

## GUIDELINES FOR CROSS-EXAMINATION OF CHILDREN AND PERSONS SUFFERING A MENTAL DISABILITY

### 1. Preamble

These guidelines are meant to provide assistance to counsel as to the appropriate approach to take when cross-examining in criminal proceedings child witnesses and witnesses suffering from mental disabilities. The guidelines are not meant to be rules of the District Court and are not meant to limit or restrict the ability of counsel to represent the interests of the client (subject to s 26 of the *Evidence Act*, other rules of evidence and rules of professional conduct).

### 2. Guidelines

- 2.1 Counsel should address the witness by the name the witness prefers. For a young child this will usually be the child's first name. (Counsel calling the witness should generally inform the Court and opposing counsel of the name the witness prefers before the witness is called.)
- 2.2 Questions should be short and simple.
- 2.3 A witness should be given an adequate opportunity to consider the question, formulate a response and then give an answer. This will generally be longer than is required for the average adult witness. Quick fire questions are to be avoided.
- 2.4 As a general rule a witness' answer should not be interrupted except where it is necessary to ensure the witness responds to the question or to prevent the witness giving inadmissible evidence. It is to be taken into account that such witnesses may require greater leeway in formulating an oral response to a question.
- 2.5 The tone of questions should not be intimidating, annoying, insulting or sarcastic. Likewise the volume of counsel's voice should not be intimidating.
- 2.6 Terminology used in questions should be age or mental capacity appropriate.
- 2.7 Legalese is to be avoided (for example, "I put it to you", "my learned friend", "His Honour").

- 2.8 A young child should not be accused of "lying" except where the defence case is that the child is deliberately telling lies. Rather, counsel should suggest the witness' version is "not correct", or is "wrong" or the child should be asked whether an alternative version has occurred. The purpose of this guideline is to emphasise that counsel should normally avoid an unnecessary allegation that a witness is "lying" which may cause distress to the witness.
- 2.9 The witness should not be subject to unduly repetitive questioning.
- 2.10 Counsel should not mix topics or switch between topics. Events should be dealt with in a logical and/or chronological sequence.
- 2.11 In cases where the witness clearly is incapable of understanding inconsistencies and the inconsistencies only go to the issue of reliability, counsel should give consideration to limiting or abandoning cross-examination on otherwise proven inconsistencies. In such cases Counsel should seek a ruling from the trial judge as to whether proven inconsistencies can be relied upon in the closing address without comment that the inconsistencies were not the subject of cross-examination.

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