

Supporting vulnerable witnesses in the giving of evidence

Guidelines for securing best evidence



**Attorney-General's
Department**

**An initiative of the Disability
Justice Plan**

The Attorney-General's Department
Disability Justice Plan 2014–2017

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People with disability face many barriers in accessing justice. Barriers to justice include the effect of a person's disability on their expressive and receptive language, attention and memory, social factors such as low self-confidence and prejudice, and issues within the interview context, including the nature of the interaction with, and types of questions used by, the interviewer.

People with disability are citizens first and foremost, with the capacity to undertake valued roles in society just like anyone else (termed *Citizenhood* in a recent South Australian publication¹). This includes being capable of providing reliable and accurate testimony when participating in the justice process. To assist this, some people with disability might need support when giving testimony. This could include communication support, information support, material access support, and social support. With such *Citizenhood* supports in place, the justice system may better serve people with disability.

These guidelines have been developed by a committee comprising criminal justice agencies and disability sector representatives. They have been designed to assist investigative interviewers to best elicit evidence from people with disability, in line with current best practice. Each step of the criminal justice process is represented, from initial contact to trial, along with relevant information regarding possible support measures, questioning techniques and other tips for investigative interviewers.

It is intended that the guidelines will be used in conjunction with comprehensive training in disability awareness and investigative interviewing. Though they have been developed for use when interviewing both victims and witnesses with disability within the criminal justice system, many parts of the guidelines could be adapted for use when interviewing children, accused persons with disability, or in other areas of the justice system where a person with disability is required to give evidence.

These guidelines have been developed as part of the Disability Justice Plan which aims to make the criminal justice system more accessible and responsive to the needs of people with disability.

¹Williams, R (2013) *Model Of Citizenhood Support*: 2nd edition JFA Purple Orange, Adelaide.

- People with disability have the same right as other members of society to access justice and pursue any grievance.
- People with disability are capable of providing credible and reliable evidence, and should be accepted by people within the criminal justice system as reliable witnesses.
- People with disability should have their privacy and dignity respected.
- These guidelines should be implemented by criminal justice agencies in conjunction with thorough training.
- Investigative interviewers should be trained to take a holistic account from a person with disability.
- Requiring vulnerable witnesses to recount their story multiple times is harmful and should be kept to a strict minimum.
- People with disability should receive the support they require throughout the criminal justice system in order to ensure their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and needs.
- Increasing support for people with disability does not diminish an accused person's right to a fair trial. There must be fairness to all. This requires the court to consider a triangulation of interests – the position of the accused, the victim and his or her family, and the public.
- All criminal justice agencies should have an organisational culture that is responsive to the complex issues and needs of people with disability and is committed both in principle and reality to person centred practice.
- Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted.
- Criminal justice agencies should have a strong form of accountability through implementation, reporting and monitoring of these guidelines and access to justice for people with disability.

1

Initial Point of Contact

Level of training: General awareness

While the initial point of contact could involve many agencies, these guidelines are confined to the initial point of contact with the criminal justice system, particularly investigation or enforcement agencies such as South Australia Police or the Department for Education and Child Development.

At this point, only basic details in relation to the offending should be obtained. Do not take a comprehensive account at this stage. In all cases the aim will be to take the whole story in a formal interview, with all the support the person needs in place.



Make an assessment of the needs of the person

This is to understand better what the person may require to participate in a formal interview.

Be aware of the general characteristics associated with a specific disability as well as the person's *individual* needs. For example:

- A person with acquired brain injury may need extra time to process questions asked of them and to formulate a response.
- People with complex communication needs do not necessarily have an intellectual disability. For example, some people with cerebral palsy may have difficulty using spoken language, but have no issues understanding questions asked of them.
- There may need to be more time allowed for interviews with people with complex communication needs in order for the interviewer to get used to the person's chosen method of communication.
- Not all deaf people use Auslan. Ensure that you ask the person whether they use Auslan and, if so, organise an accredited Auslan interpreter (family members or friends should not be interpreting). If the person does use Auslan, lip reading or writing notes is no substitute for an accredited interpreter.

People with intellectual disability may be difficult to identify. Some people with intellectual disability may try to hide or mask their disability. Potential indicators of intellectual disability are listed below. The list is not intended to be used as a test or checklist, but to indicate that the person *may* have an intellectual disability. Be careful not to *assume* a person has or does not have an intellectual disability.

- Whether the person appears to:
 - have difficulty understanding questions and instructions
 - respond inappropriately or inconsistently to questions
 - have a short attention span
 - receive a disability support pension
 - reside at a group home or institution, or be employed at an Australian Disability Enterprise
 - be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school.

- Other indicators are when:
 - the person identifies themselves as someone with intellectual disability
 - someone else (support worker, carer¹, family member or friend) tells you the person is or may be someone with intellectual disability
 - the person exhibits inappropriate social distance, such as being overly friendly and anxious to please
 - the person acts much younger than their age group
 - the person is dressed inappropriately for the season or occasion
 - the person has difficulty reading and writing
 - the person displays problems with memory or concentration.

If there is any indication that a person has an intellectual disability, or if in doubt, specialised assistance from an organisation such as Disability SA should be sought.

Once identified, consider whether the person may benefit from any support during the interview. The individual will usually be able to give you guidance on support they may require (such as technology). In some cases it may be necessary to ask a carer or support worker. Some people will not want or need support. Support includes:

- a support person of the interviewee's choice, at the discretion of the interviewer
- an interpreter or communication assistant
- other communication support (augmentative and alternative communication support such as a communication board or other tools/technology)
- professional support, such as speech pathologists or external agencies.

Some cases may need to be transferred to a specialised unit or child protection agency. If it is believed that such action should be taken, staff should check internal procedures.

In regional areas, the availability of specialised interviewers and communication supports may be an issue. The local Disability SA office is a good place to seek assistance regarding communication support.

There are a number of health and welfare services available to victims of crime. This information is contained in the booklet *Information for victims of crime: Treatment, impact and access to the justice system*, developed by the Commissioner for Victims' Rights. It is a requirement that victims of crime are provided with this information. Information is also available in an easy read format.

¹Throughout these guidelines, a distinction is made between carers and support workers. The word carer in this context is used to describe someone who provides unpaid support. This is usually a family member, and can include friends in shared living situations. A support worker, sometimes called a personal assistant or attendant, is someone who is paid to assist the person with disability.

2

Interview

Level of training: Specialised and ongoing

This stage requires a comprehensive account of events, minimising the number of times a person needs to repeat their evidence. The interviewer should adapt their interviewing technique to match the witness's needs but should also maintain a questioning style that maximises narrative detail without extensive interruption or irrelevant specific questioning.



Pre-interview planning

Consider supports that may improve the quality of evidence elicited from the person, such as:

- having a support person of their choice present during the interview, as long as that person is not involved in the case and will not compromise the quality of the evidence. This will be a matter of discretion for the interviewer. If the support person will not be allowed in the room, explain to the interviewee and their support person why this is so.
- having a communication assistant present to help facilitate communication. Keep this in mind throughout the interview.
- augmentative and alternative communication supports that the person may require – for example, assistive technology or a communication board.

Empower the witness by asking them whether they would like to have support, and respecting their choice to refuse support or the person providing support. In some cases, it may be the interviewer who has difficulty understanding the witness. In those cases, support (such as a communication assistant or other professional assistance) should be sought and the reason for seeking support (to ensure accuracy) should be explained to the witness. Professional assistance includes psychologists and speech pathologists with considerable knowledge about people with complex communication needs. A list of organisations approved by Disability SA and their contact details, as well as information about disability generally, is available at www.sa.gov.au under disability.

Consider whether the witness's communication system will have the vocabulary required for the witness to be able to give complete evidence (some communication boards or signing systems such as Makaton have limited vocabulary). If the communication system does not have the vocabulary required, seek professional assistance using the website above.

Consider how you can make the witness feel comfortable during the interview. This may include using a 'soft interview room' designed to create a more relaxing and less official-looking environment or conducting the interview at a certain time of day. It is always preferable that interviews are audio-visually recorded. Audio-visual recording equipment should be set up in a way that shows a clear view of the witness including their facial expressions and body language.

Consider what will need to be covered for an encompassing interview – for example, elements of the offence and timelines (referencing significant events or seasons).

Working with a language interpreter, including Auslan interpreters:

- Ensure the interpreter knows the reason for the interview, any alleged offence or the nature of the inquiry.
- The interpreter should not be left alone with the interviewee.
- If the interview is to be filmed, it should cover both languages. For a person using Auslan, both the interpreter and the Auslan user should be clearly visible, at an angle where the hands and face of both are in view. If interviews are audio recorded there will be no visual record of the signed utterances – only a record of the *interpretation*.
- Be aware that interpreters require regular breaks and factor this into any time considerations.
- Consider where the interpreter might be seated. For sign language interpreters, this would be with the interviewers, where the Auslan user could see both the interpreter and the interviewer(s) easily. You should seek advice from the interpreter about where they should be positioned.

Interview

Get to know the characteristics of the disability as well as the individual needs of the person. Two people with the same kind of impairment can vary markedly. For example, one person with cerebral palsy using a communication board may have intellectual disability while another with the same physical attributes, appearance and method of communication may have no intellectual impairment.

Similarly, one Deaf Auslan user may have used Auslan since early childhood and have highly developed language skills, while another may have had little exposure to Auslan and have less developed receptive and expressive language skills as a result.

Work out the person's communication strengths and limitations and how best to accommodate these:

- refer to any information obtained during initial contact
- speak to the person directly
- speak to support workers/family members/friends/professionals
- an informal chat can be a good way to gain an understanding of communication strengths and also enhances the witness's confidence and familiarity with the interviewer.

Where appropriate, guidance should be sought from a victim/witness who is able to make informed decisions prior to speaking to support workers/family members/friends/professionals, relative to the victim's communication strengths and limitations, during the preparation and planning stages of any potential interview.

Empower the witness by creating a situation where he/she sees themselves as a valued and competent informant by:

- showing through tone, manner and behaviour that you expect the witness will be able to communicate and that the testimony will be heard and understood.
- using a confident, relaxed approach – any signs of tension, anxiety or embarrassment may be interpreted negatively.

Avoid indirect value judgements or words that depersonalise and disempower the witness, such as:

- referring to the person by their disability
- talking about the witness in the third person in his/her presence
- speaking too loudly or in a patronising manner
- being awkward or averting eye gaze
- implying that the person will have trouble communicating
- making a joke about their disability.

Interviewers may have difficulty comprehending people with expressive language impairments. Be honest when this occurs without making the interviewee feel embarrassed or incompetent. In some cases options available include asking the witness to:

- slow down
- use a different word
- spell the word letter by letter

- ‘show’ what happened using mime
- draw what happened.

Consider the need for a communication assistant.

Be confident, optimistic, determined and clear in attempting to work around the communication challenge.

Pursuing an interview where interviewees are not understood can severely undermine the quality of subsequent questioning, the usefulness of the testimony and the witness’s likelihood of reporting again.

Make the process of interaction or interview ground rules explicit – for example, “Tell me if you need a break”, “You can use any words you want”, and explain that both parties should not be afraid to say that they do not understand the other.

Evidential quality can be enhanced by using a questioning style that maximises narrative detail. Open-ended questions are those that encourage elaborate details without dictating what specific information is required. When considering response accuracy, open-ended questions minimise individual differences in responding arising from variability in memory, language and social skills. All witness groups respond with high accuracy to open-ended questions and the decline in accuracy in response to specific (e.g., Who, What, When, Where) questions, compared to open-ended questions, is greater for vulnerable witnesses.

The best open-ended questions (coupled with non-verbal encouragers) are those that:

- direct the witness to the evidential detail required
- minimise defensiveness and anxiety
- overcome the witness’s natural tendency to suppress information
- avoid raising new information that has not yet been established
- encourage coherency
- elicit detail.

Examples of good open-ended questions to use with vulnerable witnesses include:

- What was the first thing that happened when... (you went into the bedroom)?
- What happened then?
- What happened when... (he touched you)?

Narrative interviewing also elicits longer responses, maximises story-grammar and greater witness credibility, encourages the witness to play an active role, and assists in detecting deception.

More specific questioning may be used after the witness has had the opportunity to explain what happened through open-ended questioning. Keep the following in mind when choosing questions:

- Coercive or leading questioning practices increase errors in recollection.
- People with intellectual and learning disabilities are among the most prone to acquiescing to leading questions.
- Keep language used as transparent, concrete and as simple as possible. Avoid ‘front-loading’ (“I suggest to you that...”; “I put it to you...”).

- Questions may be taken literally, so use plain English. Avoid using abstract language, metaphors and figures of speech. Be careful using the present tense.
- ‘How’ and ‘why’ questions can also be difficult to answer, so should be avoided where possible (e.g., “How did he touch you?” “Why did he say that?”).
- If the interviewee is not providing a lot of detail in his/her responses, you may find it beneficial to incorporate a ground rule, explaining that you do not know what happened and it is important that you understand.
- Ask questions one at a time, one idea per question, in a logical sequence. Questions containing ‘if’ almost always contain two ideas.
- Use active language (“Where did they leave their bags?” not “Where were the bags left?”). Avoid phrasing questions in the negative (“He didn’t take your bag, did he?”).
- Repetitive questioning may lead a witness to think that their first answer was wrong (even if correct) and change it.
- Questions should not include complicated, past tense verb phrases (“It might have been your brother who put it there, right?”).
- Questions should not be in the form of statements (“You wanted Jim out of your life”).

Be vigilant – look out for misunderstandings on both sides.

Advise the witness that it is important that they tell you if they do not understand.

Adopt a six-second pause rule to allow the witness to process and formulate a response to the question.

Ensure each topic is introduced in a logical sequence – do not jump between topics or suddenly change to a new topic. Signpost the change in topic – “Now I want to talk about...”

Be aware of body language and facial expressions which may indicate misunderstanding, whether someone has finished communicating or not, or whether they are fatiguing and need a break. Regular breaks are necessary as fatigue is detrimental to both rapport and quality of evidence. Signs of fatigue are not always obvious. Examples include changing the topic, repeating the interviewer’s words, deteriorating speech, and restlessness.

Towards the end of the formal recorded interview, ask the witness if there is anything else they would like to say about the events in question that may not have already been covered. Make sure you tailor the information to their understanding. This might include whether the witness will be going home or somewhere else.

After the formal recorded interview has finished and the recording equipment has been turned off advise the victim what will happen next and ask if there are any questions that the witness may have.

Post interview

Speak with the person’s family, friends or support person and explain what will happen next. If they are potential witnesses, explain that they should not talk about the offence with each other and *why* this is necessary. They should be aware that they can talk about their emotions in relation to the event(s) but not specifics about what actually occurred.

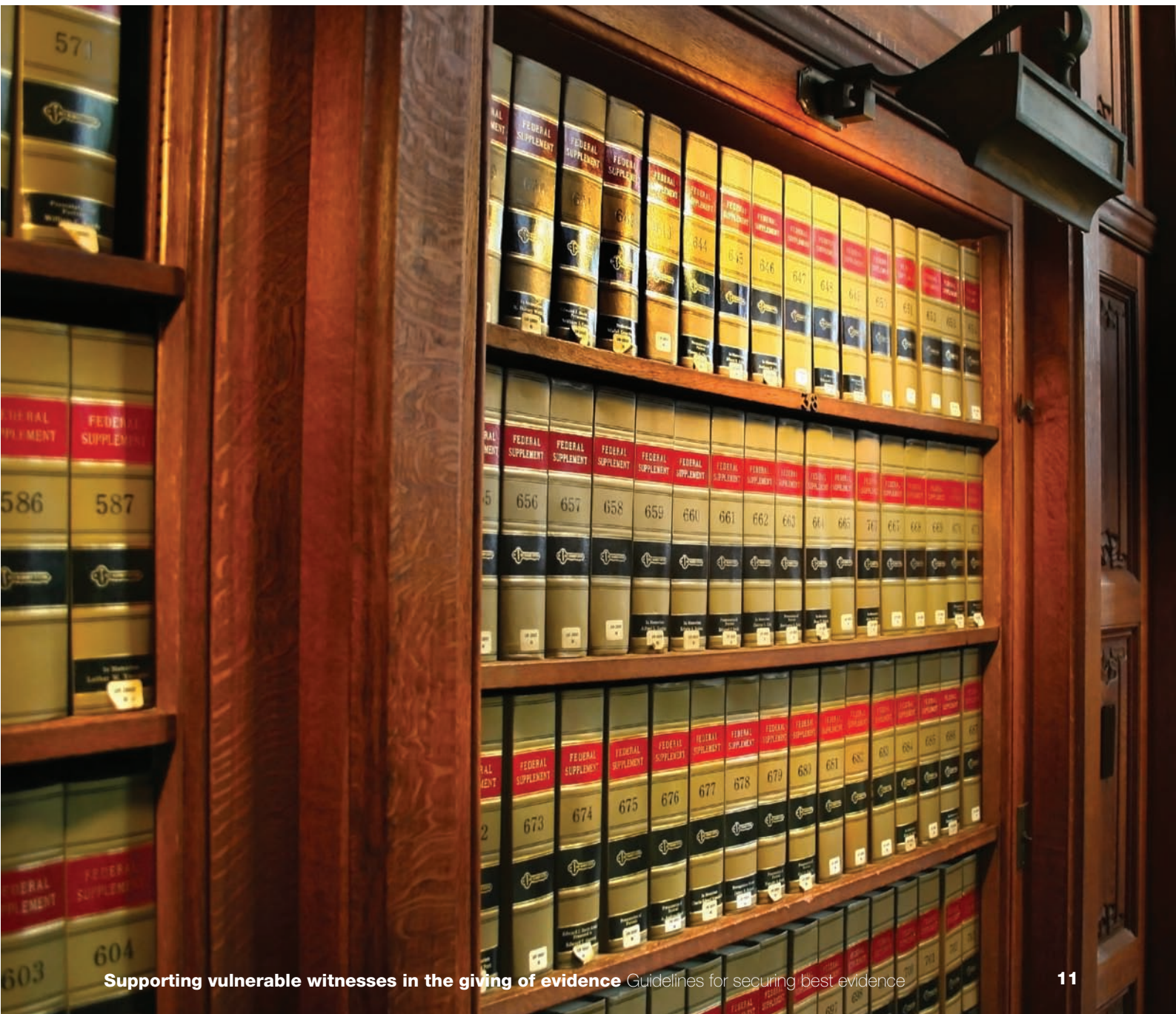
Seek feedback from those involved in the interview process or a knowledgeable colleague about your interviewing style and any improvements that could be made.

It should be kept in mind that delay can affect a witness’s ability to give evidence, especially if the witness is a child or has an intellectual disability.

3

Office of the Director of Public Prosecutions

To avoid the potential of re-traumatisation or secondary victimisation of a witness their evidence should be given the fewest times necessary. The number of times proofing occurs should be kept to a strict minimum, especially if examination in chief and cross-examination have been pre-recorded. Asking any witness to recount their story multiple times will create inconsistencies in the evidence and causes secondary victimisation.



It is crucial that, wherever possible, there be continuity in who a vulnerable person deals with. Early allocation to a prosecutor is likely to be beneficial in building rapport and engagement with a witness. Witness Assistance Service involvement should be considered.

If a witness must recount part of their evidence, questioning should be open-ended and promote narrative detail, following the techniques outlined in the interview section. The interviewer should consider the use of a communication assistant or other supports to facilitate communication.

In the lead-up to trial, consider special measures that the witness may require:

- pre-trial court familiarisation visit
- planning for breaks
- the assistance of a support person, interpreter, communication assistant or augmentative and alternative communication systems (such as a communication board or technology)
- arrangements for physical access to court rooms
- measures under section 13A of the *Evidence Act 1929* (including giving evidence through CCTV, the use of screens, having a closed court)
- arrangements for secure waiting areas away from the alleged offender
- minimising waiting times to reduce stress.

4

Court

In conjunction with these guidelines and any related court rules, the judiciary and the wider legal profession may wish to consider undergoing targeted and interactive continuing professional development in best practice techniques for questioning people with disability and recent developments in research, best practice and case law.



At trial, special arrangements that may be available to vulnerable witnesses include:

- giving evidence by way of audio-visual link
- placing a one way mirror screen between the witness box and the dock
- allowing the witness to be accompanied by a relative, friend, social worker or witness support person for the purpose of providing emotional support
- separate witness waiting areas adjacent to or away from the courtroom
- a closed court
- special arrangements for access and egress of the court building (subject to security risk assessment or direction)
- any other arrangements provided under the *Evidence Act 1929*.

The court has the discretion to disallow questions that are improper under section 25 of the *Evidence Act 1929*. Improper questions include questions which are:

- misleading or confusing
- apparently based on a stereotype, including a sexual, racial, ethnic or cultural stereotype or a stereotype based on age or physical or mental disability
- unnecessarily repetitive, offensive or oppressive
- put in a humiliating, insulting or otherwise inappropriate manner or tone.

The court may take into account disabilities that the witness may have, as well as age, personality, level of education, cultural or ethnic background and any other relevant characteristics, and the context in which the questions are put including the nature of the proceedings and the relationship between the witness and a party to the proceedings.



For more information

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