

PLANNING TO QUESTION SOMEONE WITH AN AUTISM SPECTRUM DISORDER including ASPERGER SYNDROME

Toolkit 3

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This toolkit brings together policy, research and guidance relating to:

1. *Definitions*
2. *Areas of difficulty affecting communication at court*
3. *Case management*
4. *Framing your questions*
5. *Questions likely to produce unreliable answers*
6. *Questioning style*

Autism is a spectrum condition, with varying degrees of severity. Witnesses with autism (including those with a complex autism condition) have given evidence effectively with intermediary assistance. Information about the individual's capabilities is essential and if not supplied, must be requested. This toolkit contains general guidance and is not a replacement for assessment by a Registered Intermediary which will provide advice specific to the individual. Assessment should be considered: (i) if the person is unlikely to be able to recognise when they do not understand something, or tell the questioner that they have not understood, or has some other communication difficulty, including understanding the intention underlying the question; (ii) even if no intermediary was present at the investigative interview.

KEY POINTS ABOUT QUESTIONING

Tailor questions to the individual's needs and abilities (2.1). Use short, simple questions, one idea at a time, about concrete things (no concepts, no 'why' questions) (4.1). Use simple words (4.2) with no figures of speech (4.3). Avoid use of the present tense about past events (4.4) Be clear about what you want to know (4.5). Allow extra time for the person to process the question (6.3).

Some question types carry a high risk of being misunderstood or producing unreliable answers and should be discussed at a ground rules hearing (5.1). These include questions:

- *with 'tag' endings (ie a statement followed by an invitation to confirm its truth) (5.2)*
- *in the form of a statement asserting something as a fact, which may not be recognised as a question (5.3)*
- *with forced choices (5.4)*
- *asking 'Do you remember...?' particularly where the question concerns what the witness has told someone (5.5)*
- *containing one or more negatives (5.7)*
- *relating to a causal chain of events (5.6)*
- *that are repeated (5.8)*
- *suggesting the witness is lying or confused. If a challenge is developmentally appropriate, it should be addressed separately, in simple words, at the end of cross-examination (5.9).*

Some question types are particularly problematic if the person has a learning disability and autism (5.10). If the person automatically repeats the question or the last few words of it, this is not their answer (6.3).

1. DEFINITIONS

1.1 **Autism** is a lifelong neuro-developmental disorder. It is described as a spectrum condition or disorder because although all people with autism share certain difficulties, these affect each person differently. Around 1% of the population are somewhere on the autistic spectrum. The condition may not be immediately obvious. Some people carry an 'autism alert' card; others may be unwilling to volunteer information about their condition; still others may not have had a formal diagnosis.

1.2 **Autism and Asperger syndrome** At one extreme, a person may have no social skills, no language, and major intellectual disability (classic autism). At the other extreme, the individual may have good expressive skills and vocabulary but unusual, one-sided social behaviour (high functioning autism, sometimes referred to as Asperger syndrome).¹ Both are subgroups on the autistic spectrum, sharing:

- significant difficulties in social interaction (understanding and communicating, 'getting the gist', seeing things from another person's point of view and planning and sequencing ideas);
- a strong preference for routines and repetition;
- inflexible, 'obsessional' interest in highly specific topics.

1.3 **In high functioning autism (Asperger syndrome), IQ is at least average** and (unlike classic autism) there is no intellectual disability or language delay in childhood. It is sometimes described as a 'hidden' difficulty. Someone with this condition may be so articulate that they appear more able than they actually are. Do not assume they have only 'mild' difficulties. They may have developed compensatory strategies, but what seems on the surface to be good expressive language is likely to mask their own poor understanding of what is said to them and mask their vulnerabilities generally. The syndrome affects how they interpret things and make sense of the world.

1.4 **One co-existing condition may hide another**, leaving the person's needs not fully recognised. Learning disability (Toolkit 4) is common (around 50-80% of those with autism), as are hearing (Toolkit 11) and visual impairments. There is a high risk of epilepsy and gastrointestinal pain in classic autism. Autism can also occur with other problems including specific conditions such as ADHD and dyspraxia (Toolkit 5) and mental health problems (Toolkit 12). Those with Asperger syndrome often feel socially isolated and may suffer from depression. The condition is more common in males. Females may go undiagnosed or be misdiagnosed because they can be more adaptive and better at seeming sociable, but may have secondary problems such as anxiety or eating disorders.

1.5 **People with autism seem to be over-represented in the CJS** as victims, witnesses or even perpetrators due to risk factors such as social naivety, repetitive interests, difficulties predicting consequences and diminished insight into what others think (leading to exploitation or bullying by others). People with autism may be particularly vulnerable to involvement in criminality linked to the Internet.

¹ The American Psychiatric Association [*Diagnostic Statistical Manual of Mental Disorders DSM-V*](#) (2013) uses the heading 'Autism Spectrum Disorder' and no longer recognises Asperger syndrome as a separate disorder.

1.6 **Someone with autism falls within the definition of a vulnerable witness** Section 16(2)(a), [Youth Justice and Criminal Evidence Act 1999](#) covers those whose quality of evidence is likely to be diminished because they have a mental disorder within the meaning of the [Mental Health Act 1983](#) (defined in section 1 as ‘any disorder or disability of the mind’). This covers the full range of autistic spectrum disorders, including those occurring alongside a learning disability or any other kind of disorder (section 34.18, [Code of Practice: Mental Health Act 1983](#) Department of Health 2008).

1.7 **Courts must make reasonable adjustments to remove barriers for people with disabilities, including autism** ([Equal Treatment Bench Book](#) 2013, giving effect to the [Equality Act 2010](#)).

2. AREAS OF DIFFICULTY AFFECTING COMMUNICATION AT COURT

2.1 **The most significant factor** in effective communication is the advocate’s ability to tailor questions to the needs and abilities of the individual with autism, enabling the person to understand the questions and give answers that (s)he believes to be correct. Accuracy and completeness of testimony can be significantly improved if appropriate questioning strategies are adopted. This will usually require advice from a Registered Intermediary² who will help to ensure that questions are understood.

2.2 **Autism covers a wide range** and it is important not to over-generalise or make assumptions. However, the following areas are typical potential causes of difficulty in the court process.

2.3 **People with autism are prone to heightened anxiety** and have a pressing need for ‘sameness’ and predictability. Problems can be caused by new places, disrupted routines, strangers or other events deviating from normal experience. The individual often lives with high levels of anxiety and reaches ‘overload’ or ‘meltdown’ quickly. Responses to fear, confusion and frustration (including inability to make sense of questions) may include hand flapping, pacing, laughing, self harming, screaming, making non-verbal noises, feeling the need to run away and hide or losing control. These are efforts to stop the stimuli and retreat into a calm state. Taking a short break to allow the person to calm down may save time in the long run.

2.4 **Weak listening skills and a limited attention span** are common. Because of difficulties with working memory, it may be necessary to repeat instructions often.

2.5 **Difficulties and delay between hearing, understanding and responding** Some people with autism may be non-verbal and have significant learning disability. Those who speak may have difficulty with personal pronouns (eg easily muddling up ‘I’ and ‘you’) and terms for space and time (here, there, come, go). Even someone with apparently good verbal

² Section 29, YJCEA 1999, restricts intermediary appointments to prosecution and defence witnesses. 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). Members of the judiciary may use their inherent jurisdiction to appoint a non-registered intermediary for a vulnerable defendant. Section 104, Coroners and Justice Act 2009, will (if implemented) enable the court to appoint an intermediary to assist certain vulnerable defendants but only when giving oral evidence at trial.

skills is likely to interpret literally, have difficulty understanding conversational rules and fail to understand figures of speech, jokes, irony or sarcasm.

2.6 Typically, someone with autism lacks the ability to imagine, interpret or predict others' thoughts, feelings or behaviour ('theory of mind') They have difficulty in understanding the consequences of their own or others' actions and are unlikely to be aware how their behaviour is interpreted by others. Recounting events with a personal dimension or point of view is likely to be problematic, eg 'How did it make you feel?'; 'Imagine I'm at your front door and my back is to the door, left is that way, do you follow?'.³ A question such as 'Did you see anyone there?' may produce the answer 'Yes' due to literal interpretation and a failure to understand the implicit query about whom the witness saw. The person may have difficulty interpreting a causal chain of events. However, if the information is of interest to them, they may have superior attention for details.

2.7 People with autism are thought to rely more on visual than verbal styles of processing It may help to write the question down and let the person read it. Photos or drawings etc. may assist and be understood better than speech alone.

2.8 Eye contact, expression and body language The person may not sustain eye contact (or may stare inappropriately); have difficulty interpreting tone of voice, body language and facial expression; and may appear blunt or disrespectful. Facial expression may be limited and inconsistent with emotion, eg a grin does not necessarily mean the person is happy.

2.9 Failure to recognise that they do not understand something said to them

2.10 Rigid behaviour Depending on where the individual's symptoms lie on the autism spectrum, behaviour can be inflexible, eg repeating one set of behaviours over and over again or talking excessively about obsessional interests. They may need to complete what they are talking about before they are able to move on to a different topic. 'Comfort behaviours' may include rocking, making noises or gestures or intense focus on a particular object. **Good practice example:** An adult witness with autism was permitted to give evidence wearing a lion's tail, something which was his 'comfort object' in daily life.

2.11 Heightened sensory sensitivities may affect functioning, concentration and ability to attend to questions. Abnormal sensory responses are present in the majority of children and over 90% of adults with autism spectrum disorders (Crane et al, 2009), eg difficulties filtering out background sensory information (sound, light, colour, smell or taste). Depending on the individual, problems at court could include: lights that are too bright, buzz or flicker; noise or vibration from a lift or escalator; announcements over a loudspeaker; electronic feedback over the live link; echoes in the courtroom; smells (even something as 'minor' as flavoured crisps); or colours, fabrics or materials (eg a different kind of chair might be needed). Someone with autism may have a fear of crowds.

³ Examples from trial transcripts are used to illustrate particular points. Some of these example questions contain other problems impeding communication which are not identified here for reasons of space.

3. CASE MANAGEMENT (see also Toolkit 1 Case management)

3.1 **Assessment** Ask about the individual's specific characteristics and communication capabilities. No two people with autism have the same profile of strengths and weaknesses. Someone functioning well in normal life is often able to mask their difficulties. An intermediary's assessment report will advise about the most effective means of communication tailored to the individual's needs and the vocabulary required by the case.⁴

3.2 **Communication aids** **Good practice examples** agreed at ground rules hearings include use of:

- a 5-point visual rating scale (1 calm – 5 highly agitated) to which a witness with autism could point, because sudden and fluctuating levels of performance are common. The Registered Intermediary monitored the person's level of stress during questioning. It was agreed that if he reached 3, a break would be considered;
- a 'stop' card, agreed with a witness with autism, to which the intermediary could point to alert the witness that he was continuing to talk but was not responding to the question;
- symbol cards for a witness with autism and complex communication difficulties, including 'freezing' and inability to speak under direct pressure, so that he could indicate to the court if he knew the answer to the question and needed more time, needed a break, could not remember etc. These were placed on a padded lap-tray on his knee;
- a computer with a camera showing what the witness typed, in answer to questions.

3.3 **Priority listing** The person's evidence should be scheduled at the optimum time of day for their condition, as changes in scheduling are likely to be particularly problematic.

3.4 **There should be a presumption in favour of a supporter as a special measure** There are potential benefits to recall and stress reduction if a neutral, trusted supporter accompanies the person while they give evidence. The person's wishes must be taken into account (part C3, [Application for a special measures direction](#); section 102, [Coroners and Justice Act 2009](#)).

3.5 **Explanations in advance of trial** must be given about:

- the oath/ affirmation. These include concepts likely to confuse someone with autism;
- their role as a witness and that they need not agree with suggestions put to them unless they are true;
- why their answers are necessary, ie for the benefit of the people in court;
- *exactly* what is going to happen and when, ensuring that any changes are communicated and explained as soon as possible;
- special measures. The person should practise on the live link and see screens in place, to express an informed view about how to give evidence. They may find it difficult to understand/ be understood over the live link or be distressed by feedback or

⁴ Matters of capacity to consent, competence and credibility are all beyond the intermediary remit.

background noise. If someone nevertheless wants to give evidence this way, an intermediary can assist and also alert the court to early signs of distress or confusion.

3.6 Familiarisation The person needs to be familiarised with the building entry; waiting room, which may need to be separate (the usual witness suite may be too busy or noisy); and the actual live link room or courtroom to be used at trial. **Poor practice example:** at a pretrial visit, a 12 year-old with autism was shown the live link room 'to be used at trial'. It was confirmed that he would be taken there by stair as he had a phobia about lifts. On the day of trial, he was taken by lift to a different live link room.

3.7 Planned breaks may not be sufficient if 'overload' is reached quickly Pauses with the witness in the live link room may help but proper breaks allow 'time out' to recover from the stimulus of questioning. If a break is requested, the need may be immediate.

3.8 Introductions give an opportunity to judge the person's communication abilities:

- this should be done in a calm environment without too many people present. Someone with autism will find 'small talk' difficult;
- be clear about your role, to enable the person to make sense of how to relate to you;
- seek advice from someone familiar with the person about managing the introduction;
- due to the likelihood of heightened sensitivity to touch, do not pat someone on the back, put a hand on their shoulder or offer to shake the hand of someone with autism unless this is initiated by the person.

3.9 Alert the judge to the need for unambiguous instructions avoiding figures of speech. Inappropriate instructions to people with autism have included '*I'm trying to paint a picture for you*', '*I'm going to pass you over to counsel*' and '*Don't talk about your case with anyone*'.

3.10 At trial, provide a distraction-free environment avoiding the individual's triggers to fear, anxiety and panic. When things go as expected, with no surprises, (s)he is likely to be calmer. Otherwise coping strategies may break down under the demands of the court process, making impairments more pronounced.

4. FRAMING YOUR QUESTIONS See also Toolkit 2(a), General principles from research and, if appropriate, Toolkit 4, Planning to question someone with learning disabilities

4.1 Use short, simple questions (one idea), about concrete things Someone with autism:

- will have difficulty with lengthy questions, eg Q: '*How long, if you don't know, don't say, but can you remember how long it took you to go to and from the chip shop on the Monday?*' (asked of a 9 year-old with autism spectrum disorder); A: '*Pardon?*';
- will see no reason to explain events. They are unaware that not everyone experiences the world as they do, and is likely to have difficulty with '*why*' questions.

4.2 Use simple words Problematic words used to question witnesses with autism have included fictitious, improper, hearing, aware, conceal, confused, alleged, occasions, recollect, evidence, procedure, make-believe.

4.3 **Use unambiguous language (the literal meaning)** Someone with autism is likely to be confused by figures of speech or expressions such as *'Bear with me'*, *'Set me straight'*, *'Not in any way, shape or form'*, *'I'm going to jog your memory'* or *'Draw your own conclusions'*. Check your question for alternative meanings. The following questions were asked of witnesses with autism, some of whom were children:

'Did you kick yourself when you found out?'

'Were you and Jane close?'

'Who would you say wears the trousers in your house?'

'Do you remember falling out with your boyfriend?'

Q: *'Can you remember what we were talking about before we broke?'* A: *'Broke what?'*

Q: *'Did you get cold feet in the middle?'* A: (after looking at her feet and stomach) *'I haven't got cold anything'*.

4.4 **Avoid use of the present tense about past events** This will confuse someone with autism, eg: *'Where is the man? If you are on the doorstep outside, where is Peter? Are you standing on the grass or on a pavement?'*

4.5 **Be clear about what you want to know** Because people with autism have difficulty filtering out irrelevant information and selecting what is relevant, they may be unable to work out what is wanted if asked *'Tell me what you saw'*. If necessary, reiterate information already provided eg *'Tell me what you saw happen in the shopping centre at 10 o'clock'*.

5. QUESTIONS LIKELY TO PRODUCE UNRELIABLE ANSWERS

5.1 **Some question types carry a high risk of being misunderstood or producing unreliable answers** Potentially problematic question types should be discussed at a ground rules hearing (see Toolkit 1, section 3). Cross-examination must enable the person to give answers that (s)he believes to be correct. This includes taking account of the individual's ability to refute a suggestion made in cross-examination that is inaccurate. Someone with autism may be prone to adopt erroneous details gained through leading questions that contain misinformation in the form of the desired answer in the question.

5.2 **'Tag' questions and other forms of assertion** Tag questions make a statement then add a short question inviting confirmation, eg *'John didn't touch you, did he?'* or *'John didn't touch you, right?'*. They are powerfully suggestive and linguistically complex. Someone with autism generally assumes people tell the truth because of difficulty in identifying others' motivations. When questioned by an authority figure, the person may go along with something that they otherwise consider incorrect or untrue because they think this is what they are supposed to do. (An intermediary assessment will advise about the person's ability to respond accurately to questions containing assertions.)

5.3 **Questions in the form of statements** may not be recognised as a question.

5.4 **Forced choice questions** create opportunities for error when the correct alternative may be missing, eg *'When you went to the flat, was it John or Bill who opened the door?'*. In this example, it is preferable to add *'... or someone else?'*

- 5.5 **‘Do you remember...?’** This question type requires complex processing, particularly when the person is asked, not about the event, but about what they told someone else.
- 5.6 **Questions relating to a causal chain of events** Someone with autism may struggle with questions requiring an understanding of motivation and how one action led to another.
- 5.7 **Questions containing one or more negatives** in any form are harder to process.
- 5.8 **Repeated questions** Repetition may upset someone with autism because:
- they may not understand why the question was asked again, because of difficulties with understanding someone else’s perspective;
 - they may not understand that it is the advocate’s job to put the case for ‘the other side’;
 - if a question must be repeated (even with changed wording) for clarity, explain that you just want to check your understanding of what the person said, without implying the first answer was wrong, eg *‘I want to make sure that I understand what you said’*.
- 5.9 **Questions (or non-verbal facial expression or tone) suggesting the witness is lying or confused** Because of the heightened anxiety associated with autism, facial or verbal expressions of disbelief are likely to have an adverse impact on concentration and accuracy of responses. (For an alternative approach in which such points are explained to the jury but not put to the witness, see Toolkit 1(c), Ground Rules section 3). If such a challenge is developmentally appropriate, it should:
- be addressed separately, in simple words, at the end of cross-examination;
 - not require the person to identify past emotions or intentions, as this is likely to be difficult for someone with autism.
- 5.10 **Someone with autism and a learning disability** (see Toolkit 4) is more likely:
- to acquiesce (ie reply ‘Yes’) to questions suggesting the answer, requiring a yes/ no response, that are repeated or that are not understood. When someone in authority formally suggests that something is a fact, it may be difficult for such a person to disagree if necessary, and to maintain verbally what they believe to be true;
 - to conclude their first answer is wrong or unsatisfactory if someone in authority repeats the question;
 - to get into a pattern of responses and cease to respond to individual questions if asked a series of propositions inviting repetition of either ‘Yes’ or ‘No’ answers, affecting accuracy. If only ‘Yes’/ ‘No’ questions are asked, it is difficult for advocates to determine if the witness is having problems with the questions.

6. QUESTIONING STYLE

- 6.1 **Allow the person to avoid eye contact** **Good practice example:** a 19 year-old with autism, a much younger developmental age and behavioural problems was allowed to give most of her evidence with her back to the video link camera. She whispered her replies to the Registered Intermediary who relayed them to the court.

- 6.2 **Speak slowly and calmly** and avoid any gestures or exaggerated expressions which may be misinterpreted. Use the person's preferred name to help get their attention.
- 6.3 **Allow the person extra thinking time** to process information before answering (at least six seconds). Do not fill the pause with another question. If there is no reply, try rephrasing the question. Allow extra 'tuning in time' when the speaker or questioner changes. Someone with autism may understand one question but not the next. The key is to be patient, so the person does not become emotionally aroused or upset.
- if the person automatically repeats all or the last part of your questions ('echolalia') this is not their answer. Do not repeat the question or move on: give the person time to formulate the answer;
 - do not interrupt, even if the person seems to have gone off at a tangent. Someone with autism may take a long time to get to the point. Interruptions are likely to cause unnecessary anxiety.
- 6.4 **Follow a logical, chronological order** Questions that jump around in time are confusing. 'What happened next?' rather than 'What happened before that?'
- 6.5 **Signpost your subject** and changes of subject. Explain when you are about to change the topic. It can be helpful to take a break at this point.
- 6.6 **Explain how long you will take in questioning** or how many points you want to cover. This can help the person control anxiety levels. However, saying 'I need to talk to my colleague for a minute' or 'I'm going to ask you a couple of questions' may lead the witness to expect you to be precisely a minute or to ask only two questions.

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