

# PLANNING TO QUESTION SOMEONE WITH A LEARNING DISABILITY

Toolkit 4

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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*

*No two people with a learning disability will have exactly the same profile of strengths and weaknesses. Information about the individual 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 you that they have not understood, or has some other communication difficulty; (ii) even if no intermediary was used at the investigative interview. Even witnesses with severe learning disability and no speech have given evidence effectively with intermediary assistance.*

## 1. DEFINITIONS

1.1 **Learning disability**<sup>1</sup> is used to refer to individuals who find it harder to learn, understand and communicate and whose ability to cope independently is reduced. (Some people with this condition prefer the term 'learning difficulty': find out the person's preference.) Learning disability is characterised by limitations in mental functioning and in skills such as communicating, taking care of personal needs and social skills. It is a condition which starts before adulthood, with lasting effect.

1.2 **It is the most common developmental disorder** Causes include genetic factors, infections and brain damage before, at or after birth. For many individuals, the cause remains unknown.

1.3 **'Learning disability' is distinguished from specific learning difficulties** such as language impairment and dyslexia, which occur independently of intelligence (Toolkit 5).

1.4 **Psychometric tests of intellectual functioning (IQ classification)** are used to assess the presence and degree of learning disability. In the UK, the average IQ score is 100. An IQ score below 70 is often used to indicate that a person has a learning disability and is eligible for specialist services:

- 50-70 mild learning disability;
- 35-50 moderate learning disability;
- 20-35 severe learning disability;
- below 20 profound learning disability.

1.5 **IQ measurements do not capture personal strengths and abilities** IQ scores may not be precisely accurate. IQ can vary during a person's development and is only useful in combination with assessment of social functioning, adaptation and communication.

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<sup>1</sup> Generally used in health and social care settings. In the field of education, Special Educational Needs (SEN) codes of 'moderate learning difficulty', 'severe learning difficulty' and 'profound multiple learning difficulty' all refer to generalised learning difficulty of varying severity. Taken together they are considered to be interchangeable with 'learning disability'. The criminal justice system sometimes uses the term 'mental disorder'. 'Intellectual disability' is also used.

- 1.6 **An IQ in the 70s may be described as a mild or ‘borderline’ learning disability** This may not have been diagnosed and is often difficult to identify. Comprehension difficulties may not be obvious and may be disguised by coping strategies and efforts to hide areas the person is struggling with. They may repeat language without understanding it. They may also have problems with abstract concepts such as time, duration and distance; the handling of money and personal organisation; and planning and sequencing ideas.
- 1.7 **Co-existing problems** Mental health problems (Toolkit 12) and autism spectrum conditions (Toolkit 3) are more common in people with learning disabilities than in the general population. One condition may hide another, leaving the person’s needs not fully recognised. There may also be problems with hearing (Toolkit 11) and vision.
- 1.8 **The definition of a vulnerable witness** ([Youth Justice and Criminal Evidence Act 1999](#)) includes those whose quality of evidence is likely to be diminished because they have a significant impairment of intelligence and social functioning (section 16(2)(a)(ii)). When determining whether quality of evidence is likely to be diminished, the court must consider its likely completeness, coherence and accuracy (section 16(5)).
- 1.9 **Courts are expected to make reasonable adjustments to remove barriers for people with disabilities** ([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 with someone who has a learning disability is the advocate’s ability to tailor questions to the needs and abilities of the individual, enabling the person to understand your questions and give answers that (s)he believes to be correct. This will often require advice from a Registered Intermediary<sup>2</sup> who has assessed the person and will help ensure that questions are understood, or a learning disability specialist who has worked with him or her.
- 2.2 **Each person’s capabilities differ** Typically, however, the person is likely to:
- experience difficulty and delay between hearing something, understanding it and in working out how to respond. A nod or answering ‘Yes’ does not necessarily indicate full understanding;
  - have weak listening, processing skills and a limited concentration span;
  - be prone to suggestion and compliance;
  - have limited insight and ability to identify emotions or intentions behind their own or someone else’s speech or actions, or seeing someone else’s point of view.
- 2.3 **Frustration, anxiety and stress are common** as a result of poor communication (especially in an unfamiliar context, outside of everyday routine and experience); not

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<sup>2</sup> 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](mailto:soc@nca.pnn.police.uk) (by pnn users) or [soc@nca.x.gsi.gov.uk](mailto: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.

knowing what is going to happen; people and surroundings seen as intimidating; and court delay. Responses may include feelings of panic and mental overload, leading to total shutdown; outbursts of aggressive or frustrated behaviour; or the urge to provide any answer, simply to bring questioning to an end.

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

3.1 **A full picture of the individual's communication capabilities is essential** Request information, eg about the person's education; whether (s)he has a carer; and whether (s)he uses signing/ communication aids in daily life. A Registered 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.<sup>3</sup> **Good practice example:** the intermediary helped the advocate in advance of cross-examination to tailor his questions to the understanding of an adult with a pre-school level of intellectual development.

3.2 **Ensure that any physical needs are addressed** **Poor practice example:** two boys with learning disabilities were also wheelchair users and needed a hoist to use the toilet. No hoist was provided at court. They were at court from 9am to 5pm without arrangements being made for their personal hygiene.

3.3 **Explanations about the witness role are crucial** eg that the person does not need to agree with suggestions put to them in cross-examination unless they are true.<sup>4</sup> Someone with learning disabilities may have very limited life experience and may not have seen a courtroom on TV. The person must practise on the live link ahead of time, and see screens in place, to be able to express an informed view about how to give evidence.

3.4 **The person may find it difficult to understand/ be understood over the live link** If someone with a learning disability nevertheless wants to use the live link, an intermediary can facilitate best evidence and alert the court to early signs of distress or confusion. Ensure that extraneous noise is avoided eg banging doors and conversations in the hall outside.

3.5 **Many people with learning disabilities have some skills in communication using pictures, signs, symbols or technology** Their non-verbal language may be more reliable than their verbal language. **Good practice examples:**

- for a witness with learning disabilities, the Registered Intermediary provided:
  - an outline body map to point out body parts if he was too embarrassed to verbalise terms
  - symbol prompt cards with reminders, eg that he could say if he could not remember, did not understand or needed more time to respond or a break
  - a simply worded illustrated guide to 'who's who' at court, which helped manage the witness's anxiety

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<sup>3</sup> Matters of capacity to consent, competence and credibility are all beyond the intermediary remit.

<sup>4</sup> See [Books Beyond Words](#) 'Supporting Victims' for use by people with learning disabilities and their supporters to understand what will happen when they go to court.

- an intermediary appointed for an adult defendant with learning disabilities alerted counsel to the need to give the defendant more time to find photos in an evidence book, to look at them and to process questions about them;
- in a case involving a witness with Down syndrome, the prosecution barrister arranged a conference before the ground rules hearing with the defence, CPS and Registered Intermediary. One concern was that the witness might be confused by different locations of four different but similar incidents. The intermediary prepared prompt cards, each with a photo and symbol to represent each location. At the hearing, these were approved and they were used without prompting by the witness at trial.

**3.6 *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](#); pages 45-46, Norah Fry Research Centre [What happens when people with learning disabilities need advice about the law?](#) 2013).

**3.7 *Take pre-arranged breaks, based on the person's concentration span*** This is likely to be shorter than usual at court:

- do not rely on someone to ask for a break, or to say they need one if asked. They may elect to keep going to 'get it over with'. **Good practice example:** cross-examination of a 16 year old girl with learning disabilities was conducted for two periods of 20 minutes each in the morning, over a period of five days;
- when a break is requested, it may be needed immediately. The person may lack the ability to anticipate and may quickly reach overload under cross-examination. **Poor practice example:** during the cross-examination of a 17 year-old with learning disabilities, a request was made for a break because he was showing signs of distress. The boy was advised that questioning would continue as it was 'nearly over'. After some more questions, the boy was increasingly agitated and the request for a break was repeated. Again, he was asked to go on for 'a few minutes more'. He then broke down and started to throw chairs in the live link room.

**3.8 *Being introduced to the person is an important opportunity to become familiar with the person's communication abilities*** **Good practice example:** The advocate talked to the witness beforehand, checked what she liked to be called and explained 'You'll see me later on the screen'.

**3.9 *Adopt an appropriate manner while questioning*** Look at the person, ensure they know you are speaking to them and use their name. The person may be easily disconcerted and upset by intimidating, overly formal or otherwise inappropriate body language. **Poor practice example:** the advocate shuffled his papers and looked at the jury, avoiding eye contact with an adult witness with learning disabilities, who was confused as to whether she was meant to respond to his questions.

#### 4. FRAMING YOUR QUESTIONS (see also Toolkit 2(a), General principles from research)

- 4.1 **Accuracy and completeness** of testimony from someone with learning disabilities can be significantly improved if the person's preferred communication strategies are adopted, including use of symbols and other aids.
- 4.2 **Speak slowly and allow the person extra thinking time (at least six seconds)** to process information before answering. Do not move on to another question too quickly. If there is no response, try rephrasing the question.
- 4.3 **Use simple words with which the witness is familiar** Avoid redundant words and phrases (eg 'To your knowledge...', 'I put it to you ...'), jargon and complex vocabulary. Use the same words consistently in questions. Ensure there is a shared understanding of key concepts and phrases.
- 4.4 **Use unambiguous language** Avoid metaphors and figures of speech which, even if understood, may be interpreted literally, eg Q: 'Nothing stood out then?'. A: 'I were sitting down' (asked of a 16 year old with moderate learning disabilities).<sup>5</sup> 'Are you sure?' or 'Is that true?' are better alternatives than 'Is that right?' because the word 'right' gives undue emphasis to the suggestion.
- 4.5 **Repeat names, places and objects often** 'Carol, were you in the kitchen?' not 'Were you there?'. Avoid pronouns, eg 'What did Max say?' not 'What did he say?'. Name objects, eg 'Was the money in the wallet?' not 'Was it inside?'. Use the witness's name at the start of questions (find out what the person wants to be called).
- 4.6 **Questions removing personal references to the witness and/or defendant are more difficult to understand** and have a distancing effect, eg 'Did you tell the police about what is in that statement about the matter, about the touching of the boobs?' (asked of an 11 year-old). This can cause comprehension problems even for adults. Better options include: 'You said Jim touched your boobs. Did you tell the police?'.  
  
4.7 **Ask short, simple questions, one idea at a time** Complex questions are likely to result in incorrect or 'I don't know' responses, even though the person knows the answer if the question is phrased simply. In order to answer accurately, someone with a learning disability needs to be able to remember and process the whole question. The person will have a limited working memory and will be unable to remember all of a multi-part question or decipher embedded clauses, eg:
- 'You can't be certain that you think that it was not possible that you filled in the first side of the form?' (asked of a defendant with learning disabilities);
  - 'You said you've been raped by the coffee machine' (asked of a witness with learning disabilities).
- 4.8 **Follow a logical, chronological order** Avoid questions that jump around in time or appear to be unconnected, requiring constant re-orientation by the witness. Avoid

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<sup>5</sup> 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.

questions with 'before' and after'. Also, referring to more than one event per question is confusing, eg

*'Let's talk about the "new nasty thing", what happened in May, but there was also a nasty thing a year before, in the bedroom, let's call it the "old nasty thing". You said the "new nasty thing" was when he touched your breasts'.*

4.9 **Signpost the subject and explain when it is about to be changed** This gives the person transition time to focus on the next subject, eg 'Now we're going to talk about...'. It can be helpful to schedule a break at a change of subject.

4.10 **Ask questions in the active voice** Questions in the passive form are unnecessarily complex, eg 'Were you to have been taken to the shops that day?'. Better alternatives include: 'Did someone take you shopping on the day of the bus strike?';

4.11 **Avoid 'why' questions** Someone with learning disabilities will have limited ability to identify emotions or intentions, eg 'Why would you be in your dad's bedroom when your mum was in the kitchen?' (asked of a teenager with learning disabilities).

4.12 **Check directly on understanding, using simple words** You may need to check understanding throughout. Alternative approaches include asking the person to explain what they thought the question meant. 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, most witnesses with a learning disability are likely to have difficulty in recognising when they do not understand something. They may also fail to say they do not understand because of a fear of looking stupid, because the questioner is an authority figure, or because they think that they understand the question when in fact they do not. In the following exchange, the judge and prosecutor were unaware of these limitations concerning a defendant with mild learning difficulties (O'Mahony 2012) :

Prosecutor: *'If you do not understand a word I use, please can you indicate it?'*

Defendant: *'Yes'*

Prosecutor: *'If you don't indicate it, I am going to assume you understood the word; do you follow?'*

Defendant: *'Yes'*

Intermediary: *'Your Honour, Miss X may not even understand the word "indicate"'*.

Judge: *'Hang on, let's keep a balance here. (To the defendant): Miss X, if you don't understand Mr Y's questions, you say so. That is simple. If you don't say that you don't understand, we are entitled to assume that you do understand.'*

Defendant: *'Okay, yeah'*

Judge: *'That is pretty simple with the problems you have. Either you can tell us you understand or you don't. I don't see a problem with that.'*

Prosecutor: *'Do you understand the word "indicate"?''*



Defendant: 'No'.

4.13 **Be alert to miscommunication** The person is likely to try to answer even if they do not understand or have no knowledge. Be alert to non-verbal clues to miscommunication, 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.

## 5. QUESTIONS LIKELY TO PRODUCE UNRELIABLE ANSWERS

5.1 **Some question types carry a high risk of being misunderstood or producing unreliable answers** (chapter 5, para 64, [Equal Treatment Bench Book](#) 2013). People with learning disabilities are more likely to go along with (ie reply 'Yes') to questions suggesting the answer, requiring a yes/ no response, that are repeated or that are not understood. As questions supply more information which did not originate with the witness, the more leading they become. Problematic question types should be discussed at a ground rules hearing (see Toolkit 1(c), 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 that is inaccurate.

5.2 **Take account of abilities in relation to age equivalency for use of language, rather than actual age** This can help guide what is developmentally appropriate (see Toolkit 6, section 5). However, the ability of someone with learning disabilities to refute inaccurate suggestions as put in cross-examination requires assessment by an intermediary.

5.3 **'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. Judicial guidance recommends that this form of question be avoided with children and that a direct question be put instead, eg '*Did John touch you?*'. '*How did John touch you?*' By analogy, tag questions should also be avoided with an adult whose intellectual development equates to that of a child or young person.

5.4 **Other forms of assertion** When someone in a position of authority formally suggests that something is a fact, it becomes extremely difficult for a person with a learning disability to disagree if necessary, and to maintain verbally what they believe to be true. The person is likely to have a particular problem with an assertion in the form of a statement, viewing this as a comment and not appreciating that it requires a response.

5.5 **Forced choice (closed) questions** eg '*When you went to the flat, did John or Bill open the door?*' or '*What was he wearing on top?*' (if the person was not wearing anything on top). These create opportunities for error when the correct alternative may be missing. If asked open, free recall questions (eg '*What happened?*'), people with learning disabilities can provide accounts with accuracy rates broadly similar to the general population.

5.6 **'Do you remember...?'** This type of question requires complex processing, particularly when the person is asked, not about the event, but about what they said about it to someone else, eg '*Now when you were being looked after at Uxbridge do you remember*



*speaking to one of the people that was looking after you and speaking about something nasty?’ (asked of a woman with learning disabilities).*

**5.7 Questions containing one or more negatives in any form** make it harder to decipher the underlying meaning. Negatives increase complexity and the risk of unreliable responses. All of the following were asked of adults or children with learning disabilities:

- single negatives, eg *‘Kevin wasn’t angry about it, was he?’*. Better alternatives include: *‘Was Kevin angry?’*;
- double negatives, eg *‘Now, when you did that, did you not say that it was something that you did not like?’*;
- multiple negatives, eg *‘It [racism] is hating people who are not white because they are not white, is it not?’*. Better alternatives include *‘Racism means hating people with a different skin colour. Is that true?’*;
- implicit negatives, eg *‘You’ve been into the house before without anyone asking you in’*. Better alternatives include: *‘Have you been to the house before?’*; followed by *‘Did someone ask you to come into the house?’*;
- words with a negative meaning, eg *‘Are you sure nobody has asked you to tell these lies about your dad?’*. Better alternatives include: *‘Has someone told you what to say about your dad?’* followed by *‘Are you sure?’*

**5.8 Questions repeated by authority figures** (whether asked consecutively or interspersed with others) risk reducing the overall accuracy of someone with a learning disability:

- the person is likely to conclude that their first answer is wrong or unsatisfactory if someone in authority repeats the question, and may go along with the suggested answer, even if the person disagrees with it;
- 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 *‘Thank you, but I want to be sure I understand. Tell me again’* (followed by the question).

**5.9 A series of propositions inviting repetition of either ‘Yes’ or ‘No’ answers is likely to affect accuracy** An acquiescent person (ie someone with a tendency to answer ‘yes’, regardless of the question) often gets into a pattern of responses and will cease to respond to individual questions. If only ‘Yes’/ ‘No’ questions are asked, it is difficult to determine if the witness is having problems with the questions.

**5.10 Questions suggesting the witness is lying or confused** Because of the heightened anxiety associated with learning disability, these questions 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, at the end of cross-examination;
- be put in simple, clear language, eg not *‘I suggest that Paul never ever put his thumb or his finger up your bottom or towards your bottom. I am suggesting that did not happen at all and that you are confused about it, am I right or wrong?’*;

- not require the person to identify past emotions or intentions, eg not *‘Can I suggest to you that the reason that you did not call out for Jane is that the account you are giving is not a truthful one?’*. A question about past emotions or intentions may be developmentally inappropriate for someone with learning disabilities.

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Crown Prosecution Service (2009) [Supporting victims and witnesses with a learning disability](#)

Department of Health (2011) [Positive practice, positive outcomes: A handbook for professionals working in the CJS with offenders with a learning disability](#)

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