



SUBMISSION TO:

Australian Human Rights Commission

Access to justice in the criminal justice system for people with
disability

PREPARED BY:

SPEECH PATHOLOGY AUSTRALIA

August 2013



For more information please contact:

Dr Jemma Skeat
National Advisor Research and Policy

jskeat@speechpathologyaustralia.org.au

Speech Pathology Australia

Level 2 / 11-19 Bank Place

Melbourne Victoria 3000

T: 61 3 9642 4899

F: 61 3 9642 4922

Speech Pathology Australia is the national peak body for speech pathologists in Australia, representing over 5000 members. Speech pathologists are university educated professionals with specific knowledge and expertise in all areas of speech, language, communication and swallowing, including disorders of speech, language, literacy and numeracy, as well as difficulties with eating and drinking.

Speech pathologists work with children, adolescents and adults with communication disabilities and special needs prior to and during their formal education, in the public and private sectors, health, disability, mental health and the juvenile and criminal justice systems. As such, the profession believes it is well placed to provide meaningful input regarding the questions posed in this Issues Paper. This input is based on feedback from our members who work with clients with a communication disability (and their parents, carers or community workers).

Questions posed in Discussion Paper:

1. What are the biggest barriers for you or other people with disability in the criminal justice system?

SPA believes that one of the greatest barriers that people with a disability face in seeking access to justice, whether as a witness, victim or defendant, is communication. Communication is a two-way process that comprises verbal and nonverbal information, either verbal or written. Over one million Australians have communication disability.

Communication disability takes many forms. It may result from an intellectual disability, or may have another underlying cause such as an acquired neurological or physical deficit. For over 40% of people with severe communication disabilities, the underlying impairment is unknown.¹ Communication disability impacts on independence, and on social, educational and employment participation.

People with severe communication difficulties may communicate via a communication aid or device either alone or in combination with speech, known as augmentative and alternative communication, or AAC. AAC may encompass anything from a simple picture symbol choice board through to a complex speech-generating device. For people who use AAC, their ability to understand verbal information may be compromised, or only their ability to produce communication, or (more frequently) both. They may also have reduced attention and listening skills, reduced memory, difficulties interpreting and using non-verbal aspects of language (e.g. body language, tone of voice), and deficits in social communication skills, such as being able to consider another person's perspective, or understand emotions.

People with moderate or mild communication impairments may also face significant barriers when seeking access to justice.² This includes people with language disorders that affect their understanding and/or use of spoken language. Australian research shows that one in two young male offenders has a clinically significant, yet unrecognised language impairment, affecting both comprehension and expressive skills.³ This potentially compromises their ability to comprehend instructions or questions, or to tell a story or event in a logical and sequential manner. They may have difficulty understanding the complex language used in the legal system and/or difficulty expressing themselves adequately. Their ability to provide meaningful testimony, to tell their story, or to respond to questioning is reduced.⁴

People with communication disabilities may be difficult to interview.² Police officers may form the view that when individuals have difficulty answering questions reliably or retelling events in detail, they are uncooperative or evasive and subsequently not truthful. Distress and anxiety at being questioned by police can add to the communication confusion. This can act as a vicious cycle further reducing their ability to understand and respond appropriately to questions. This can include understanding of rights; silence or not being able to request access to a legal representative. These individuals may have little or no understanding of legal procedures and are vulnerable to making inappropriate confessions (acquiescing), changing their story and/or becoming totally uncommunicative. There is potential for these people to be labelled as rude, challenging or uncooperative, and for this label to stick as they move through the justice system.⁵

The questioning style used by police or other persons involved in the justice system, including lawyers and court officers can also result in incomplete and/ or inaccurate information being provided by an individual with a communication disability.² If questions are abstract (e.g., asking about qualities such as honesty or reliability), leading, are repeated or require a specific response, then individuals with may provide answers that they think are 'expected' rather than the facts. Individuals with communication difficulty may have difficulty following and understanding the question, and may provide a fragmented and illogical recount of an event in a statement to police or in a court situation.

Individuals with intellectual or cognitive disability, communication disability or poor oral language skills can also have specific difficulties with memory. Memory difficulties may cause problems with the individual's account in interviews as he/ she may have difficulty understanding and storing information, and recalling or retrieving information about events. Factors that can affect an interviewee's response include the way questions are asked, the length of the questions, how many component parts the question has, and the amount of time that has passed between the event and the request to recall it.

People with communication disabilities are also likely to have problems with literacy, and their ability to access written information may be severely compromised. People with poor literacy skills and additional communication problems are extremely disadvantaged within the justice system and need extra support for example, additional time for exploratory interviews and confirmation of statements.

Speech Pathology Australia believes that it is critical that people with communication disabilities are given every opportunity to understand the investigative and legal process from whatever perspective and are supported to provide accurate information to ensure their rights are upheld.

2. What could be done to remove these barriers and help people with disability in the criminal justice system?

It is critical that people with communication disabilities are identified, so that they are provided with appropriate supports and opportunities to understand proceedings, questions and information, and to provide accurate information themselves. For this we recommend:

- A robust screening and assessment process conducted by a suitably trained speech pathologist who can advise professionals involved in all components of the legal process regarding the individual's communication ability and supports needed.
- Improvements to the definition of 'vulnerable witness'. SPA contend that all people with a communication disability, regardless of cause, should be considered as potentially vulnerable witnesses, because their ability to provide testimony, make statements, comprehend instructions, and understand the processes and language of the justice system are potentially compromised. The definition should include:
 - people who cannot communicate using speech, and those who have difficulty understanding or using speech to communicate, including those who use or require an AAC device or method to communicate;
 - people who have difficulty understanding or using language to an extent that potentially compromises their ability to reliably tell their own story or understand questions or instructions (as determined by speech pathology assessment).
- Assessment by a speech pathologist should be the criteria used to determine if someone is a vulnerable witness in relation to their communication disability. The presence of a trained speech pathologist as intermediary (see below) should be considered for vulnerable witnesses with communication disabilities.
- Intermediary support by a qualified speech pathologist should be provided for all people who experience difficulty communicating, to confirm their understanding and responses and to facilitate the communication process between the person with a disability and police, lawyers, court officials, etc. This person could also have a role in supporting other professionals in the justice system to relate better to people with communication disability.
- Accessible information regarding their rights and information regarding the processes of the criminal justice system from reporting a crime to being interviewed as a witness or defendant. One accessible form of written information is that of Easy English, The Easy English style includes short sentences using simple words, a clear visual layout (e.g. less words on the page and more white space) and key concepts represented by pictures (see <http://www.scopevic.org.au/index.php/site/resources/easyenglishstyleguide>). Any information can be translated into Easy English and should be consumer tested to ensure optimal usability and readability.
- Confirmation that people with a communication disability understand their rights at the first point of contact with the justice system.

- Formal acceptance of communication using non spoken forms such as pictures or drawings, or augmentative communication devices at all levels of the Justice system, including police taking statements or interviewing and giving of evidence in court.
- The provision of pictorial resources to aid both comprehension and expression in all police stations.
- Training of police, lawyers and other staff involved in the justice system to enable them to a) identify communication problems; b) respond to these- for example, with simplified questioning styles.
- As people with a communication disability may have memory problems, timely follow up is crucial, and the option of giving testimony (including cross examination) as soon as possible after the event is important.

3. Can you provide information about support that has helped you or other people with disability to participate in the criminal justice system?

Some specific examples with reference to the above recommendations:

- NSW Police has recently contracted Scope (Victoria) to complete their victims' rights fact sheets in Easy English. As part of this project extensive consumer testing was completed. Several consumers with limited functional literacy skills and dual diagnoses were consulted. The consumers provided feedback that they would never choose to read the original versions of the fact sheets. All consumers stated that the Easy English versions were easier to read and understand, and this was largely due to the format (including spacing on the page and simplified information written in short sentences or bullet points.
- Registered Intermediary services have been used in the UK for several years, predominantly employing speech pathologists. The role of the intermediary is to communicate between the witness and other persons (judge, lawyers, police), and to explain questions or answers to the witness as needed. The intermediary is not a witness supporter or advocate, they are impartial. Intermediaries in the UK are required to be trained and registered, and must abide by strict codes of ethics and practice, and professional development. More information can be found at: <http://www.soca.gov.uk/about-soca/specialist-operations-centre/witness-intermediary-team>

4. Please tell us about any time that you or another person with disability experienced barriers to justice.

NA

5. Do you have any other thoughts, ideas or comments you would like to make about people with disability and the criminal justice system?

There is a growing trend in Australia, particularly in youth justice settings, for the use of restorative justice conferencing (RJC) between an offender and a victim, most commonly, a face to face meeting. The purpose of RJC is to support offenders to understand the consequences of their actions and to accept responsibility, as well as identify opportunities to repair the harm they have caused.

RJC presents particular problems for people with communication disabilities. Snow (2013)⁶ likens these conferences to a high stakes, 'second language environment' for a person with a communication disability (who may be many years behind their expected age in terms of understanding and using language): they may get the gist of what is said, picking up on key words, but not entirely sure of the meaning. Their ability to express themselves clearly and with authenticity is likely to be reduced, which may lead to the interpretation that they are not engaged in the process. Snow and Sanger⁷ argue that these conferences may place people with communication disabilities at an extra level of disadvantage, and are likely to have limited effectiveness in terms of providing an opportunity for social restoration for the individual, and healing for the victim. There may in fact be unintended harm caused. It is crucial that criminal justice personnel are aware of the potential for undetected communication disability in a significant proportion of offenders, so as to reduce the risk of RJC processes discriminating and further marginalising these people.

Speech Pathology Australia is happy to provide support to the development of appropriate training guidelines for police, court staff and judiciary in relation to supporting people with communication disability to access the criminal justice system. In general, these guidelines should emphasise the need for communication disability to be identified, and for speech pathology assessment to be undertaken prior to questioning and taking of statements. In

addition the guidelines should include the use of Easy English documentation to inform people of their rights and the justice process

Do you give the Commission permission to use your responses or experiences as a case study in its work? Your name and any identifying information will not be used. For example, the Commission may discuss your experiences in meetings and forums or it may publish your story in its reports.

Yes, I give the Commission permission to use my response in its work with all identifying information removed.

Do you give the Commission permission to publish your response on its website?

Yes, I give the Commission permission to publish my response on its website and to use the following name

Speech Pathology Australia

Can the Commission contact you for further information? Yes

The Commission would like to know more about you. This information may help to better understand how barriers in the criminal justice system prevent people with disability achieving access to justice.

If you have provided information on behalf of a person with disability can you state your role?

- Representative organisation

References

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