

If a CA is due to assist a participant in court in the next four weeks but has not yet been invited to a pre-trial hearing, they should contact the court to check that the pre-trial hearing is scheduled, and that they will be invited to attend.

At the pre-trial hearing the CA should:

- have copies of the assessment report and any visual aids or other tools that have been developed for use available
- clarify the recommendations in the assessment report as requested
- clarify what their role will be in court – this includes how the CA will assist the participant, how they should communicate any issues to the court and where they should sit
- confirm arrangements to work with counsel on preparing trial questions
- clarify when and how the CA will take their oath (see Appendix C). It is an option for the CA to be sworn in at the outset of the hearing to enable their ability to participate in the hearing as an officer of the court and to facilitate later consultation between the CA and counsel over question preparation.

The CA (along with other parties) receives a copy of the judge’s minute that records the directions for the trial, so they have clear information on what has been agreed. This minute includes what meetings or hearings the CA and counsel have been directed to attend.

A further short hearing may be held closer to the time of trial, or on the first morning of trial, to confirm and/or adjust directions, especially where the trial judge did not issue the pre-trial directions or if there is a change to what has been agreed (for example if the defendant elects to give evidence at trial). The CA is also present for this and can give advice on any new measures that should be taken to accommodate any changes to the initial agreement.

4.4.4 Attendance at court education/orientation

Court education is a programme offered by court victim advisors for all child and vulnerable witnesses (and their whānau) in criminal courts.

The victim advisor or the officer in charge will coordinate this appointment, and both will attend. If a CA is involved in the case, it is usual practice for the CA to attend the court education session.

The court education session usually runs for approximately an hour and a half. The victim advisor will often use pre-made booklets to run through court information and duties as a witness. The CA may need to provide running translation and use visual aids or drawings. In some cases, the CA may work with the victim advisor to provide highly simplified versions of the resources. It is common for the prosecutor to join the end of a court education session to introduce themselves face to face with the witness for the first time.

There is no usual process for court education or orientation for defendants. If the CA considers this would be effective for a defendant, it can be recommended in the assessment report.

4.5 Communication assistance at trial

4.5.1 During a trial

At trial, the CA's role is to:

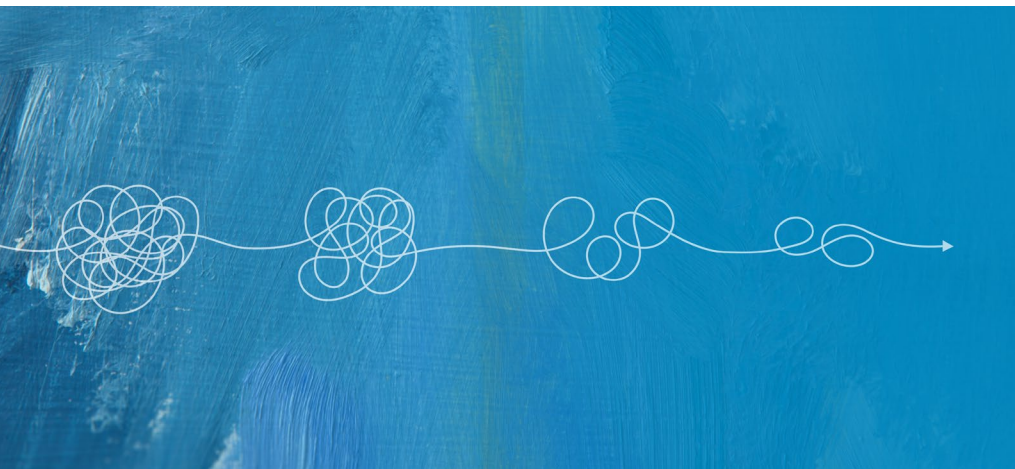
- monitor communication and associated issues (for example, concentration span) and alert the judge to any issues as they arise in a way that is sensitive to what may be heard by the jury or the participant being assisted
- assist the judge and counsel to address any issues that arise (for example, advise how to reformulate a question or how to clarify any unclear speech)
- use (or assist in the use of) communication and visual aids
- use strategies to assist the participant to understand what is being said by others.

During a trial, the CA should behave in a manner that maintains their neutrality and impartiality. This is likely to include avoiding liaising with lawyers and whānau during breaks to avoid discussing the case.

The CA is not in court to act as an advocate or emotional support for the participant but may advise the court about issues that may impact the participant's communication such as their emotional state, hunger or fatigue.

Asking questions in court

While it is not normal practice, the CA may be required in some circumstances to put questions to the defendant or witness on behalf of counsel. If the CA is to put questions on behalf of counsel, this arrangement is agreed at the pre-trial hearing to allow the CA and counsel time to prepare.



Taking the participant's oath

It is the court's role to take the defendant or witness's oath, not the CAs. If the participant requires an easy to understand oath, the CA prepares an oath worded in a way that meets the participant's communication abilities. The court can use this version of the oath to ensure that the participant understands that they must tell the truth and not tell lies.

Requests to assist additional participants during a trial

If it becomes apparent during a trial that other participants may require communication assistance, the court cannot expect the CA to assist this additional participant without first completing an assessment, submitting their recommendations to the court and having a judge direct what the CA's involvement should be. See section 4.2.6 for more information on when a different CA should be assigned to assist multiple participants in the same case.

Requests to comment on the reliability of evidence

It is not the CA's role to give an opinion on the reliability of any evidence given in court or an Evidential Video Interview (EVI). The court should not ask the CA to comment on any aspect of the EVI as it relates to reliability of evidence. The CA may comment on whether a participant's communication abilities as shown in the EVI are consistent with their communication abilities seen during the communication assessment.

Notes taken and materials prepared for court

The notes taken by the CA or material prepared to help the individual understand what is going on in court will not be part of the court record as defined in the Senior Courts Act 2019 (Schedule 2), District Courts Act 2016 (Schedule 1) or the Criminal Procedure Rules 2012.

4.5.2 Resolution of issues at trial

If the CA considers there is significant miscommunication or communication is breaking down, they can request a break in the trial and then ask the Court Registry Officer for an in chambers discussion with the judge.

All parties can discuss the issues in chambers (away from the jury in a jury trial) and the judge will issue new directions to better facilitate communication. A further adjournment may be ordered for counsel to consult with the CA on how to adapt their language.

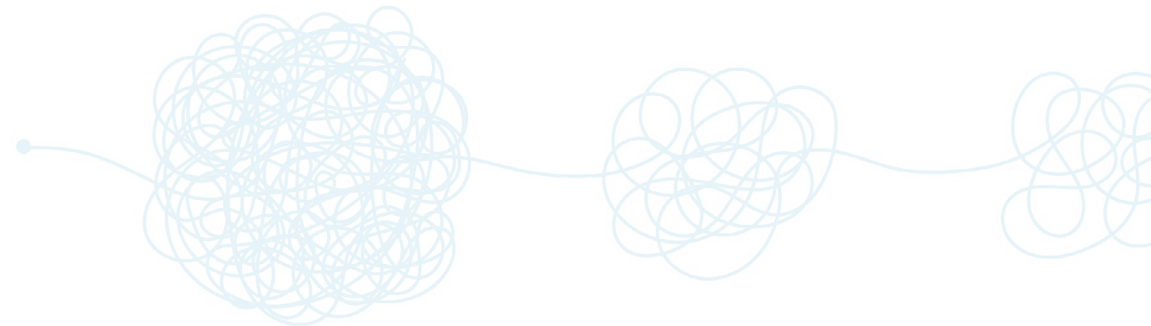
If a dispute arises during any hearing or trial about how communication is being facilitated, the court will determine how to proceed.

A longer trial because of CA interventions is justified by the necessity to ensure a fair trial.

4.5.3 Communication assistance post-trial

After the trial, the CA may be directed by the court to:

- assist in explaining the verdict or outcome to the defendant
- assist the defendant to communicate with probation or health officials, or cultural report writers for the pre-sentence report, or attend a restorative justice conference
- assist the defendant to understand the sentencing.



4.6 Preventing untimely disclosures and managing disclosure of information relating to the case

4.6.1 Preventing untimely disclosures of information about the case

To prevent becoming a witness in a case the CA should:

- avoid being alone with the participant (so the CA is not the only person to hear any disclosure)
- explain to the participant that they should not discuss details about the case
- ask the participant to stop disclosing information if they begin talking about the case
- ensure that a responsible third person is present at assessments.

In addition, counsel, the officer in charge, or other professionals should support the CA to avoid them being in a position where they could be alone with the participant, including when at court.

4.6.2 Managing disclosures of information about the case

If the participant wants to discuss the case, and defence counsel (for a defendant) or the officer in charge/police representative (for a witness) is present, the CA may facilitate communication between the participant and their counsel or officer in charge about the case.

The CA should take accurate notes or a recording of the time, date, people present and content of the disclosure. Where the officer in charge or defence counsel are present for the disclosure, they can follow up on any new information that is disclosed.

If the defence counsel or officer in charge/police representative is not present, and the participant indicates that they want to disclose information about the case, the CA should ask the participant to wait until the defence counsel, or their representative, or officer in charge/police representative can be present. The CA can pause the assessment to get advice if required.

Despite these steps, it may not always be possible to prevent a participant from disclosing information about the case when their counsel or the officer in charge/police representative is not present. The CA will not always know whether the information shared by the participant is new or relevant.

If this happens, the CA must record as accurately as possible what was said and inform the officer in charge (for a prosecution witness) or the defence counsel (for a defendant or defence witness) as soon as possible.

If the CA is informed by defence counsel or the officer in charge/police representative that the disclosure is substantive new information about the case, then the CA submits an affidavit that includes verbatim transcript of the information disclosed. The affidavit is submitted to defence counsel for a defendant or defence witness and officer in charge for a prosecution witness.

If the participant discloses information about the case to the CA during a trial, the CA requests to speak to the judge in private and tell them what they have heard.

4.7 Appeals

From time to time, a case where a CA was engaged will be involved in an appeal. An appeal means a higher court will look at the case again to determine if aspects of the case require reconsideration.

Appeals can be lodged by a convicted person for a number of reasons, including against their conviction and/or their sentence. A prosecutor may lodge an appeal if they think the sentence wasn't adequate for the crime or was not legally correct. The party that lodges the appeal is called the appellant and the party against who the appeal is filed is called the respondent.

A higher court may dismiss or uphold the appeal. If the higher court upholds the appeal (that is, determines there are grounds for the case to be reconsidered) they may change the sentence given to the convicted person, order a re-trial or acquit a convicted person (meaning they are free to go).

When a CA could be involved in an appeal

While not an exhaustive list, a CA could become involved in an appeal if:

- an appellant or respondent requires a CA to communicate with their counsel to prepare for an appeal or participate in a hearing
- they are asked to participate by the appellant or respondent as an expert witness or to give comment on expert witness reports that relate to how communication was facilitated
- the potential grounds for appeal question the quality of the communication assistance provided by the CA in the previous proceedings.

It is acknowledged that being involved in an appeal can be stressful for the CA, especially where the potential grounds for the appeal relate to whether the participant's communication was effectively facilitated during a case or how any aspect of communication assistance was conducted.

Whatever the circumstances around the appeal, the CA can seek clarification about what their role in an appeal is and what they are required to do.

If the CA has been instructed by the court, they should seek clarification from the Court Registry Officer at the appeal court. If instructed by one of the parties, they should contact the lawyer acting for that party.

Engaging a CA to participate in an appeal to assist an appellant or respondent

The only way to engage a CA to assist a participant is on the direction of a judge. If the appellant or respondent may require a CA to assist their communication in preparation for appeal or to participate in a hearing, they must apply to the court to engage a CA in the normal way (that is, using the application form).

Managing conflicts of interest when appointing a CA to assist a participant in an appeal

If a CA assisted a participant in the previous court proceedings, the same CA may continue to assist the participant in relation to the appeal. However, if there is any potential that the grounds for appeal may be based on the poor quality of the communication assistance provided in the previous court proceeding, a different CA should be engaged to assist the participant during the appeal.

When a CA is asked to be an expert witness

It is not the CA's role to give comment on the reliability of any evidence or the participant's accuracy or competence.

The CA may provide comment as an expert witness in relation to how communication was facilitated in the previous court proceedings – this may include comment on the extent to which the CA's recommendations and special measures directed by the court were implemented.

An expert witness is not an advocate for the party who engages the witness, therefore the CA can maintain their impartiality and still participate as an expert witness.

A code of conduct for expert witnesses is set out in Schedule 4 of the High Court Rules 2016.

When an appeal questions the quality of communication assistance in previous proceedings

If there is any question around how communication assistance was provided in a previous proceeding, the CA may be asked to provide an independent affidavit or affirmation⁸. Guidance for how to prepare an affidavit or affirmation is available on the [Ministry's website](#).

The CA should not disclose legally privileged information unless directed by the court.

Payment for CA time in appeals

If the CA is engaged by the court to assist a participant in an appeal, the communication assistance provider may invoice the Ministry in the usual way for the time the CA spends working on the appeal.

If the CA is directed by the court to act as a witness, or acts as an expert witness, the CA can receive payment in accordance with the Witnesses and Fees Regulations 1974.

Ongoing monitoring of the outcome of appeals in cases involving CAs

The outcome of appeals can be important in setting precedent for how other cases involving CAs should be managed in future. The Ministry will work with communication assistance providers to review appeal decisions in cases involving CAs and update this quality framework as required.



⁸ Written evidence is known as an affidavit if its contents are sworn on oath on a religious scripture. The document is known as an affirmation if its contents are said to be true, but an oath is not sworn on a religious scripture.

Performance monitoring and ongoing quality improvement

This chapter sets out a framework for monitoring communication assistance performance and quality improvement.

5.1 Ministry leadership

5.1.1 Outcome agreement and relationship management

Operational management and leadership of the communication assistance service will be provided by a contract manager who will be responsible for:

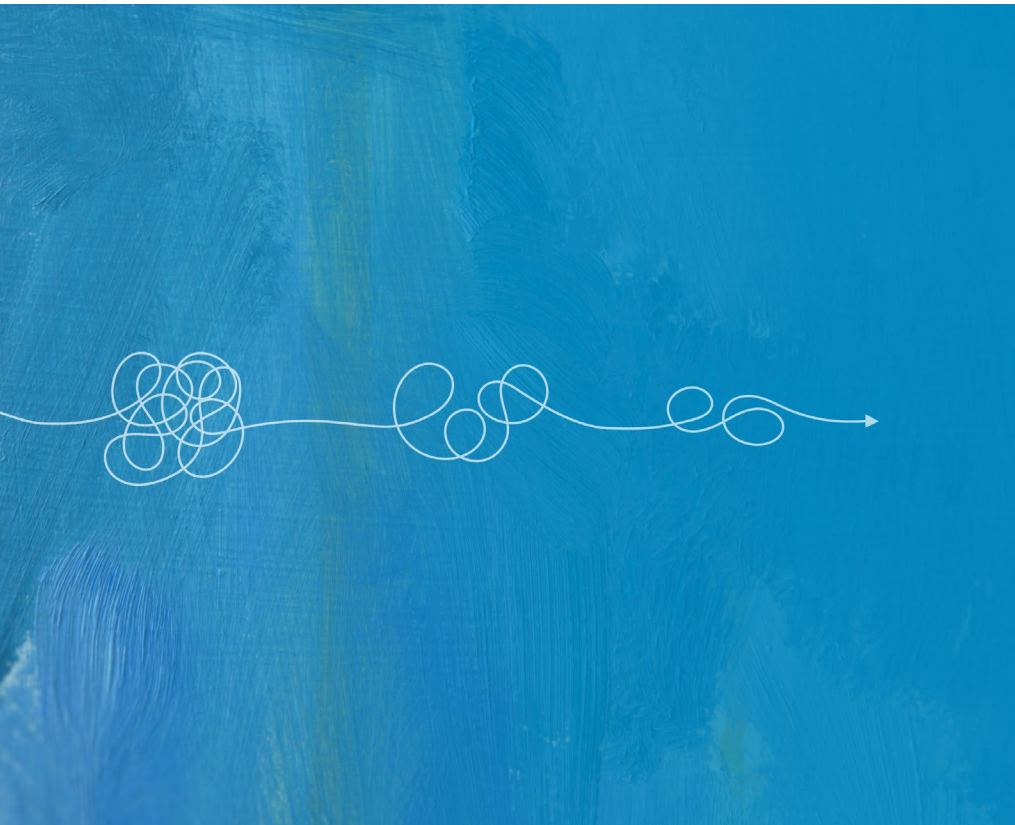
- managing relationships with communication assistance providers
 - engaging with the Police, Oranga Tamariki, the Department of Corrections, Parole Board, Ministry of Health and victim support services on cross-sector matters relating to communication assistance
 - providing feedback, advice and guidance to Court Registry Officers and providers
 - reviewing and updating the communication assistance quality framework and related policies and procedures as required
 - ensuring the Ministry's communication assistance webpages and intranet (knowledge base) are up to date
- analysing communication assistance demand, financial costs and service coverage
 - monitoring workforce availability, training and professional development
 - resolving escalated complaints
 - monitoring provider compliance with outcome agreement requirements (includes provider audits)
 - procurement of communication assistance services
 - responding to Official Information Act requests and Ministerial correspondence as required
 - ensuring efficient administration of the communication service (includes referrals, bookings, fair allocation of cases between providers, and payment in accordance with outcome agreement terms and conditions)
 - ensuring the implementation of ongoing quality improvement initiatives
 - escalating emerging issues and matters of concern to managers as required.



5.2 Monitoring and reporting performance

Communication assistance providers must report to the Ministry on their performance. A reporting template is provided for this purpose. The Ministry will also conduct analysis on service use, costs and stakeholder satisfaction with the service.

The Ministry will use the reported information and its analysis to inform ongoing service improvement and enable communication assistance workforce monitoring and planning.



The contract manager will prepare an annual report for the communication assistance service that covers:

- communication assistance use rates by region
- trends in demand for the service by region and type of court proceeding
- number of cases referred to each provider
- financial costs of the service
- workforce availability
- workforce training
- numbers of escalated complaints and types of issues raised
- performance against outcome and performance measures
- stakeholder feedback on the service
- changes to the quality framework or ongoing improvement activities
- comment on the overall effectiveness of the service in increasing access to justice.

The annual report will be presented to Ministry management to provide assurance that the service is operating effectively and that any emerging issues are identified and managed as appropriate.

Communication assistance providers may seek feedback from defence counsel, prosecutors, participants or their whānau to inform their own ongoing quality improvement.

5.3 Complaints management

Communication assistance providers must have a complaints policy and be able to demonstrate that they have effective systems for reviewing complaints about the quality of services provided.

The complaints policy must reflect the complaints management process set out in the Outcome Agreement.

Appendix A: Evidence Act 2006 provisions

The Evidence Act 2006

Section 4 Interpretation	<p>Current definition:</p> <p>communication assistance means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who –</p> <ul style="list-style-type: none">a) does not have sufficient proficiency in the English language to –<ul style="list-style-type: none">i) understand court proceedings conducted in English; orii) give evidence in English; orb) has a communication disability. <p>Interpreter includes a person who provides communication assistance to a defendant or a witness.</p> <p>New definition in the Sexual Violence Legislation Bill which has not yet become law and may be subject to change:</p> <p>Communication assistance means any assistance (for example, oral or written interpretation of a language, written assistance, or technological assistance) that enables or facilitates communication with a person who for any reason (for example, insufficient proficiency in the English language, age, or a disability) requires assistance to –</p> <ul style="list-style-type: none">a) understand court proceedings; orb) give evidence.
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Section 80 Communication assistance	<ol style="list-style-type: none">1. A defendant in a criminal proceeding is entitled to communication assistance, in accordance with this section and any regulations made under this Act, to –<ul style="list-style-type: none">a) enable the defendant to understand the proceeding; andb) give evidence if the defendant elects to do so.2. Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge.3. A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.4. Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the Judge.5. Any statement made in court to a judge or a witness by a person providing communication assistance must, if known by the person making that statement to be false and intended by that person to be misleading, be treated as perjury for the purposes of sections 108 and 109 of the Crimes Act 1961.
Section 81 Communication assistance need not be provided in certain circumstances	<ol style="list-style-type: none">1. Communication assistance need not be provided to a defendant in a criminal proceeding if the Judge considers that the defendant –<ul style="list-style-type: none">a) can sufficiently understand the proceeding; andb) if the defendant elects to give evidence, can sufficiently understand questions put orally and can adequately respond to them.2. Communication assistance need not be provided to a witness in a civil or a criminal proceeding if the Judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them.3. The Judge may direct what kind of communication assistance is to be provided to a defendant or a witness.

Appendix B: Qualification and registration requirements

	Qualifications	Annual practicing certificate	Professional membership/ registration body	Regulation
Speech-language therapists	<ul style="list-style-type: none"> NZ accredited qualification: speechtherapy.org.nz/university-programs Overseas qualification accepted by the NZ Speech-language Therapists' Association. 	Issued by NZ Speech-language Therapists' Association.	NZ Speech-language Therapists' Association.	Self-regulation by NZSTA
Psychologists	<ul style="list-style-type: none"> NZ accredited qualifications: psychologistsboard.org.nz/accredited-training-programmes2 Overseas qualification accepted by the New Zealand Psychologists Board. 	Issued by New Zealand Psychologists Board.	NZ Psychologists Board.	Health Practitioners Competence Assurance Act 2003
Occupational Therapists	<ul style="list-style-type: none"> NZ Qualifications: otnz.co.nz/occupational-therapy/occupational-therapy-career/studying Overseas qualifications accepted by the Occupational Therapy Board of New Zealand. 	Issued by the Occupational Therapy Board of New Zealand.	Occupational Therapy Board of New Zealand.	Health Practitioners Competence Assurance Act 2003
Nurse Mental Health specialist	<ul style="list-style-type: none"> NZ Registered Psychiatric Nurse NZ Registered Comprehensive Nurse. 	Issued by the Nursing Council of New Zealand.	Nursing Council of New Zealand.	Health Practitioners Competence Assurance Act 2003
Specialist teachers	<ul style="list-style-type: none"> Teacher with postgraduate qualifications in special education. 	Current practicing certificate issued by Teaching Council NZ.	Teaching Council of Aotearoa NZ.	Education Act 1989

Appendix C: The oath

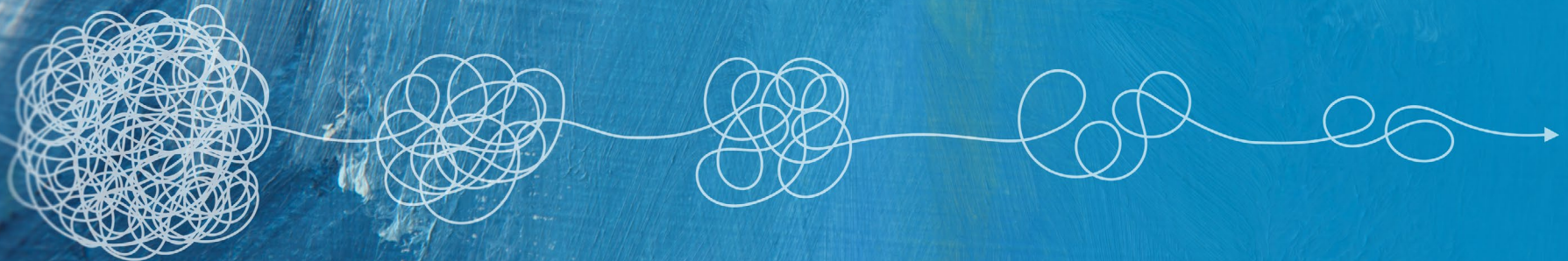
CAs usually swear or affirm an oath. In some cases, it is recommended that the oath is undertaken at the pre-trial hearing/directions conference/ground rules hearing. This ensures the CA can participate freely and ensure confidentiality when either counsel consult the CA over question preparation.

The oath includes:

- a promise that the CA will not disclose any substantive matters discussed in or disclosed in any consultation with either counsel (this covers assistance given at interviews with defendants and sessions with either counsel to prepare questions)
- an obligation to alert the judge to any communication issue arising at trial.

The following CA oath is suggested⁹:

“I promise to assist the court and counsel by providing communication assistance to _____ to the best of my skill and ability. I will not discuss or share any legally privileged information communicated by the participant or either counsel. I will let the judge know if I consider there is risk of significant miscommunication or the agreed special measures are not being implemented”.



9 Source: Judge Duncan Harvey



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