

GENERAL PRINCIPLES FROM RESEARCH - PLANNING TO QUESTION A VULNERABLE PERSON OR SOMEONE WITH COMMUNICATION NEEDS

Toolkit 2(a)

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Always consider assessment of a vulnerable witness by a Registered Intermediary (section 29, [Youth Justice and Criminal Evidence Act 1999](#)). For information about Registered Intermediaries for witnesses, contact the National Crime Agency at 0845 0005463, and by e-mail at soc@nca.pnn.police.uk (by pnn users) or soc@nca.x.gsi.gov.uk (by others). The judiciary may use its inherent jurisdiction to appoint a non-registered intermediary for a vulnerable defendant. Section 104, [Coroners and Justice Act 2009](#), will (if implemented) enable appointment of intermediaries for certain vulnerable defendants but only for oral evidence at trial. This toolkit contains general guidance and is not a replacement for an intermediary assessment which will provide advice specific to the individual.

1. Questioning approach
2. Framing your questions
3. Questions easily misunderstood/ risking unreliable answers

1. QUESTIONING APPROACH

1.1 **Keep the duration of questioning developmentally appropriate**

1.2 **Meet the person informally** to help you 'tune in' to the person's communication style.

1.3 **Maintain eye contact, an important part of communication** unless there are cultural or other specific reasons to avoid it. On the live link, look straight at the camera, not your papers. Avoid showing only the top of your head or 'looming' into the camera.

1.4 **Ensure tone and body language are neutral** Do not nod, inviting an affirmative response, or express disbelief through your expression.

1.5 **Speak slowly** Take care not to speed up again. Normal court pace is often too fast.

1.6 **Use the witness's preferred name** to help keep their attention.

1.7 **Give the witness enough thinking time to process your question** (at least six seconds: some need longer). Ask the witness to listen carefully and not to rush to answer. If the witness pauses before answering, do not interrupt or jump in too quickly, even if this feels uncomfortable.

1.8 **Be alert for possible miscommunication** including non-verbal clues such as a puzzled or frustrated look, knitted eyebrows, downcast eyes and long pauses. An intermediary in the live link room often identifies signs of confusion before these are picked up by those in court. It is good practice to ask the witness to say, put up a hand or to point to a 'cue' card if (s)he does not understand (go over court 'rules' like this when you are introduced to the witness beforehand, rather than at the start of cross-examination). However, many will not recognise when difficulties occur or will be too embarrassed to admit this. Do not just say 'Do you understand?'. If necessary, ask the witness to explain what is meant in their own words.

1.9 **Check that you and the witness mean the same thing** Clarify understanding of words crucial to the evidence, eg 'touch'. This may be interpreted as relating solely to touching by hands. Q: 'Did he touch you?' (asked of a 6-year-old). A: 'No. (later) He licked me'. The question may not be understood if it implies that the witness was active in the event, Q: 'Did you touch John?' A: 'No'. (later) 'He put his willy in my hand and in my mouth'.

1.10 **Be alert to loss of concentration** Early signs may not be evident over the live link. Ask someone with the witness to alert the court. Even if distressed, a witness may elect to continue to 'get it over', but reliability of answers is likely to suffer. A pause without the jury leaving the court may allow the witness to re-focus. Once a break is requested, in the interests of 'best evidence' it is generally not appropriate to continue for '*one or two more questions*'.

1.11 **Consider non-verbal communication/ use of visual aids** This almost always requires intermediary involvement. Asking a witness to demonstrate intimate touching on their own body is inappropriate. Use a body map or diagram (see Toolkit 6).

1.12 **Avoid asking the witness to say his or her address** If this is necessary for evidential purposes, ask for it to be written down, not read it aloud.

1.13 **Draw the court's attention to improper or inappropriate cross-examination** Both the prosecutor and defence advocates have this responsibility.

2. **FRAMING YOUR QUESTIONS** (Writing them in advance out will help to identify potential problems)

2.1 **Follow a logical, chronological order** Questions that jump around in time are confusing. '*What happened next?*' rather than '*What happened before that?*' or '*Now I want to go back to...*'.

2.2 **Signpost your subject and changes of subject** This prepares the witness to respond. Explain when you are about to change the subject, eg '*Now I'm going to ask you about X*'.

2.3 **Ask about one idea at a time** Questions containing 'if' almost always contain two ideas, eg '*How do you know what X was doing if the lights were off?*'. Better alternatives include '*You said the lights were off. Could you see X?*'. [Answer] '*What was X doing?*'. The witness needs to remember all of the question to answer accurately.

2.4 **Keep questions short** Avoid 'front-loading', eg '*I suggest to you that...*'; '*I put it to you...*'; '*I believe you told us...*' or phrases such as '*Do you follow?*' at the end of questions.

2.5 **Use simple, common words** Avoid words such as '*allegation*', '*intervention*', '*exaggerate*' '*recollection*', and '*indicate*'. Use the witness's words (eg for body parts and sexual terms).

2.6 **Ask who/ what/ where questions** These are usually most easily understood. *Why/ how* involve abstract concepts which the witness may be unable to process.

2.7 **Use concrete words** Abstract 'concept' words can be problematic, such as numbers; before/ after; in front of /below /behind; always /never; different/ same; and more/ less. Use by the witness does not mean they are understood, eg the ability to count does not mean a witness can answer accurately '*How many times?*' something happened. Tie questions about timing of what happened to events: '*What was on TV?*'.

2.8 **Name people, places and objects** Avoid pronouns other than 'you', eg '*What did Jim say?*' not '*What did he say?*'. '*Was the knife in the box?*' not '*Was it inside?*'. Use the witness's name if it helps them focus. '*Jane, were you in the bar?*' not '*Were you there?*'.

3. QUESTIONS EASILY MISUNDERSTOOD/ RISKING UNRELIABLE ANSWERS

- 3.1 **'Tag' questions** combine a statement and a short question inviting confirmation of its truth, eg *'Jim didn't slap you, did he?'* or *'Jim didn't slap you, right?'* (see 3.2). They are powerfully suggestive and linguistically complex. To be able to respond accurately, the witness has to judge whether or not the statement part of the question is true; understand that the tag expresses the advocate's point of view, and is not necessarily true; and be able to counter that point of view. Tag questions combining a positive and negative add further complexity: the witness has to understand that a positive statement takes a negative tag and vice versa. The Judicial College recommends avoiding tag questions with children and putting a direct question instead, eg *'Did Jim slap you?'*. Tag questions are often problematic for adults with learning disability, specific language impairment or autism spectrum disorder (irrespective of their level of intellectual ability).
- 3.2 **Other assertions** eg *'Isn't it a fact that...'*. When an authority figure declares that something is a fact, the witness may be unable to disagree and to maintain what they believe to be true. Asking *'Is that right?'* gives undue moral emphasis to the suggestion. Better alternatives include *'Are you sure?'*; *'Is that true?'*; or *'Did that really happen?'*.
- 3.3 **Questions in form of statements** (also assertions) eg *'You're not telling the truth, you wanted Jim out of your house'* may not be understood as requiring a response. Better alternatives include: *'Did you want Jim out of your house?'*.
- 3.4 **'Do you remember...?'** This requires ability to follow and recall the whole question and to identify what the questioner wants to know. The task is particularly complex where the witness is asked, not about an event, but about what (s)he told someone else about it.
- 3.5 **Questions containing negatives** Even single negatives (eg *'Didn't he hurt you?'*) are more difficult to process than their affirmative counterparts. Double negatives (*'Isn't it the case that you weren't touched by Joe?'*); negative forms (eg *'incorrect'*); and concealed negatives (*'unless'*, *'if not'*, *'unhappy'*, *'clueless'*) are also harder to process.
- 3.6 **Forced choice questions** create opportunities for error when the correct alternative may be missing eg *'When he hit you, did you shout or cry?'* Where they are unavoidable, one approach is to give no more than three options, with the last one always open-ended eg *'Was the car blue, or was the car green – or was the car some other colour?'*
- 3.7 **Literal interpretation** Q: *'Did you go to Jim's house?'* A: *'No.'* Q: *'Did you go to Jim's flat?'* A: *'Yes.'* Avoid figures of speech eg *'I am going to run through a few things'* and use of present tense, eg Q: *'Are you in school now?'* A: *'No, I'm at court.'*
- 3.8 **Effect of repetition** Questions repeated (consecutively or interspersed with others) by authority figures may cause a witness to conclude that the first answer was wrong (even if correct) and to change it. If a question must be repeated because an answer was unclear, explain why, eg: *'Thank you, but I want to be sure I understand. Tell me again'* (followed by the question). If elaboration is required, an accurate response is more likely to be triggered by an open question, eg *'Tell me more about that'*, *'Did anything else happen?'*

3.9 **Leading questions inviting repetition of either ‘Yes’ or ‘No’ answers** carry a risk that an acquiescent witness will adopt a pattern of replies ‘cued’ by the questioner and will cease to respond to individual questions, leading to inaccurate replies.

3.10 **Suggestions that the witness is lying or confused** are likely to affect concentration adversely and may result in inaccurate answers. If the challenge is developmentally appropriate (see Toolkit 1(c) Ground Rules, section 3) it should be addressed separately, in simple words, at the end of cross-examination.

The development of this toolkit was funded by Lexicon Limited. The toolkit was reviewed by Professor Penny Cooper (Kingston University London) and Kim Turner on behalf of the Royal College of Speech and Language Therapists. It summarises key points from:

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British Dyslexia Association and Developmental Adult Neuro-Diversity Association (2009) [Good Practice Guide for Justice Professionals: Guidelines for supporting clients and users of the justice system who have Dyslexia and other Specific Learning Difficulties](#) (also deals with autism)

Communication Trust (2009) [Sentence Trouble](#)

Crown Prosecution Service (2012) [Safeguarding Children as Victims and Witnesses](#)

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