



Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary

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The following article examines the significant obstacles that vulnerable people face and outlines the role of the witness intermediary in the criminal justice process.

"Vulnerability" can be defined in different ways depending on the context (legal, health, etc), yet there is no agreed definition.¹ Vulnerability may be linked to age or linguistic development (as with children), language or cognitive impairments, intellectual disabilities, learning difficulties, Autism, Attention Deficit Hyperactivity Disorder, mental impairments, physical or mental trauma² or membership in a minority culture (refugees and migrants). The vulnerability of individuals having contact with the justice system with physical, mental, social, cultural and language issues³ may increase if the process is not only foreign, but stressful and adversarial.⁴ It is well documented that vulnerable people, including those on remand, witnesses, victims and defendants, are over-represented in the criminal justice system.⁵

Within the Australian legal system, a range of requirements are in place to address vulnerability. For example, Australia has obligations under Art 12 of the United Nations Convention on the Rights of the Child;⁶ Art 13 of the United Nations Convention on the Rights of Persons with Disabilities;⁷ Art 14, Pt 3 of the International Covenant on Civil and Political Rights⁸ and The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁹ to ensure that vulnerable people are equal participants before the law and that proper measures are in place to ensure their access to justice. Equal access to justice is a broad term "... encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice".¹⁰ It includes the ability to provide accurate and complete information,¹¹ to be treated with respect and to be communicated with in a manner which promotes equal and fair participation.¹²

Although Australia has implemented these requirements in line with UN standards, significant obstacles remain for children, Autistic individuals and those with intellectual disabilities when they interact with the justice process.¹³ These obstacles are exacerbated by several factors:

1. developmental factors such as age and cognitive ability
2. limited understanding of legal procedures
3. exposure to overly complex legal language
4. challenges in effectively communicating their experiences or "telling their story"
5. difficulty comprehending legal questioning, notably during cross-examination
6. misconceptions about Autism and intellectual disability, that can affect decisions and how people interact with individuals with these disabilities.¹⁴ This is particularly so for Autistic individuals as Autism is a spectrum. Each Autistic person will therefore have unique strengths and challenges which legal professionals may not realise, if they are unfamiliar with the disorder.¹⁵

Misconceptions and biases around the capacity of people with disabilities to participate in the legal system can include:¹⁶

1. *People with disabilities are less credible and reliable.* Studies have shown however, that when questioned in an appropriate manner with open questions that are simple and direct, people with intellectual disabilities and Autism can provide reliable and accurate evidence.¹⁷
2. *All disabilities are visible.* Research indicates that people with disabilities will often hide or deny their disability to appear more competent.¹⁸
3. *A "one-size-fits-all" approach to accommodations will work.* This approach will not work with Autism which is a heterogenous disorder where every individual will have unique capabilities and challenges, therefore requiring specific accommodations to meet their unique needs.¹⁹

Improper questions and the control of questioning

Cross-examination, which is a key feature of the Australian adversarial system, requires witnesses to give oral evidence and for this evidence to be tested.²⁰ Traditional cross-examination techniques require lawyers to use leading statements as questions and suggestive propositions to advance their case. For effective cross-examination to occur, vulnerable witnesses must be able to comprehend these types of questions, yet many cannot, often resulting in unreliable evidence.²¹ Numerous studies have examined the linguistic complexity of legal language, in particular during cross-examination. Questions commonly used at court that can be misunderstood and are difficult to comprehend can include:²²

1. Tag questions
 - "You didn't tell the police the truth, **did you?**"

- “You agree, **don't** you, that you went to his house because you wanted to”.
 - “**Do you agree** that you could not remember what happened that day?”
2. Multi-part questions
 - “Who did you tell first about what happened and where were you when you talked about it?”
 - “Did you speak to a police officer named Phil at his office in Liverpool in June 2023?”
 3. Questions containing double negatives
 - “It's true **isn't** it, that you **never** told him to stop because you wanted him to have sex with you?”
 - “You **haven't** been telling us the truth because **nothing** actually happened that day”
 4. Questions containing legalese and preamble
 - “Is it fair for me to say that...”
 - “Let me just take you back to the evidence you just gave”
 - “I suggest to you that ...”

These questions require extensive cognitive thought and the ability to understand the structure and form to be able to respond accurately. Although legislation exists for judicial officers to control improper questioning,²³ they may be reluctant to do so as they do not want to jeopardise the defendant's right to a fair trial or risk having an appeal.²⁴ Furthermore, judicial officers may fail to identify improper or overly complex questions as they themselves have historically employed or been accustomed to such questioning techniques in their legal practice.²⁵ For the judiciary to effectively regulate questioning of vulnerable individuals and children by lawyers, training on language development, the spectrum of disabilities and their impact on comprehension and courtroom communication would be highly beneficial. This training would enable judicial officers to make informed decisions about appropriate questioning restrictions and accommodations, thereby enhancing access to justice for the vulnerable participants they encounter in their courts.

The witness intermediary special measure

To enhance the capacity of vulnerable people, especially children, to participate effectively in the justice process, the special measure of witness intermediaries was implemented in NSW in 2016 as a pilot program. The pilot initially ran for three years and became the Child Sexual Offence Evidence Program in 2019. The *Criminal Procedure Act 1986* (NSW) as amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* (NSW) sets out the legislative basis for the program. The current legislation provides for the use of intermediaries only for children under 16 years and those 16 to 18 years if they have a cognitive impairment or communication disability. No parallel legislation exists for vulnerable adult complainants, witnesses and

defendants. Intermediaries do, however, provide their service to this vulnerable population through out of program referrals. Referrals for intermediary assistance for adult complainants and witnesses are made by the Office of the Director of Public Prosecutions. The author has facilitated communication for vulnerable youth and adult defendants where the referrals were made either by the court or Legal Aid. The presiding judge determines how the intermediary can facilitate communication for vulnerable adults in out of program matters.

A witness intermediary provides advice to the judges and lawyers on the best form of questioning to use to enable the vulnerable person to provide complete, coherent and accurate evidence.²⁶ The witness intermediary's assessment of the vulnerable individual's communication and language skills provides guidance to the judge and lawyers on the specific recommendations for questioning. These recommendations are then discussed at a ground rules hearing with the intermediary, judge and lawyers. The ground rules hearing is an opportunity for the judge and legal practitioners to ask the intermediary about how the person's disability or communication can affect their participation and what accommodations can be made. The judge makes the final orders about how the lawyers should question the vulnerable person based on this discussion and the intermediary's recommendations.²⁷ Intermediaries are neutral and impartial as they are officers of the court. They only facilitate communication and are not advocates for the witness or a second questioner.²⁸

Witness intermediaries have been found to “play an educative role in developmentally appropriate and effective questioning”.²⁹ Research conducted with judges and lawyers has found that the presence of an intermediary can reduce the stress of giving evidence and that vulnerable people provide better quality evidence.³⁰ Furthermore, both lawyers and judicial officers have indicated that intermediary presence enables access to justice for a vulnerable group of the population who would otherwise be deemed unable to participate in the legal process.³¹ Notwithstanding initial skepticism from some members of the judiciary and legal profession, intermediaries are increasingly recognised as invaluable assets in enhancing the reliability of the evidentiary process.³²

Conclusion

Australia's commitment to human rights necessitates ensuring equitable access to justice and the effective participation of vulnerable individuals in legal proceedings. In my view, the contribution of intermediaries in facilitating communication during the evidentiary process cannot be overstated; they serve as the vital bridge between the vulnerable person and the court. Given the linguistic complexity of legal language and the nature of questioning during cross-examination and the barriers these pose to individuals with disabilities, the role of the intermediary is crucial in the process. Judicial officers equally play a pivotal role

in the process, bearing the responsibility to recognise and mitigate improper questioning. By incorporating the recommendations of the intermediary and actively managing the linguistic environment of the courtroom, judicial officers can ensure that the questioning of vulnerable individuals is appropriate and can result in clear, complete and accurate evidence. This collaborative approach between the judge, intermediaries and lawyers can create a more inclusive and effective justice process that upholds fair and equal participation for all.

Endnotes

- * Accredited Witness Intermediary, Independent Communication Intermediary, Speech and Language Pathologist, PhD Candidate.
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- 8 International Covenant on Civil and Political Rights, entry into force: 23 March 1976, in accordance with [Art 49](#).
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