



Administrative  
Appeals Tribunal

## Migration and Refugee Division

# Guidelines on Vulnerable Persons

*From 20 December 2017 all references to:*

- *the Department of Immigration and Border Protection (DIBP) should be read as references to the Department of Home Affairs (Home Affairs); and*
- *the Minister for Immigration and Border Protection (MIBP) should be read as references to the Minister for Home Affairs*

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## Objectives

1. All references in this document to 'tribunal' are to be read as references to the Migration and Refugee Division of the AAT.
2. This guidance is intended to address the needs of those individuals who face particular difficulties in the review process. These difficulties may be because their ability to understand and effectively present their case or fully participate in the proceedings is impaired due to their age or physical, mental, psychological or intellectual condition, disability or frailty.
3. The objectives of the guidance are:
  - to ensure that vulnerable persons are supported during the review process
  - to ensure that the inherent dignity of vulnerable persons is recognized and respected
  - to heighten awareness of Members and staff of the need to consider implementation of procedures for dealing with vulnerable persons.

## Background

4. Staff and Members dealing with vulnerable persons should consider this guidance in conjunction with the following relevant guidance and procedures:
  - *President's Direction – Conducting migration and refugee reviews*
  - AAT security policies and procedures, set out on the intranet page
  - if an applicant is in detention, the special arrangements in place for detainees set out in the *President's Direction – Conducting migration and refugee reviews*
5. Members or staff who would benefit from personal support in relation to issues associated with dealing with vulnerable persons should advise their supervisor and consider using the services of the Employee Assistance Program (EAP).

## Definition of a vulnerable person

6. A vulnerable person is a person whose ability to understand and effectively present their case or fully participate in the review process may be impaired or not developed.
7. Some factors which can affect a person's ability to participate in the review process may include:

- Age: children<sup>1</sup> and young people may not be able to fully comprehend the context of the review and may not have developed the capacity or the knowledge to understand the wider implications for them of the review.
  - Physical or psychological abuse and trauma: victims of abuse, torture, rape, slavery, slavery-like practices such as forced labour and forced marriage, human trafficking or other serious forms of psychological, physical or sexual violence.
  - Sensory impairment: vision or hearing loss which prevents interaction with others and difficulties in accessing information.
  - Mental illness or emotional disorder: episodes of mental ill health which seriously affect mood (bipolar disorder, depressive illness), grief and loss reactions, depression, thought disorder and difficulties with complex reasoning.
  - Intellectual, developmental and learning disabilities: disability present from an early age either from genetic conditions or early brain injury (e.g. meningitis) or illness or nutrition of mother during pregnancy (e.g. rubella, foetal alcohol syndrome) which affect ability to learn and develop intellectual functioning.
  - Physical disability: problems with mobility and muscle movement, (e.g. paralysis, cerebral palsy) which do not generally affect psychological or intellectual functioning.
  - Acquired brain injury: neurological disorders as a consequence of trauma to the head and/or brain
  - Older age and frailty: disorders of older age: memory loss and inability to cope with complex decision making; sensory and mobility problems which prevent new information being accessed and new learning.
8. This list is not exhaustive and other factors, or a combination of factors, may affect an individual's capacity to participate in the review process. The central issue for consideration is whether a person's capacity to participate in the review process is impaired or limited, taking into account the entirety of the person's circumstances.
9. Persons who are parties to or witnesses in reviews may be vulnerable persons.

### **Procedural approaches that may be adopted by the tribunal in relation to vulnerable persons**

10. The guidance sets out a number of procedural approaches that may be adopted by the tribunal in relation to vulnerable persons. The approaches are designed to ensure that proper account is taken of the needs of vulnerable persons, be they parties or witnesses, and to ensure no applicant is disadvantaged when the tribunal conducts a review.

11. The procedures may not be appropriate in all cases involving vulnerable persons. The guidance is intended to complement existing legislation, policy and guidance and should not be applied inflexibly.

## Early identification of vulnerable persons

12. A person may be identified as vulnerable at any stage during the review process. However, it is preferable that vulnerable persons are identified as early as possible and that appropriate accommodations are made as soon as practicable, including ensuring a flexible approach to the processing of cases involving them.
13. A person may be identified as vulnerable before the tribunal has considered or tested the evidence or made an assessment of a person's claims. A Member or staff member may form a view that a person is a vulnerable person. This view may be based on a range of factors including, but not limited to:
  - information contained on tribunal or Department of Immigration and Border Protection-(department) files or documents
  - interaction with the person
  - information received from healthcare professionals
  - information provided by a person's representative or guardian
  - information provided by an officer of the department.
14. A person may be identified as vulnerable because the person is at risk of, or has been subject to human trafficking, slavery or slavery-like practices. These guidelines use the term 'modern slavery' to refer to the types of criminal exploitation and abuse prohibited by the *Criminal Code Act 1995* (Cth), including human trafficking, slavery, servitude, forced labour, deceptive recruiting for labour or services, forced marriage and debt bondage.
15. If a Member forms a view that there are indicators that a person may be a victim of modern slavery, the Member should discuss the possibility of making a referral to the Australian Federal Police (AFP) or other relevant organisation with their senior Member or Deputy Division Head. Referrals to an appropriate agency (for example, the AFP or the Fair Work Ombudsman) may only be made by the Registrar and must be made in accordance with the tribunal's referral protocol.
16. An identification of a person as vulnerable does not indicate the acceptance of underlying facts or predispose the tribunal to make a particular determination of the case. The tribunal will make its decision on the merits of a case based on an assessment of all the evidence available to the tribunal.

## Priority attention to cases involving vulnerable persons

17. To ensure a fair and just review it may sometimes be necessary to delay the processing of a case, because of issues causing the person to be identified as vulnerable. Any consideration of a delay in the processing of a case involving a vulnerable person should take into account the obligation on the tribunal to complete reviews without undue delay.
18. The President or his or her delegate decides who is to constitute the tribunal for each case. It may be appropriate in cases involving vulnerable persons for the tribunal to be constituted by a Member of a particular gender or by a particular Member because of that Member's special knowledge or experience in dealing with cases involving similar issues.
19. When a case involving a vulnerable person is allocated to a Member, the tribunal will assign an experienced case officer to assist. The case officer should maintain responsibility for case management issues in the application.
20. The case officer should provide the vulnerable person, his or her representative, friend, or relative, with information about the tribunal's processes and procedures and should remain the primary contact throughout the review process.
21. Members should consider whether particular procedural arrangements or additional representation or support are desirable in an individual case. Members should ensure that any arrangements made are consistent with the tribunal's' statutory obligations under the procedural code set out in the *Migration Act 1958* (Cth) (the Migration Act). Members may seek advice on this issue from the tribunal's' Legal Services section.
22. The case officer may discuss the needs of the vulnerable person with the person and his or her representative or support person. If appropriate, the case officer may direct the vulnerable person to a community or government organisation that can offer access to health care, counselling or other assistance that may be required to meet the vulnerable person's needs. Tribunal's forms MR 22 Support Services - MR Division provide details of a range of nationwide services that may be of assistance to vulnerable persons.

## Representatives

23. The tribunal's procedures are designed to provide a review process which is fair and just, and to ensure that applicants can fully put their case to the tribunal without the assistance of a legal practitioner or migration agent if they so choose.
24. A representative can assist a vulnerable person with his or her case in a number of ways, including by:
  - providing written submissions and written evidence to the tribunal

- contacting the tribunal on behalf of the vulnerable person
  - accompanying the vulnerable person to any meeting or hearing arranged by the tribunal.
25. With limited exceptions<sup>2</sup> a representative must be a registered migration agent. A number of community and government organisations provide advice and assistance in migration matters<sup>3</sup> Children may be represented in the review process by a parent or guardian.
26. At a hearing, the Member may consider it appropriate to permit a representative representing a vulnerable person to present arguments or submissions or to comment on specific matters. If the Member considers it appropriate to allow the representative to participate in the tribunal hearing, the representative should be informed in sufficient time before the hearing to give him or her adequate time to prepare. Members may seek further guidance on the role of representatives in hearings from the tribunal's Legal Services section.
27. A vulnerable person who is an applicant may choose not to nominate a representative. The tribunal have no power under the Migration Act to appoint a person to act on behalf of an applicant<sup>4</sup>, although the tribunal can encourage a vulnerable person to find representation.
28. Vulnerable applicants are entitled to have another person present to assist them in migration hearings. Such an assistant is not entitled to present arguments to the tribunal or to address the tribunal unless the Member considers it appropriate in the circumstances of the case.<sup>5</sup> An assistant could include a friend, relative, church leader, medical practitioner, social worker, counsellor, mental health caseworker or psychologist. The Member may determine how many support people are required. Persons who attend a hearing to provide support to an applicant may not take an active part in proceedings.

## **Competency to give oral evidence at a tribunal hearing**

29. The Migration Act sets out the circumstances in which the tribunal must invite an applicant to appear before them to give evidence and present arguments<sup>6</sup>. The tribunal may take evidence on oath or affirmation but are not obliged to do so.<sup>7</sup>
30. Members may need to determine if a person is competent to give sworn evidence if that person appears to be a vulnerable person. The Member may need to consider making inquiries into the extent and effect of any vulnerability or impairment.<sup>8</sup>
31. Although the tribunal is not bound by the rules of evidence,<sup>9</sup> Members may consider the rules of evidence set out in the Evidence Act 1995 (Cth) (the Evidence Act) when considering the competency of a vulnerable person.<sup>10</sup>

32. Before taking evidence from a vulnerable person, Members may need to determine if the person understands the nature of an oath or affirmation to tell the truth and whether he or she is able to communicate evidence. An assessment should be made about the evidence the person is able to provide and the best way to elicit that evidence.
33. The Evidence Act provides guidance that Members may consider helpful. It says that a person who may not be competent to give evidence about a particular fact may be competent to give evidence about other facts, and that a person is not competent to give evidence about a fact if he or she does not have the capacity to understand a question about the fact, or to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome.<sup>11</sup>
34. A Member may require medical or other expert evidence about the competency of a vulnerable person.<sup>12</sup> This may be in the form of a report from a psychiatrist, psychologist or the vulnerable person's own medical practitioner or specialist. The report would normally cover matters including:
- a diagnosis in respect of the vulnerable person
  - whether or not the person experiences symptoms of illness or disability that will affect the ability of the person to participate in tribunal proceedings
  - the vulnerable person's ability to understand the nature of tribunal proceedings
  - the vulnerable person's sensory or physical needs that should be taken into account during the review process
  - whether the vulnerable person can give evidence under oath or affirmation
  - whether the vulnerable person can give instructions to his or her representative
  - in the case of a witness, their ability to give evidence
  - a prognosis in relation to these issues.
35. In some circumstances, it may be appropriate for the tribunal to obtain a medical report by arranging for the person to attend a specialist.<sup>13</sup> Members may also need to consider obtaining evidence from a person closely associated with the vulnerable person who is familiar with the claims. This may include a representative, medical professional or close relative.
36. Evidence may be provided orally at a hearing or in writing in the form of a report, submission or statement. The weight to be given to evidence provided by a person closely associated with a vulnerable person is a matter for the Member to determine.

37. The weight to be given to the oral evidence of a vulnerable person may depend upon the person's understanding of the obligation to be truthful and his or her ability to communicate evidence. Sworn evidence is not required to be given more weight than unsworn evidence. The weight to be given to the evidence is a matter for the Member to determine. More information about competency issues is available from the tribunal's Legal Services section.

## Conducting the review

38. Vulnerable persons may find it difficult to participate in the review process. Depending upon the vulnerable person's age and/or the nature or severity of the person's condition, impairment or illness, he or she may find it difficult to compile and present documentary evidence relevant to the claims. A vulnerable person may also find it difficult to give evidence or present arguments at a tribunal hearing or to follow the process of the review.
39. Some of the options available for assisting vulnerable persons to participate effectively at a tribunal hearing are set out in paragraphs 45 onwards.

## Tribunal decisions

40. Members should avoid unnecessary disclosure in tribunal decisions of information of a sensitive, private or personal nature.
41. The published versions of refugee decisions must not contain information which may identify an applicant or any relative or other dependant of an applicant.<sup>14</sup> The Migration Act empowers the migration reviews to restrict the publication of evidence given before, information given to, or the contents of any document produced to, the tribunal if satisfied that it is in the public interest to do so.<sup>15</sup>

## Notification of tribunal decisions

42. After a Member has made a decision, a written statement of decision and reasons will be given to the applicant or his or her authorised recipient and to the Secretary of the Department. Decisions can be provided by email, fax or post.
43. If a Member is concerned that a vulnerable person may find it difficult to understand the decision or may be distressed by the outcome of the review, the Member should endeavour to ensure that the person receives appropriate support at the time they receive the decision.
44. Further guidance on the notification of decisions where applicants may be at risk of harming themselves or others can be found in *President's Direction – Conducting migration and refugee reviews*.

## Options for assisting vulnerable persons

45. The following measures may be considered to assist in the taking of evidence from, or the presentation of claims by, a vulnerable person at a tribunal hearing:

- Encouraging the person and his or her representative to seek access to the tribunal and department case files prior to the scheduled hearing.
- Requesting an interpreter of a particular gender.
- Ensuring that an interpreter is appropriately briefed about the vulnerability issues (Members and staff should limit the disclosure of the personal information of applicants to that which is necessary to effectively conduct the hearing).
- Encouraging the person to be supported during a hearing.
- Creating an informal setting for the hearing.
- Allowing any other procedural accommodation that may be reasonable in the circumstances.
- If the vulnerable person has difficulty providing oral evidence in person, or would find it difficult or stressful to attend the hearing in person because of physical, medical or psychological issues, allowing the vulnerable person to provide evidence via videoconference or other means.
- Conducting part or all of a hearing of a migration review in private, where the Member considers it would be in the public interest to do so, or where it would be impracticable to take evidence in public.
- Informing the person about whether the hearing will be conducted in public or in private.
- Creating an open, reassuring and supportive environment in order to establish a relationship of confidence and trust between the Member and the person and to facilitate the full disclosure of sensitive and personal information.
- A vulnerable person who has difficulty understanding complex information or who has difficulties with concentration should be encouraged to request that the question be repeated or explained in a different way.
- Questioning should be done in a sensitive and respectful manner and questions should be formulated in a way that the vulnerable person understands.
- Consider taking evidence from family members or close friends if a vulnerable person is highly agitated or unable to provide coherent evidence.

- Monitoring the vulnerable person and providing breaks or adjournments as appropriate.
  - Accommodating requests for breaks or adjournments.
  - During the hearing of claims concerning sexual violence or other traumatic incidents, an adjournment or second hearing may be appropriate if a person is becoming or has become emotionally distressed. It is important that a person is not further traumatised by the process of giving evidence. Members considering an adjournment should consider the tribunal's obligation to complete reviews without undue delay. Advice on this issue may be sought from the tribunal's Legal Services section.
  - Encouraging a person to seek appropriate counselling or other support services after a hearing, or recommending to the person's representative that such services be sought.
46. If, at a tribunal hearing, the Member considers it appropriate that a vulnerable person be given the opportunity to obtain assistance or be medically assessed, the Member should adjourn the hearing to enable the assistance or a medical or other expert report to be obtained.<sup>16</sup> More information on legal issues associated with competency and medical or other expert reports is available from the Legal Services section. The important task for Members is to identify and support individuals who may face particular difficulties before the tribunal. Members are not qualified, and it is not their role, to make assessments of the cause of the problems experienced by vulnerable persons. Background information on some of the specific issues that may arise in relation to vulnerable persons, and strategies for assisting persons facing those issues to participate in the review process, are provided below.

## **Types of vulnerability and strategies to assist**

47. Vulnerable persons may exhibit one or more constraints in their ability to participate in the review process. Many of the strategies to assist, presented below, are similar.

### **Impact of age**

48. When considering the type of procedural adjustments, representation or support needed by a child applicant, or an elderly applicant, tribunal Members and staff should take the child's or elderly person's wishes and best interests into consideration.

### **Children**

49. Children process information differently from adults and may not be able to be as precise as an adult would be in giving evidence. Young children may not be able to put events into a wider context or put together events in a sequence. Children may attribute different importance to events and reactions. Children, depending on age, will

pay more attention to some details rather than others. Feelings and reactions to events may also be different compared to adults who experienced similar events.

50. Some strategies for assisting children include:

- Create an informal setting for the hearing.
- Recording equipment should be placed so that the child does not have to raise his or her voice to be recorded.
- It will usually be appropriate for an adult person who is trusted to be present when the child is providing evidence. This person may or may not be the child's guardian or representative.
- When taking evidence from a child inform him or her that if they do not know an answer to a question, they should simply say so.
- Reassure the child that he or she is not expected to answer one way or another and that he or she should just answer what they can.
- If the child becomes distressed or uncomfortable during the hearing, ask if he or she would like a break or to talk to someone privately.
- Reassure the child that he or she is not expected to answer one way or another and that he or she should just answer what they can.

## Older people

51. Most older people do not have mental health problems or dementia. Visual and hearing loss, loss of mobility and uncontrolled pain can often be interpreted as mental decline in people over the age of 65.
52. Dementia accounts for only 4% of disability in Australians over 65.<sup>17</sup> Dementia affects people in different ways. Depending on the type of dementia, the changes in the brain can affect mood, thinking, memory, muscle tone or facial expressions. Depression in older people may appear to be dementia (pseudodementia).
53. Alzheimer's Disease is the most common form of dementia reported in Australia and accounts for half the cases of dementia recorded. Alzheimer's Disease can have an early onset (e.g. from mid 50s); symptoms include memory loss, progressive deterioration in muscle tone and loss of ability to recognize familiar places and people. Other common symptoms are psychosis, depression, agitation, aggression and disinhibition. Older people who develop dementia often lose an acquired second language and revert to their first language of many years ago. This may present difficulties in finding an interpreter who can speak the dialect of the person.

54. A psychogeriatric assessment may be important in identifying if the person has memory loss, inability to understand complex issues and capacity to make decisions.
55. Some strategies for assisting an older person can include:
- Find out what the person can contribute to the hearing process and what assistance might help.
  - Face to face hearings are preferable to ensure the person is oriented. Videoconference with a support person or carer can also be used.
  - A person may not be able to give all facts but they may be able to give views and remember some facts and events.
  - Reassure the person that if he or she doesn't know the answer to a question or can't remember then they should say so.
  - Encourage the person to ask that a question be repeated or asked in a different way.

## **Impairments associated with physical and developmental conditions**

### **Mobility and other health problems**

56. Mobility and other health problems may make attending a tribunal hearing in person very difficult. These can include:
- limitations to physical mobility – needing a wheelchair, walking frame
  - incontinence
  - needing oxygen support
  - frailty – difficulty in sitting or walking
  - advanced pregnancy
  - risk of infection, allergic reactions.
57. Some strategies for assisting a person with mobility or other health problems include:
- Conducted the hearing by videoconference or teleconference where possible.
  - Making specific accommodations for the person e.g. ensuring disabled access and toileting facilities at the venue.

- Nursing or carer attendance e.g. explore whether a nurse or carer can accompany the person to the hearing.

## **Cognitive impairment**

58. Cognitive impairment can be caused by intellectual disability, developmental disorders, acquired brain injury and physical conditions adversely affecting brain functioning. Where causes such as stroke or other neurological damage result in severe impairment expert professional assistance should be sought.
59. Some strategies for assisting persons with a mild or moderate cognitive impairment, include:
- Explain the process, for example, why they are there, the role of those present at the hearing, what will happen next.
  - Keep questions simple and short – avoid complex questions.
  - Avoid leading questions.
  - Encourage the person to say if he or she does not understand what the tribunal is asking.
  - Ask if the person would like the question be repeated or explained in a different way.
  - It will usually be appropriate for an adult person who is trusted to be present when the person is providing evidence.
  - When taking evidence from a cognitively impaired person inform him or her that if they do not know an answer to a question, they should simply say so.
  - If the person becomes distressed or uncomfortable during the hearing, ask if he or she would like a break or to talk to someone privately.
  - Reassure the person that he or she is not expected to answer one way or another and that he or she should just answer what they can.

## **Sensory impairment**

60. It should not be assumed that because a person has hearing or visual loss that he or she cannot understand and process complex information.
61. People who have been hearing impaired from a young age have generally had the opportunity to learn other means of communication – for example, signing. Auslan is the recognized sign language in Australia, although there are many other sign languages. A signing interpreter should be used to communicate in the person's preferred language.<sup>18</sup>

62. Some strategies for assisting a person with hearing loss:

- Ascertain the need for a signing interpreter and the appropriate language.
- Look directly at the person so your face and lips can be clearly seen when speaking and encourage any interpreter to do that.
- Use non-verbal gestures if possible.
- Ask: is the person able to hear the discussions in the hearing? Is there someone with the person to ensure he or she can hear what is being said. Ensure that everyone keeps his or her voice at a level that can enable the person to hear what is being said.
- Encourage the person to say if they cannot hear.
- Writing down what is being said: can a support person write down the questions that the Member wishes to ask the person?
- Does the person have a hearing aid? Check to ensure that the person is able to use it in the hearing and ask if he or she can hear with the aid switched on. Is there a hearing loop in the hearing room? If so tell the person to switch the hearing aid to "T".
- Are there facilities which can be put in place at the hearing (e.g. a hearing wand). Better Hearing Australia<sup>19</sup> has a number of services that can help.
- Can the National Relay Service<sup>20</sup> be used to communicate with the person?

63. People who lose vision at a young age can generally learn Braille or use electronic devices to read material and communicate. Older people who lose vision because of progressive deterioration (e.g. glaucoma, retinal detachment, cataracts) may not be able to learn Braille or adapt to electronic devices.

64. Some strategies for assisting a person with visual loss:

- Ensure the person has heard and understood any material used for the review and that it is in a format they can use (e.g. larger type, Braille, audiotope).
- Ensure that the hearing venue is accessible and that the person can safely make his or her way into the room.
- Read out any information during the review and confirm with the person that he or she understands it.
- Be aware of non-verbal gestures that the person cannot see.

- Describe to the person what is happening – (e.g. who is there, who is nodding or agreeing).
65. Vision Australia<sup>21</sup> provides a number of resources to assist people who have a visual impairment.

## **Impairments associated with psychological and psychiatric conditions**

66. There are a number of impairments associated with psychological and psychiatric conditions which could affect a person's ability to participate in the review process. Such impairments include impaired attention and concentration, disturbances in form and content of thought, memory impairment, the effects of traumatic experiences and mood disturbances.
67. These impairments are of a type likely to be observed in the review process enabling strategies to be put in place to accommodate them. Where severe they can enable early identification and priority attention including referral to a mental health professional.<sup>22</sup>
68. All the impairments can manifest in children. Accommodations required in the hearing process would need to take into account the age and the maturity level of the child.

## **Impaired attention and concentration**

69. Concentration has a linear connection with attention. Concentration is required in order to direct attention to something or someone. Reduction in concentration causes distraction so that tasks are no longer carried out properly, or not carried out at all.
70. A large number of psychological conditions and disorders go together with a reduced capacity to concentrate. With Post Traumatic Stress Disorder and depression, concentration problems are explicitly identified as symptoms.
71. Some strategies for assisting a person with impaired attention and concentration:
- Keep questions factual and short.
  - If the person is not focusing on what the question is, repeat the question and bring the conversation back to the question.
  - Ensure the environment is as distraction free as possible and remove any background noise.
  - Acknowledge any difficulties and reassure the person if he or she loses focus or becomes irritable.
  - Pay close attention to non-verbal cues such as eye contact.

## Impairment in form and content of thought

72. Impairments in the form of thought involve disruption to the flow of thought, described as flight of ideas and loosening of associations; and over-inclusive or tangential thinking where the individual cannot confine their thoughts to the topic under consideration.
73. Such impairments when mild can be due to emotionally aroused states. When severe, they are usually associated with psychiatric conditions (commonly bipolar disorder, mood disorders with psychotic features, and schizophrenic disorders) but can also result from physical conditions (infection, intoxication or brain damage). Impairments in the form of thought can affect the consistency and coherence of testimony.
74. Impairments in the content of thought refer to beliefs which are distortions of reality. Severity of the distortion can vary, for example, from ideas of reference (the person feeling that they are being singled out for notice by everyone around them) to delusional beliefs (false but firmly held beliefs, contrary to evidence). Content of delusions can be grandiose, persecutory, bizarre and/or relate to thoughts being controlled. Delusions may or may not be associated with hallucinations (auditory or other perceptions which do not correspond with physical reality). The presence of delusions indicates a psychotic condition which can be brief and acute, or part of a chronic disorder.
75. Some of what the person is saying may be based on real events and their reactions to these events. Delusional beliefs will often be associated with a lack of insight into the degree of loss of functioning and anyone very familiar with the person would report poor everyday functioning.
76. Some strategies for assisting a person with impairment in form and content of thought:
  - Be concrete in your approach: ask factual questions.
  - Keep questions and explanations simple and short.
  - If the person is not focusing on what the question is, repeat the question and bring the conversation back to the question.
  - Gently and firmly stop the person if he or she continues conversation irrelevant to the proceedings.
  - Acknowledge any difficulties and accommodate emotional reactions such as irritability or frustration.
  - If the person brings in his or her own view of the world, acknowledge the view, say that you don't share that view but accept that he or she does. Gently and firmly bring the person back to the original question.

- It may be appropriate to get psychiatric evidence about the person's diagnosis, treatment and prognosis. Where there is evidence of severe impairment it may be appropriate to adjourn the review until the person has been treated. Members considering an adjournment should also bear in mind the tribunal's obligation to complete reviews without undue delay. Advice on this issue may be sought from the tribunal's Legal Services section.

77. SANE Australia has a number of resources to help people living with mental illness.<sup>23</sup>

### **Impaired memory**

78. This section describes memory impairment caused by psychological conditions. Memory impairment caused by physical and developmental conditions is referred to in the section on impact of age.
79. Memory impairments caused by psychological conditions can affect the ability to remember recent or past events. If a person's ability to accurately remember events as they occur is affected, their recollection for those events later on will be impaired.
78. Often a person who has been severely mentally ill will have poor recollection for events during the period of illness. This is because the events were never accurately recorded in the first place due to the person's poor concentration or disorganized thinking at the time.
80. Events may also not have been accurately recorded at the time because the level of emotional arousal the person was experiencing disrupted the ability to register those events accurately. Later the person may have difficulty accurately recalling the events associated with the event or may be able to recall only certain aspects of what happened.
81. The ability to remember may also be affected by a current mental disorder in a variety of ways. Psychotic illness is sometimes associated with delusional memories, where the person adamantly believes that events occurred which never did. A depressed person tends to be able to recall events consistent with their depressed state more easily than events that are inconsistent with that state (e.g. enjoyable occasions). Severely depressed people may have difficulty recollecting basic biographical material.
82. A person with Post Traumatic Stress Disorder may suppress aspects of the traumatic event, have vivid memories for other aspects of the event, or more rarely recall little of what happened. It is important to distinguish between a traumatised individual's inability to recollect and a reluctance to recollect due to associated distress.
83. Long term memory for events which are not traumatic in nature but are significant to a person such as a person's upbringing and family history are usually left intact.
84. The inability to recall basic biographical information or significant past events may suggest the presence of a mental or cognitive disorder. The effects on memory of

traumatic events usually do not cause the wholesale inability to recall biographical information but tend to be temporally confined to the trauma itself.

85. Severe memory impairment affecting new learning and therefore the recall of recent events will disrupt a person's daily life. It will usually be associated with a recognizable mental or cognitive disorder and people who know the individual will be able to observe the disability it causes.
86. Some strategies for assisting a person with impaired memory:
  - Remove distractions and encourage the person to pay attention.
  - Keep questions simple and short and repeat to encourage the person to focus.
  - Encourage the person to draw a time line of events: Members may consider asking supporters and family to help the person fill in some of the gap or to corroborate details.
  - The person may be able to remember events such as those preceding or following any one particular traumatic event.
  - Provide multiple opportunities to recall any one event, associated events and circumstances at the time. Explain why you are asking for such information even though he or she may not remember actual events.
  - Asking for concrete details about events such as time of day, physical conditions of a cell may assist in the reconstruction of a traumatic event but not in every case.

## **Impairments associated with torture and other traumatic experience**

87. A traumatic event is defined as an event or events involving actual or threatened death or serious injury, or a threat to the physical integrity of self or others and the person's response involved intense fear, helplessness or horror.<sup>24</sup>
88. Such events include torture, arbitrary detention, kidnapping, human trafficking, slavery and slavery-like practices, severe hardships and threats to life endured during flight from a country, being a victim of violence or abuse, witnessing harm inflicted on others, war and conflict, bomb blasts, accidents, natural disasters.
89. Traumatic experiences can include a wide range of experiences. It should not be assumed that everyone will react to exposure to a particular type of traumatic event in a similar way. Some reactions may be immediate and others may be delayed.
90. The nature of the reaction is influenced by the nature of the traumatic events (whether accidental or intended), the length of exposure, the age of the survivor and protective

factors such as the degree of control at the time, support systems, coping skills and belief systems.

91. Detention in immigration detention facilities is characterised by confinement and deprivation of liberty. Some people may experience detention as a traumatic event and/or witness traumatic events in detention such as witnessing self-harm, suicide attempts, and destruction of property.
92. There are many recognised psychological effects of traumatic experiences. They include effects on relationships (fear of authority, overly compliant behaviour and eagerness to please, hostility and resentfulness, social withdrawal, distorted beliefs about others such as readily perceiving threatening behaviour, pre-occupation with revenge, behaviours leading to re-victimisation, victimising others) as well as effects on identity and the self (feelings of helplessness, loss of trust, self-degradation, self-destructive behaviour, guilt and shame, self-blame and excessive responsibility for impact on others, loss of previously sustaining beliefs, strengthening of sustaining beliefs, view of oneself as permanently damaged, minimisation of impact on self, loss of initiative and reduced ability to make decisions, foreshortened sense of future).
93. Common symptoms which follow the experience of traumatic events are anxiety symptoms, dissociative symptoms, poor attention and concentration, memory problems, depressive symptoms, suicidal ideation, physical symptoms (digestive, cardiopulmonary, sexual problems, chronic pain), symptoms characteristic of post traumatic stress disorder, and behavioural problems including risk taking behaviours and addictive behaviours.
94. The following symptoms and effects may manifest during the conduct of hearings and influence an applicant's ability to participate:
  - Poor attention, poor concentration and distractibility which may be the result of intrusive recollection of events, generalised fear and emotional arousal, or depression. Anger and hostility towards Members may occur which are the result of over- reactivity to reminders of traumatic experiences, poor control of emotions, sensitivity to feeling that one is not believed, protection against shame and guilt, anxiety and distrust of people in authority.
  - Memory difficulties which can manifest as extremely vivid recollection of some details alongside amnesia for other detail. This may lead to apparent inconsistencies and/or inability to present a chronologically intact account. These difficulties may be the result of any of the aforementioned factors - intrusive recollection of events, generalised fear, avoidance or depression, protection against shame and guilt.
  - Hesitancy to disclose due to fear of reliving experiences, shame, guilt, or anger about having to prove experiences of violence or injustice.

- Emotional distress due to intrusive memories/images of traumatic experiences, grief, shame or guilt.
- Some effects may be more pronounced if exposure to traumatic events has recently occurred (such as traumatic events in detention and/or there has been recent bad news about safety of family members) or personal circumstances at the time of review are very stressful.

95. Strategies to assist people who have experienced traumatic events include:

- Encourage applicants to bring a friend or relative to the hearing to support them if it is known that the impairments are likely to manifest in an interview situation.
- Explain to the person that it may be necessary to ask questions about “difficult” or “upsetting past experiences during the hearing. Assure the person that the questions will be limited to those that are necessary for the review process.
- Assist applicants to locate traumatic events in time by not relying only on chronology and dates, but by asking about other contextual events – for example, about how old the applicant was at the time or what their social and familial role was, what was happening in the applicant’s family at the time, or what significant local events occurred around that time.
- If the person shows that they are distressed or very angry ask if he or she wants to continue or have a break.
- Don’t expect the person to display emotion when recounting traumatic experiences. Emotional detachment is a symptom of PTSD and/or functions as a coping mechanism.
- Explain the process, outline the possible outcomes, specify what other specific information is needed.
- Acknowledge distress without judgment.
- Show that you want to understand why the person is distressed.
- Where appropriate link the person to community support groups or mental health professionals who have experience with victims of trauma (details of some appropriate nationwide services can be found in tribunal’s’ forms MR 22 Support Services – MR Division).<sup>25</sup>
- The tribunal can consider requests for matters to be heard by Members of a particular gender, or for an interpreter of a particular gender to be used.

## **Mood disturbances**

96. Mood disturbances may manifest at a tribunal hearing and affect the ability to participate. Some disturbance of mood is common in stressful circumstances and/or at times of loss. Mood disturbance is associated with a number of psychological disorders, can result from medical conditions such as acute infectious diseases, and is the key diagnostic characteristic of the Mood Disorders.<sup>26</sup>
97. Mood disturbances can manifest as elevated mood, depressed mood and as intense emotional distress. Elevated mood may be accompanied by increased rate of speech, fast flow of ideas, irritability, restlessness and agitation. Depressed mood may be accompanied by slowed flow of ideas, a lack of energy, difficulties with concentration, expressions of hopelessness and teariness.
98. Elevated mood disturbances can be extreme and the person may appear obviously ill. Speech may be so pressured it is unintelligible; ideas may appear grandiose in content or convey feelings of omnipotence. Similarly, depressed mood disturbance can be extreme and the person would be obviously unwell.
99. Intense emotional distress may manifest in a variety of ways in the review process as emotional outbursts, aggressive verbal expressions, fainting, and threats of self-harm or self-harming behaviour.
100. Strategies for assisting a person with a mood disturbance or severe emotional distress are:
  - Encourage applicants to bring a friend or relative to the hearing to support them if it is known that the impairments are likely to manifest in an interview situation.
  - Explain to the person that it may be necessary to ask questions about “difficult” or “upsetting past experiences during the hearing. Assure the person that the questions will be limited to those that are necessary for the review process
  - Keep questions short and factual. Concentration may be impaired but the person may be able to concentrate for short periods.
  - If the person shows that they are distressed, ask if he or she wants to continue or have a break.
  - Where appropriate link the person to community support groups or mental health professionals (details of some appropriate services can be found in tribunal’s’ forms MR 22 Support Services – MR Division).
  - Acknowledge distress without judgment.
  - Show that you want to understand why the person is distressed.

- Where mood disturbances are severe it may be appropriate to obtain a psychiatric assessment about the person's diagnosis, treatment and prognosis. It may be appropriate to adjourn the review until the person has been treated, bearing in mind that the tribunal has an obligation to complete reviews without undue delay. Advice on this issue may be sought from the tribunal's Legal Services section.
- In the case of self-harm, further guidance for staff dealing with applicants at risk of harming themselves or others, including procedures for responding to critical incidents involving such applicants, can be found in *President's Direction – Conducting migration and refugee reviews*.

## Modern slavery

101. There are a range of factors which may inhibit people who have experienced modern slavery from speaking about their experiences including fears for their own safety and/or the safety of family members, and distrust of authorities. Sometimes people may not self-identify as victims, or may believe they agreed to a situation of exploitation even when this 'agreement' was obtained as a result of coercion, threats or deception.
102. If a Member forms a view that there are indicators of modern slavery, it may also be necessary to consider excluding individuals other than the person at risk from the hearing so that the person who may be at risk can give evidence more freely. People who have experienced modern slavery are often dependent on those who are exploiting them for work and/or housing and may be unable to freely give evidence until they have exited the exploitative situation and had time to reflect and recover from their experiences.
103. People who are identified as suspected victims of human trafficking or slavery by the AFP may be eligible for support (through the Australian Government's Support for Trafficked People Program) and temporary visas. If a referral is made to the AFP and the AFP identifies the person as a suspected victim of trafficking, it may be necessary to consider adjourning the hearing to take place at a time when the person is better able to participate after having received initial support.
104. Consideration may also be given to directing the person to a community organisation that can facilitate access to health care, counselling or other legal or social assistance that may be required to meet the person's needs. The Department of Home Affairs website contains resources on human trafficking and forced marriage, including guidelines and fact sheets in English and other community languages. These resources contain details of specialist services that may be of assistance to persons who may be at risk of, or subject to, modern slavery.
105. In addition to the strategies set out in these Guidelines to assist people who have experienced traumatic events, Members should be aware of the reasons that a person's account of human trafficking or slavery may change over time. In cases

involving trafficking for sexual exploitation, questions about a person's sexual history that are not immediately relevant to the claims that a person has been trafficked should not be asked.

106. Further resources about modern slavery, the indicators of modern slavery and the conduct of interviews with suspected victims are available from the tribunal's library.

## Sources of further guidance

### *Administrative Appeals Tribunal*

Guidelines on the Assessment of Credibility – MR Division

Guidelines for Interpreters– MR Division

### *Immigration and Refugee Board of Canada*

Refugee Protection Division, Training Manual on Victims of Torture - April 2004  
[www.irb-cisr.gc.ca/eng/tribunal/rpdspr/victorture/Pages/index.aspx](http://www.irb-cisr.gc.ca/eng/tribunal/rpdspr/victorture/Pages/index.aspx)

Guideline 8 – Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB – 15 December 2006.

Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution - 13 November 1996.

Guideline 3 – Child Refugee Claimants Procedural and Evidentiary Issues - 30 September 1996.

### *United Nations High Commissioner for Refugees (UNHCR)*

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees – 1992 (Reissued December 2011).

UNHCR Handbook for the Protection of Women and Girls - January 2008.

*Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006

Guidelines on International Protection No 1: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees - 7 May 2002.

UNHCR Guidelines on Determining the Best Interests of the Child - May 2008.  
Refugee Children: Guidelines on Protection and Care - 1994.

UNHCR Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons – Guidelines for Prevention and Response - May 2003.

*National Collaborating Centre for Mental Health*

Self Harm: the short term physical and psychological management and secondary management of self harm in primary and secondary care. National Institute for Clinical Excellence, London, 2004.

*International Association of Refugee Law Judges (IARLJ)*

Report of IARLJ Working Party on vulnerable persons - 2008.

Vulnerable persons working group workshop discussion paper - the best interests of children seeking refugee protection and their right to be heard, IARLJ 2011 World Conference, Bled, Slovenia - 2011.

*The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime*

The Bali Process. *Policy Guide on Identifying Victims of Trafficking*, May 2015  
<https://www.baliprocess.net/UserFiles/baliprocess/File/Policy%20Guide%20on%20Identifying%20Victims%20of%20Trafficking.pdf>

## Endnotes

1. The tribunal considers a child to be someone who is under 18 at the time of the application for review.
2. Under Part 3 of the Migration Act, apart from a registered migration agent the following persons can represent an applicant before the tribunal: a spouse, child, parent, brother or sister; the nominator or sponsor of the visa applicant; a member of a diplomatic mission, consular post or office of an international organisation; parliamentarians; and an official (as defined in Part 3 of the Migration Act) in the course of his or her duties.
3. Refer to Tribunal's Fact Sheet MR2 – Immigration Assistance for a list of service providers. This fact sheet is available on the tribunal website at: <http://www.aat.gov.au>.

The Immigration and Border Protection (DIBP) funds the Immigration Advice and Application Assistance Scheme (IAAAS). The IAAAS provides professional assistance, free of charge, to visa applicants and sponsors who are in financial hardship and are disadvantaged by other factors, including physical or psychological harm or disability. For further information on the IAAAS refer to the department's website at: <http://www.border.gov.au>.

4. Certain Australian courts may appoint a person to act as the next friend or guardian ad litem of a child or disabled person. See for example Part 7, Division 4, Rule 7.18 of the Uniform Civil Procedure Rules 2005 (NSW) and Part 6.3 of the Family Law Rules 2004 (Cth).

Certain State or Territory boards or tribunal may appoint a substitute decision-maker for a person. Alternatively, a person may have an enduring power and may appoint a substitute decision-maker. The name given to the substitute decision-maker depends on who has appointed him or her, and the name may vary from jurisdiction to jurisdiction. The powers given to the substitute decision-maker may include the power, for instance, to commence or finalise legal proceedings, retain a representative, or seek a refund of the application fee on behalf of the person. The substitute decision-maker does not, merely by being appointed the substitute decision-maker, have authority to make claims or give evidence on behalf of a person. Further information about substitute decision-makers is available at <http://www.agac.org.au>.

5. Migration Act s.366A (MRT).
6. Migration Act s. 360 (MRT) and s.425 (RRT).
7. Migration Act s. 363(1) (a) (MRT) and s.427 (1) (a) (RRT).
8. In *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 the High Court of Australia held that there is no formal competency requirement at the tribunal. A Member does not need to formally establish that an applicant is legally competent to give evidence before proceeding with a hearing (at [1] and [45]). However, when there is evidence before the tribunal that the applicant may have a medical condition which would affect his or her capacity to give evidence, the tribunal may need to consider what effect the medical condition has on the applicant and what weight it can give to his or her evidence. Failure to do so may result in a jurisdictional error and/or a breach of the tribunal's obligations under s.360/425 (see for example *SZIWY v Minister for Immigration and Citizenship* [2007] FMCA 1641).
9. Migration Act s.353(2) (a) (MRT) and s.420 (2) (a) (RRT).
10. The rules of evidence applying in federal courts have been codified in the Evidence Act 1995 (Cth). The Evidence Act contains a rebuttable presumption that every person is prima facie competent to give evidence (s.12). If a person is incapable of understanding that he or she is under an obligation to give truthful evidence, he or she is not competent to give sworn evidence (s.13(3)). A person who does not understand the obligation of an oath may however give unsworn evidence if the court has told the person certain things prescribed in the Act (including the importance of telling the truth) (s.13(4)).
11. Evidence Act ss.13(2) and 13(1).

12. Where an expert opinion is sought, the expert should be provided with a copy of the tribunal's Guidelines on Expert Opinion Evidence, available on the intranet and website.

13. Migration Act s.363(1)(d) (MRT) and s.427(1)(d) (RRT). It should be noted that sections 363(1)(d) and 427(1)(d) of the Migration Act empower the tribunal to obtain a medical examination; they do not impose an obligation or duty to do so: *Minister for Immigration and Citizenship v SZGUR* (2011) 273 ALR 223 at [22].

14. Migration Act s.431(2).

15. Migration Act s.378(1).

16. Where a Member has concerns regarding the applicant's competency to participate in a hearing, the Member may consider obtaining a medical report or assessment by arranging for the applicant to attend a specialist. Members who consider that a medical report or assessment may be required should first discuss the case with their senior Member. Guidance on the issue of costs for medical reports is provided in TG17 - Costs arising from applications for review. Where an applicant is in detention, a medical professional employed by the department's medical services provider may provide a report or assessment regarding the applicant's competency.

17. Australian Institute of Health and Welfare (AIHW) 2006. *Dementia in Australia: National data analysis and development*. AIHW cat. no. AGE 53. Canberra: AIHW.

<http://www.aihw.gov.au/publication-detail/?id=6442467941>

18. Auslan Signbank is a language resources site for Auslan (Australian Sign Language). Auslan is the language of the deaf community in Australia (<http://www.auslan.org.au>). A links page referring to relevant organisations in every state with various services for the deaf community is available at <http://www.auslan.org.au/about/links/>.

The Australian Sign Language Interpreters Association (NSW) - ASLIA (NSW). ASLIA (NSW) advocates for the use of professional interpreting services and provides professional development, regular mailouts with information about interpreting and a support network for Auslan interpreters in NSW.

Fax: c/- Deaf Society of NSW – (02) 9893 8333 Email: [aslia\\_nsw@yahoo.com.au](mailto:aslia_nsw@yahoo.com.au)

Website: <http://www.deafsocietynsw.org.au/>

19. Better Hearing Australia is a non-profit, self-help organisation controlled by its members and provides an Australia-wide community support service of rehabilitation and help for Australia's hearing impaired.

TTY: (03) 9510 3499

Ph (voice): (03) 9510 1577

Fax: (03) 9510 6076

Email: [bhavic@betterhearing.org.au](mailto:bhavic@betterhearing.org.au) Website: <http://www.betterhearing.com.au>

20. The National Relay Service (NRS) can be used for all calls to and from people who are deaf or have hearing or speech impairments. The NRS is an Australian Government initiative that uses relay officers as the central link in every phone call, relaying exactly what is said or typed. It is not restricted to text alone and is more flexible than dedicated TTY-to-TTY calls because at least one party to the call can use an ordinary phone. <http://www.relayservice.com.au>

People who are deaf or have a hearing or speech impairment, can call through the National Relay Service: TTY: Ph 133 677 and ask for 1300 22 4636.

Speak and Listen (SSR): Ph 1300 555 727 and ask for 1300 22 4636.

Internet Relay: connect to [www.relayservice.com.au](http://www.relayservice.com.au) and ask for 1300 22 4636.

21. Vision Australia provides a range of services and aids for people who have a visual impairment. People do not need to be legally blind to use their services. [www.visionaustralia.org.au](http://www.visionaustralia.org.au) or national contact centre : 1300 84 74 66

22. The tribunal's forms MR22 Support Services contain a list of 24-hr nationwide health advice services.

23. SANE Australia produces a range of resources to educate and inform people about living with psychosis. <http://www.sane.org>

The Transcultural Mental Health Centre Clinical Consultation and Assessment Service (CCAS) can assist anyone from a culturally and linguistically diverse community (CALD) living in NSW, who is experiencing a mental health issue. The service can help a wide range of people, from those experiencing early symptoms of mental illness, distress or anxiety to those who have been diagnosed with serious and chronic conditions. The service is free and is available to individuals, families, children, young people, adults and older people.

<http://www.dhi.health.nsw.gov.au/Transcultural-Mental-Health-Centre/Information-for-Health-Professionals/Clinical-Consultation-and-Assessment-Service/default.aspx>

24. Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, a revised text called DSM-5, was published in 2013.

25. Some key services for refugees in Australia include:

### **NSW**

NSW Refugee Health Service

STARTTS - The Service for the Treatment and Rehabilitation of Torture and Trauma Survivors: produces a number of resources to support survivors. <http://www.startts.org.au>

NSW Education Program on Female Genital Mutilation.

<http://www.dhi.health.nsw.gov.au/fgm/fgm/default.aspx> Health Care Interpreter Service. South Western Health Care Interpreter Service

### **QLD**

Brisbane Actionweb for refugee collaboration. <http://www.barc.org.au>

Brisbane Refugee and Asylum Seeker Health Network. <http://www.refugees.org.au>

QPASTT - The Queensland Program of Assistance to Survivors of Torture and Trauma. <http://www.qpastt.org.au/>

### **SA**

STTARS - Supporting survivors of torture and trauma. <http://www.sttars.org.au>

### **TAS**

Phoenix Centre - Support Service for Survivors of Torture and Trauma. <http://www.mrchobart.org.au/index.htm>

### **VIC**

Foundation House - Victorian Foundation for Survivors of Torture (VFST) <http://www.foundationhouse.org.au>

Victorian Transcultural Psychiatry Unit. <http://www.vtpu.org.au/>

### **WA**

Association for Services to Torture and Trauma Survivors. <http://www.asetts.org.au>

26. DSM-5 (2013)