

# **CROSS-EXAMINATION OF VULNERABLE WITNESSES**

**A BEST PRACTICES TOOLKIT  
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# Cross-Examination of Vulnerable Witnesses

## Editor's Note

The Best Practices Toolkit has been updated to ensure alignment with the recommendations made by the Penal Code Review Committee (the "Committee") in their report dated August 2018 (the "Report"). In particular, the Report dedicated an entire chapter on "[e]nhancing protection for vulnerable victims", which included points that have been taken into consideration when updating this toolkit.

In addition to providing tips on the cross-examination of child witnesses and complainants of sexual offences, this updated toolkit also includes tips on the cross-examination of two other sets of vulnerable witnesses – witnesses with a mental disorder, as well as the elderly.

## A Best Practices Toolkit

The dominant view of the purpose of a trial is to have an examination, by a court sitting in public, of the admissible evidence brought by the prosecution and defence, in order to decide whether the defendant did the act as charged and, if so, was at fault for doing it. Seen in this light, the purpose of cross-examination of a witness is not only to elicit favourable admissions or concessions from the witness, and/or to discredit and/or undermine the evidence-in-chief of the opponent's witnesses. As an officer of the Court, a legal practitioner also has a duty to assist the Court in the administration of justice.

This best practices toolkit outlines what legal practitioners may wish to bear in mind when handling the cross-examination of vulnerable witnesses. The general tips below offer guidance. They are not meant to be prescriptive, nor exhaustive on how to approach the cross-examination of vulnerable witnesses, which should be left to the discretion of counsel.

## Right of Cross-Examination

*"Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed on the witness."*

*Wong Kai Chung v The Automobile Association of Singapore*

[1992] SGHC 16

[penultimate paragraph]

The Evidence Act<sup>1</sup> provides for the examination and cross-examination of witnesses. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.

As a key stakeholder in the administration of justice, a legal practitioner conducting cross-examination faces the challenge of balancing an advocate's twin duties of ensuring that an accused person is given a fair trial by invoking the right to challenge and examine witnesses, and discharging the advocate's duty to elicit the best evidence for the Court.

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<sup>1</sup> Evidence Act (Cap 97) Rev Edn 1997 ("Evidence Act").

## Respect and Fairness

As an officer of the Court, an advocate serves both the client's cause and the interests of justice by demonstrating respect and fairness in the conduct of the case. "Respect" is mentioned several times in the Legal Profession (Professional Conduct) Rules ("PCR 2015").<sup>2</sup> In line with respect, in particular for vulnerable witnesses, there is a need for counsel to "always be courteous in the conduct of a case, whether to the court or tribunal, or any other person involved in proceedings" (Rule 13 (3) PCR 2015). More generally, counsel should treat any person who is not represented by another legal practitioner fairly (Rule 8 (1) (c) PCR 2015).

Vulnerable witnesses are particularly susceptible to the power which the advocate wields in the courtroom and as such, are especially susceptible to unfair or disrespectful questioning. Counsel preparing to cross-examine vulnerable witnesses may ask questions firmly but not unfairly. Further, counsel may consider the available "tools" set out below to assist in their balance of fairness to the witnesses and duty to the Court when cross-examining vulnerable witnesses.

*"Cross-examination, a powerful weapon entrusted to counsel, should be conducted with restraint and with a measure of courtesy and consideration to the witness."*

*Kwang Boon Keong Peter v PP*  
[1998] 2 SLR (R) 2011  
(cited in *PP v Xu Jiadong*  
[2016] SGM 38)

## Vulnerable Witnesses

The vulnerability of a witness during cross-examination is associated with some feature of the individual in question which may compromise their ability to give accurate, thoughtful or voluntary testimony in court. Vulnerable witnesses may find the spectacle of the court room daunting and, because of deference to authority figures, may be impressed by factors which do not relate to the essence of the question being asked. Their ability to understand the complex and formal styles of questioning typically used by advocates may be limited. Apart from socio-demographic characteristics, situational circumstances, such as previous encounters with authority figures, may also render certain individuals vulnerable during the cross-examination process. Additionally, these may include reduced mental capacity and experiences with trauma from being victims or eye-witnesses of violent crimes or sexual offences.

Section 2 of the Vulnerable Adults Act<sup>3</sup> (the "Vulnerable Adults Act") defines "vulnerable adult" to mean:

"... an individual who –

- (a) is 18 years of age or older; and
- (b) is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect or self-neglect;"

The following persons, though in no way a definitive and/or exhaustive list, may be considered vulnerable adult witnesses, which may likely impact on the quality of the evidence that they give<sup>4</sup>:

<sup>2</sup> Legal Profession (Professional Conduct) Rules 2015 ("PCR 2015").

<sup>3</sup> Vulnerable Adults Act 2018 (No. 27 of 2018).

<sup>4</sup> Barbara Mitchels, "Children and Vulnerable Witnesses in Court Proceedings" at page 53 and <http://researchbriefings.files.parliament.uk/documents/LLN-2018-0071/LLN-2018-0071.pdf>. Also, in the UK, the Equality Act 2010 governs disabled people's rights, and a person is defined as having a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Additionally, at an international level, the United Nations Convention on the

- (a) Persons with learning disabilities;
- (b) Persons with physical disorders;
- (c) Persons with autism spectrum; and/or
- (d) Persons that suffer from paranoia, dementia, schizophrenia and/or bipolar disorder.

Further, the Committee in their Report, recommended that the definition of “vulnerable adults” under the Vulnerable Adults Act be broadened for the purposes of section 74A of the Penal Code such that younger vulnerable persons (without the age requirement of 18 years) with similar disabilities or incapacities would also be covered as regards the enhancement of penalties for offences committed against “vulnerable persons”.

On another note, in Singapore, the Criminal Justice Division’s Witness Support Programme (the “Programme”), managed by the State Courts, provides support to vulnerable witnesses in criminal cases who have to give evidence in Court against their perpetrators. The Programme provides emotional support through a volunteer support person to vulnerable witnesses, *inter alia*, (a) adults who have a mental capacity that is below the age of 18, and (b) elderly victims above 65 years old. In each circumstances, the investigating officer, prosecutor or defence counsel may identify suitable cases and inform the witness of the Programme, and the witness who wishes to participate in the Programme can download and submit a referral form. More about this Programme can be found at [www.statecourts.gov.sg](http://www.statecourts.gov.sg).

Attention is also drawn to section 62A of the Evidence Act that may aid in reducing the stress level for vulnerable witnesses. Section 62A(1) of the Evidence Act permits the giving of video-linked evidence in civil proceedings :

*“a live video or live television link in any proceedings, other than proceedings in a criminal matter, if –*

- (a) the witness is below the age of 16 years;*
- (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;*
- ...*
- (c) the Court is satisfied that it is expedient in the interest of justice to do so.”*

Section 8 of the Supreme Court of Judicature Act<sup>5</sup> gives the Court the power to hear certain proceedings *“in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so.”*

Finally, general tips for counsel to consider when cross-examining specific groups of vulnerable witnesses are set out below.

### **Child Witnesses**

The recommendations made in the Report in relation to child witnesses, were made to ensure that the Penal Code adequately protects minors from sexual predators.

Likewise, increased care could be taken to protect child witnesses in the often gruelling cross-examination process.

On another note, for purposes of section 74A of the Penal Code on the enhancement of penalties for offences committed against “vulnerable persons”, the Committee recommended that the definition of “vulnerable persons” be broadened, as compared to that defined in the Vulnerable Adults Act, to include

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Rights of Persons with Disabilities 2008, as summarised by the UN Department of Economic and Social Affairs, *“adopts a broad categorisation of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.”*

<sup>5</sup> Supreme Court of Judicature Act (Cap 322) Rev Edn 2007.

younger vulnerable persons (without the age requirement of 18 years) with similar disabilities or incapacities. This is highlighted to ensure that it is clear who a child witness is, and to whom the general tips below are afforded to.

1. **Introduction.** A child is unfamiliar with the court room environment and could find it intimidating. Consider introducing yourself and explaining to the child what the child's role is before commencing questioning. An introduction may also put counsel in a better position to be acquainted with the child's communication abilities and reduce stress and anxiety for the child.
2. **Set the stage.** Use of a calm tone and simple language would help put a child at ease. Consider whether it would help to remind the child that s/he:
  - a. does not have to agree with suggestions made unless they are true;
  - b. can respond to say, "*I don't know*", "*I don't understand*", or "*I don't remember*", as may be appropriate;
  - c. should only talk about things that really happened, things the child is sure about, and things the child saw, heard or felt;
  - d. should not make things up, tell lies, make guesses or pretend;
  - e. should tell counsel if s/he is confused or muddled up; and
  - f. can stop when s/he feels the need to and come back when s/he is ready.
3. **Body language, tone and demeanour.** Maintaining neutral body language and tone, and making appropriate eye contact can help reassure the child that counsel is speaking and listening to him or her. If there is a "live" video link, maintain appropriate eye contact with the camera rather than look at papers. Using the child's preferred first name instead of addressing the child as "*witness*" may also help build rapport with the child and encourage responsiveness.
4. **Plan questions by topics and be clear about topic changes.** Questioning children in court is very different from questioning them in a family context. Considerable skill is required when adapting questions for children in court. Advance preparation and flexibility during cross-examination is required. Planning questions by topic and being clear about topic changes help the child to make sense of the process and give them transition time to focus on the next subject. For example, you can signpost the subject and explain when the subject is about to change.
5. **Clear and simple language.** Children do not use, process or understand language in the same way as adults. Use of clear and simple everyday words which a child of the appropriate age would be accustomed to would help the child's understanding. It is much easier for a child to understand your question if you use consistent terms throughout. Use of metaphors, non-literal language, figures of speech and double-negatives may be confusing to children.
6. **Precise questions.** Complex or multi-part questioning may result in "*I don't know*" or inaccurate responses. Counsel may also wish to consider using the past tense during cross-examination. Use of the present tense may cause confusion, distress or even trauma to a child witness as children tend to have a different sense of temporality from adults. Questions in the form of statements may receive no response from children because they may not understand that a response is required of them.
7. **Pace.** Children have short attention span compared to adults. Consider what pace of questioning would be suitable for the child witness. Some children may need more time to process questions before answering them.

8. **Seek clarification.** If a question needs repeating in order to verify whether the child has understood fully, consider explaining that by saying, “Thank you, but I want to be really sure I understand you. Tell me again [...]” (followed by the question).
9. **Gestures and actions.** Children may be able to demonstrate what happened instead of using words to explain what they witnessed. When in doubt, seek clarification on what their gestures mean.
10. **“Handle with care”.** Consider treading carefully when referring to the child’s appearance, dressing and/or sexual history. Care should be taken especially when asking about the child’s sexual history, unless counsel can effectively show that such questions are relevant, going to facts in issue or related matters. Be mindful of the parameters in the Evidence Act, PCR 2015 and the relevant case law.

In *PP v Ong Jack Hong* [2016] 5 SLR 186, a submission was made by the respondent’s Counsel that the victim had had sexual relations with her boyfriend, i.e. suggesting that the victim had not been traumatised by the incident. The learned Chief Justice, in obiter, made the following statement as regards counsel’s conduct of the case:

*“As officers of the Court, counsel should always be mindful of the importance of ensuring the appropriateness and relevance of any submission that he or she was making, and this was especially so where such a submission impugned the character or integrity of a person who was not only not on trial but was in fact the victim of the crime in question.”<sup>6</sup>*

The learned Chief Justice disregarded that submission for the following reasons:

- a. Counsel’s conclusion could not have fairly been drawn in all the circumstances as there was no basis for comparing a 14-year-old’s reaction to sexual encounters with her boyfriend in a steady relationship, with an encounter that took place with a stranger while she was drunk and vulnerable; and
- b. Even if it were true that she had not been traumatised, that would not be a mitigating factor; it would only mean that there was no such aggravating factor. It was unnecessary for a point that appeared, in the final analysis, to be directed at the morality of the victim to be put forward. This was unhelpful in the context of sexual offences.

### **Complainants of Sexual Offences**

The Committee’s recommendations in the Report and their underlying principles support the position taken in this section of the toolkit, which seeks to enhance the protection of complainants of sexual offences during cross-examination.

1. **Introduction.** A complainant of a sexual offence could be suffering from stress and anxiety in the lead-up to trial. Consider taking time to put the complainant at ease by introducing yourself and your role as well as to get a sense of the complainant’s level of communication abilities. This may enable the complainant to understand your approach in the line of questioning that follows, and consequently encourage responsiveness.
2. **Set the stage.** A complainant may be unfamiliar with what to expect during cross-examination. Consider explaining to the complainant what his/her role is and clarify that:

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<sup>6</sup> *PP v Ong Jack Hong* [2016] 5 SLR 186, at [23].

- a. the complainant does not have to agree with the suggestions put to her/him unless they are true;
  - b. it is okay for the complainant to say “I don’t know”, “I don’t understand” or “I don’t remember”, as may be appropriate.
3. **Body language, tone and demeanour.** Maintaining neutral body language and tone, with appropriate eye contact can help put the complainant at ease and provide assurance that you are speaking and listening to him or her. If there is a “live” video link, maintain appropriate eye contact with the camera rather than looking at papers.
  4. **Precise questions.** Consider being as precise as you can in questioning the complainant. Generally, witnesses find it easier to respond to who/what/where questions. Figurative or vague questions may result in “I don’t know” responses, though the complainant may know the answer.
  5. **“Distancing effect”.** Questions phrased in too impersonal terms may have a “distancing effect”, e.g. “Did you tell the police about what is in the statement about the matter, about the touching of the breasts?” An alternative could be “You said John touched your breasts. Did you tell the police?”.
  6. **Patience.** By the time a case goes to trial, a complainant’s memory of events may have deteriorated due to the time that may have passed since the alleged offence was reported (and/or the complainant’s psychological state). Consider giving the complainant time to recollect what had allegedly happened before responding to your question. If no reply is forthcoming, consider counting to six in your mind before repeating or rephrasing the question.
  7. **Visual Communication Aids.** Consider using a body map or diagram rather than asking the complainant to show intimate touching on her/his own person.
  8. **“Handle with care”.** Consider treading carefully when referring to the complainant’s appearance, dressing and sexual history. Care should be taken especially when asking about the complainant’s appearance or dressing, and any part of her/his body at the material time unless counsel can effectively show that such questions are relevant, going to facts in issue or related matters. Be mindful of the parameters in the Evidence Act, PCR 2015 and the relevant case law, and ensure the relevance of the questions you are asking so that your line of questioning will not be seen as:
    - a. indecent or scandalous;<sup>7</sup> and/or
    - b. intended to insult or annoy, or, though proper in itself, needlessly offensive in form.<sup>8</sup>

Further, rule 12(5) of the PCR 2015 provides that:

*“A legal practitioner must not make any statement, or ask any question, which is scandalous, is intended or calculated to vilify, insult or annoy a witness or any other person, or is otherwise an abuse of the function of the legal practitioner.”*

In *PP v Xu Jiadong* [2016] SGMC 38, the accused faced one charge under section 354 (1) of the Penal Code<sup>9</sup>, for outraging the victim’s modesty while she was on the MRT train. The victim alleged that the accused used his forearm to brush against her lower breast. The court made the following observations about counsel’s conduct while cross-examining the victim:

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<sup>7</sup> Section 153 Evidence Act.

<sup>8</sup> Section 154 Evidence Act. Also see *The Law Society of Singapore v Wong Sin Yee* [2017] SGDT 12 at [59].

<sup>9</sup> Penal Code (Cap 224) Rev Edn 2008.

- a. During cross-examination, counsel had asked the victim to stand up to assess how attractive she was standing up. Counsel's reliance on section 153 of the Evidence Act was misplaced. Such line of questioning was "*indecent and scandalous*"<sup>10</sup>. Section 153 of the Evidence Act provides that:

*"The court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed."*

- b. Counsel's cross-examination seemed to be intended to insult or annoy the victim, in breach of section 154 of the Evidence Act – a mandatory provision that called for the Court's intervention. Section 154 of the Evidence Act provides that:

*"The court shall forbid any question which appears to it to be intended to insult or annoy, or which though proper in itself, appears to the court needlessly offensive in form."*

- c. Counsel stared inappropriately at the victim's breasts during cross-examination thereby making the victim re-live her odious experience and causing her distress.<sup>11</sup> He ignored the victim's distress with the impolitic nature of his remarks.<sup>12</sup>
- d. Improper humiliation of victims of sexual offences during cross-examination could discourage future victims from coming forward.<sup>13</sup>
- e. Members of the Bar needed to observe high standards of professional conduct and a proper sense of responsibility in the conduct of cases; if this was not done, the whole profession would suffer in the public's estimation.

In *The Law Society of Singapore v Wong Sin Yee* [2017] SGGT 12, the Disciplinary Tribunal listed generally, the objectionable aspects of the Respondent's conduct as follows:

- a. Engaging in an objectionable line of questioning on whether the victim was attractive, including asking the victim to stand up and sit down; and
- b. Using needlessly offensive and intemperate language in the exchange with the District Judge, including references to breast size, to the point where the District Judge had to stop the Respondent repeatedly.

In obiter, the Tribunal pointed out as follows:

- a. As an advocate of a client's interests, liberty and sometimes life, counsel's questions during cross-examination may at times necessarily intrude into areas that cause a witness discomfort, in order to establish discrepancies and elicit concessions relevant to the case.
- b. The Tribunal, however, stated that such latitude to question in a manner that would best advance one's client's interest was not without limits, as evidenced in the legislative provisions. The Tribunal highlighted the necessity to maintain the honour and standing of the legal profession, and cautioned that the level of mindfulness and restraint that an advocate should exercise was more exacting in situations where "victim blaming" may arise, particularly in sexual offences cases.

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<sup>10</sup> *PP v Xu Jiadong* [2016] SGM 38, at [100] – [101].

<sup>11</sup> *PP v Xu Jiadong* [2016] SGM 38, at [106].

<sup>12</sup> *PP v Xu Jiadong* [2016] SGM 38, at [108].

<sup>13</sup> *PP v Xu Jiadong* [2016] SGM 38, at [109].



- c. In this case, the Respondent's words and conduct fell into the category of crude and scandalous language, and bullying intimidation.

### **Witnesses and Defendants with Mental Disorder**

In addition to the aforesaid on vulnerable witnesses, the term "mental disorder" may include a broad range of mental health conditions.<sup>14</sup> The definition of the term is set out in the Mental Health (Care and Treatment) Act:

*"[M]ental disorder means any mental illness or any other disorder or disability of the mind, and "mentally disordered" shall be construed accordingly;"<sup>15</sup>*

According to a report published in 2014, one in six people in Singapore suffer "from some form of mental illness", and there is considerable stigma that attaches to a person with such an affliction.<sup>16</sup>

General tips for counsel to consider when cross-examining a person with a mental disorder are set out below, bearing in mind that the frame of mind of a person who suffers from a mental disorder will affect his ability to give evidence. "Mental disorders are broad, complex, and encompass many aspects of one's level of functioning."<sup>17</sup> Therefore, mental disorders may exist across a spectrum, with varying levels of vulnerability.

1. **Exercise Patience.** Consider giving the witness considerable time to respond. Bear in mind that some witnesses wish to tell their story before getting to the point. Consider repeating a question if the witness does not appear to understand the question or clarifying with the witness if he appears to be upset. However, this is a delicate exercise that calls for counsel's discretion.

Repeatedly asking the same question several times could affect the reliability of evidence given by some witnesses with a mental condition. A witness may think that his first response is wrong, prompting him to give the "correct" response in order to "get it over with". Further, the witness may be unsettled by persistent repeated questioning. Hence, where counsel decides to repeat a question despite a response, consider explaining the reason for the repetition so as to alleviate any concerns that the witness's first answer to the question was wrong.

2. **Sensitivity.** A degree of compassion and sensitivity would contribute to establishing rapport with the person concerned, to put the witness at ease and facilitate communication in Court. To this end, understanding statements such as "giving evidence in Court can be quite stressful" might go some way to putting the person at ease. Instead of addressing him as "witness", consider finding out what the person's preferred name is and how he wishes to be addressed. This approach may encourage responsiveness. Consider communicating with the person by his preferred name at the start of each question, so he knows that he is being addressed.

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<sup>14</sup> This best practices toolkit outlines what legal practitioners may wish to bear in mind when handling the cross-examination of witnesses and defendants who suffer from a mental disorder. It is not a substitute for an assessment by a psychiatrist or psychologist that would help the person concerned.

<sup>15</sup> Section 2(1) Mental Health (Care and Treatment) Act (Cap 178A) Rev Edn 2012.

<sup>16</sup> Joel Yang, "Let's end stigma of mental illness", Today (1 May 2014). The article observed that:

*"Stigma includes both prejudicial attitudes and discriminating behaviour towards individuals with mental illness. A local study on help-seeking behaviour among those with mental illness indicated that only about half of those with a severe mental disorder had sought help in the past 12 months. The reason in part is the stigma attached. Critically, besides the treatment gap caused by stigma, we often see patients suffer self-stigma."*

<sup>17</sup> Keri Bolton Oetzel, "It Happens in Real Life, The Complexities of Conflict and Mental Health Within Families", page 239.

Further, witnesses with mental disorders, such as schizophrenia or other delusional disorders, may give unreliable evidence that are accurate from their perspective but have no bearing on the reality. As such, consider probing their accounts sensitively, carefully and in a non-judgmental way, in order to sift out elements of the account that are delusional from those that might have a firmer foundation in reality<sup>18</sup>.

3. **Plan questions by topics and be clear about topic changes.** Considerable skill is required when adapting questions for persons suffering from a mental disorder in court. Planning questions by topic and being clear about topic changes gives the witness transition time to focus on the next subject. For example, you can identify the subject and explain when the subject is about to change. It may also be worth considering a plan for breaks, where there will be a change of subject in your line of questioning. Such an approach would be more likely to encourage appropriate responses.
4. **Body language, tone and demeanour.** Consider making appropriate and natural eye contact without looking at the witness for too long. Such an approach can help reassure the witness that you are speaking and listening to him. The witness may look away to think of an appropriate response to a question. Maintaining appropriate eye contact is particularly important if there is a “live” video link; counsel should maintain appropriate eye contact with the camera rather than look at papers.
5. **Flexibility.** Advance preparation and flexibility during cross-examination are useful skills for an advocate to develop. Consider adjusting to the witness’s needs to secure reliable evidence for the Court, and maintain composure in the face of hostility. For example, counsel’s innocuous questions may elicit offensive responses, resulting in the witness “acting out”, or even running out of the courtroom. However, with due regard for the witness’s condition, and with counsel’s patience and perseverance, this witness might still be capable of giving reliable and useful evidence.
6. **Clear and simple language.** Consider using simple language and refrain from using legal jargon. Such an approach would make it easier for the witness to understand the questions and respond accordingly. As is the case with other vulnerable witnesses, the use of metaphors, non-literal language, figures of speech and double-negatives may give rise to confusion.
7. **Discernment.** Persons with mental disorders may fluctuate in their vulnerability and/or lucid moments, depending on the level of emotional difficulties and possible distress at any given time. Discernment is necessary to assess, at every stage of the cross-examination, when the vulnerable witness is not able to give reliable and/or cogent evidence. Consider frequent breaks for rest and refreshment and/or flagging out issues in coherence to the Judge at the appropriate juncture.
8. **Precise questions, and pace.** On a related note, consider asking short, simple questions, one at a time. A person with a mental condition could have a modest ability to recall a complex question. Hence, he may not be in a position to reply accurately to all aspects of a complex question.
9. **Sequencing.** Consider asking open-ended questions in a logical time-sequence, one event at a time, rather than combining two or more questions into an overarching one. For example, it may well be easier for a witness with a mental disorder to respond to questions like, “*What did you do next?*”, rather than “*Before the person ran away, did you observe anything?*”

A simple approach is more likely to enable the witness to be give suitable responses, particularly if he has issues with sequential thought, coupled with the additional concern of other disruptive

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<sup>18</sup> Barbara Mitchels, “Children and Vulnerable Witnesses in Court Proceedings, page 55.

thoughts unique to his condition. Questions that move back and forth in time and appear to be unrelated could give rise to or aggravate comprehension issues.

10. **Timelines.** Consider using a schedule setting out a sequence of events and places, if the witness appears to find it challenging to reply to questions about times, dates or places.
11. **Seek clarification.** Consider checking with the witness on his understanding of the question, in simple, understandable words. While it may be helpful to ask the witness to seek clarification when he does not understand a question, a witnesses with a mental condition might not realise that he has not understood what has been said or he may not be willing to say so. When in doubt, it may be worth checking on the witness's understanding of a question by asking him to state the question in his own words, then seeking his response to it. Indeed, it may not be very helpful to ask "Do you understand?", as the witness could claim that he understands.
12. **Gestures and actions.** Recognise the importance of correctly interpreting gestures, including being alert to certain body language. Some vulnerable witnesses, including a witness with a mental disorder, may have developed "coping mechanisms" to hide his lack of understanding. Such gestures might include nodding to show understanding, when in fact he may not.

Counsel may also consider suggesting the use of certain gestures to the witness, to enable the witness to communicate by showing, when telling becomes problematic for him. For example, signs or gestures could be introduced and agreed upon for the following: "I don't understand", "Go slower", "Stop", and "Toilet break" could be used to facilitate proceedings. When in doubt, consider seeking to clarify what the gestures mean.

13. **Visual Communication Aids.** Likewise, consider the use of drawings, body maps, diagrams, or figurines, which can be helpful communication tools.

### **Witnesses and Defendants who are Elderly**

In Singapore, as stated above, the Programme provides emotional support for elderly, defined as persons being above 65 years old, who are required to give evidence in Court in criminal cases.

Under the Programme, upon the application of the prosecutor or defence counsel, and where permission is granted by the Judge, the vulnerable witness may have the support of a volunteer support person sitting behind him in open court or when he/she gives evidence via video link in a witness room, during the period of the trial.<sup>19</sup> We have assumed that the elderly above 65 years old are vulnerable witnesses for the purposes of this aspect of the toolkit.

Further and/or in the alternative, the elderly may be considered vulnerable witnesses by virtue of section 2 of the Vulnerable Adults Act. As stated above, section 2 defines "vulnerable adult" to mean:

*"... an individual who –*

- (c) *is 18 years of age or older; and*
- (d) *is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect of self-neglect;"*.

As with other vulnerable witnesses, the manner, tenor, tone, language and duration of cross-examination should be appropriate to the witnesses' developmental age and communication abilities.<sup>20</sup>

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<sup>19</sup> [www.statecourts.gov.sg](http://www.statecourts.gov.sg)

<sup>20</sup> [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_Children\\_Vulnerable\\_adults+\\_finalised\\_.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_Children_Vulnerable_adults+_finalised_.pdf)

The following general tips should be taken into account by counsel when cross-examining the elderly.

1. **Patience and pace.** Counsel should expect that the elder would take longer than usual to recall and/or answer to questions. Further, counsel should bear in mind that some witnesses prefer to tell their story before getting to the point.<sup>21</sup> Sensitive timing and pacing are required to ensure that the elder “does not become overwhelmed, potentially re-traumatized or unable to communicate”.<sup>22</sup>

Counsel should therefore not rush or suggest answers to the elder. Instead, give him the time needed to recall comfortably. It may also be worth considering using memory-jogging techniques if the elder is facing extreme difficulties in answering questions.

2. **Introduction and initial assessment.** As the elder is unfamiliar with the court room environment, counsel may consider introducing himself and explaining to the elder, what his role is before commencing questioning. Counsel may also use this introductory period as a means to conduct an initial assessment of the elder, keeping counsel’s questions at a more casual level so as to identify the elder’s possible limitations and/or ability to communicate. In particular, an introduction and/or initial assessment may put counsel in a better position to be acquainted with whether the elder:
  - a. Has difficulty answering simple questions;
  - b. Has difficulty seeing or hearing;
  - c. Needs ancillary devices such as eye glasses or a hearing aid; and
  - d. Is physically self-sufficient.

Further, the introduction and/or initial assessment may further protect the interests of the elder by reducing anxiety and promoting effective testimony.

3. **Sensitivity.** A degree of compassion and sensitivity would contribute to establishing rapport with the elder and encourage responsiveness. Counsel may consider:
  - a. Speaking face-to-face with the elder;
  - b. Asking the elder for his full name or preferred name;
  - c. Referring to the elder by his title; and/or
  - d. Establishing eye contact so that the elder can read counsel’s lips, if necessary.

4. **Attention to triggers to vulnerability.** In addition to being sensitive towards the elder throughout the cross-examination, counsel may consider giving attention to potential triggers to the elder’s vulnerability throughout the proceedings. For example, older witnesses may also suffer from dementia, which can cause cognitive impairment. Hence the issue of vulnerability should regularly and proactively be reviewed, as vulnerability may only become apparent or exacerbated in certain circumstances.<sup>23</sup> Where counsel applies his discretion and determines that the elder exhibits signs of distress, he may consider giving the elder some time to compose himself. Ultimately, enabling the elder to participate effectively in the cross-examination ensures access to justice and a fair hearing.

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<sup>21</sup> In the book “Children’s Testimony: A Handbook of Psychological Research and Forensic Practice”, Chapter 14 on “Safeguarding Vulnerable Witnesses” by Graham Davis and Helen L Westcott, University of Leicester, United Kingdom, it states that:

“Research has demonstrated that the most reliable evidence comes from “open” questions – those that invite extended narrative from the witness (see Chapter 7) but such question[s] appear to be rarely used in cross-examination.”

<sup>22</sup> The Advocate’s Gateway, “Vulnerable Witnesses and Parties in the Civil Courts”, Toolkit 17, July 2015.

<sup>23</sup> The Advocate’s Gateway, “Vulnerable Witnesses and Parties in the Civil Courts”, Toolkit 17, July 2015.

5. **Plan questions by topics and be clear about topic changes.** This technique gives the elder time to transition to and focus on the next topic. Further, it is more likely to encourage appropriate responses from the elder.
6. **Precise questions and possible repetitions.** Consider asking short and simple questions, one at a time, bearing in mind that an elder may have a modest ability to recall answers to a complex question. Additionally, consider repeating questions where the elder appears to have difficulties understanding the questions, though be mindful that repeated questions may cause a witness to conclude that the first answer was wrong (even if correct) and to “correct it”. If a question must be repeated because an answer was unclear, this should be explained to the witness. As such, application of such techniques requires counsel’s suitable discretion.
7. **Seek clarification.** If a question needs repeating in order to verify whether the elder has fully understood, consider explaining that by saying, *“Thank you, but I want to be really sure that I understand you. Tell me again [...]”* (followed by the question).
8. **Clear and simple language.** Consider refraining from legal jargon to ensure that the elder understands counsel’s questions accurately. As with other vulnerable witnesses, the use of metaphors, non-literal language, figures of speech and double-negatives may give rise to confusion.
9. **Compensating for other physical limitations.** Consider applying one or more of the following approaches to ensure that the elder is fully engaged during the cross-examination:
  - a. Ideally, try to schedule the elder’s cross-examination for mid-morning, when he is more likely to be at his best;
  - b. Requesting that cases involving elders are given priority in the list, so that the elder does not suffer unnecessary anxiety or stress due to long waiting times;
  - c. Rather than assuming so, try asking the elder if he is having trouble seeing and/or hearing;
  - d. Maintain appropriate and natural eye contact with the elder as he may have to compensate for his hearing loss by lip reading or watching for facial expressions;
  - e. Use visual communication aids with larger diagrams and font sizes where possible; and/or
  - f. Eliminate background noises to ensure that counsel’s questions are heard accurately.

Maintaining appropriate eye contact is particularly important if there is a “live” video link; counsel should maintain appropriate eye contact with the camera rather than look at papers.

10. **Visual Communication Aids.** As mentioned above, consider the use of larger drawings, picture cards, signal boards, body maps, or other diagrams with larger font sizes, which can be helpful communication tools. Visual time lines set out in a schedule may be useful where the elder finds it challenging to recall answers about times, dates or places.

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Respectful, fair and effective cross-examination of vulnerable witnesses is a challenging undertaking. For instance, *“because a complainant’s evidence in [sexual assault] cases is central to establishing the alleged offending, defence lawyers’ main – and often only – avenue of defence is to discredit the complainant’s*

account through cross-examination”<sup>24</sup>. Skilful advocates do so without engaging in intimidation, shaming or disrespect.

***It is up to counsel, as an officer of the Court, to develop his/her own unique art of advocacy, having considered the values recalled above, the tips covered, and the possible pitfalls.*** As officers of the Court, counsel conducting the cross-examination of vulnerable witnesses, particularly those who may be victims of sexual assault, should be mindful that such witnesses may experience trauma in attempting to answer questions put to them and should be circumspect when navigating the duties to the Court and to the client. It is important to avoid, through the nature of cross-examination, further victimisation of already damaged witnesses. The oft-quoted remarks of Lord Reid in *Rondel v Worsley* [1969] 1 AC 191 offer useful guidance:

*“Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests.”*<sup>25</sup>

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<sup>24</sup> Sarah Zydervelt, Rachel Zajac, Andy Kaladelfos and Nina Westera, “Lawyers’ Strategies for Cross-Examining Rape Complainants: Have we moved beyond the 1950s?” in *British Journal of Criminology*, Vol. 57 (3), May 2017, pp. 551-569.

<sup>25</sup> *The Law Society of Singapore v Wong Sin Yee* [2017] SGGT 12, at [55].