

ADDITIONAL FACTORS CONCERNING CHILDREN UNDER 7 (OR FUNCTIONING AT A VERY YOUNG AGE)

Toolkit 7

August 2014



Lexicon Limited

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

1. [Expectations](#)
2. [Difficulties affecting the young child's communication at court](#)
3. [Registered intermediary assessment](#)
4. [Strategies to facilitate best evidence](#)
5. [Framing your questions](#)

This should be read in conjunction with Toolkit 6, *Planning to question a child or young person*.

Information about the individual child's communication is essential and if not supplied, must be requested. [Achieving Best Evidence](#) (Box 2.1, 2011) states that if a child seems unlikely to be able to recognise a problematic question or say that they have not understood, assessment by an intermediary should be considered. This is so even if no intermediary was present at the investigative interview. The age norms of language development outlined in this toolkit are only a guide: they are not a replacement for assessment providing advice specific to the individual child.

KEY POINTS ABOUT QUESTIONING

Tailor your approach to the individual child. Be flexible (2.5). Very young children do not organise events in their minds in an adult way (2.1) and need almost twice as much time to process questions (2.4). There is a high risk of unreliable responses when they are asked questions with tag endings, questions in the form of a statement asserting something is a fact (which may not be recognised as a question), 'Do you remember...' questions and repetitive and forced choice questions (2.3).

Ask simple questions, one idea at a time (5.2). Be alert to lack of understanding of crucial evidential words (3.4) and literal interpretation. Avoid figures of speech (5.4). Young children have difficulty with pronouns, adverbs and prepositions (3.2), measurements, time references and other concept words (3.3).

Other suggestions to maximise the quality of evidence are:

- limit question length to the maximum number of words this child is likely to understand, as indicated in the intermediary's report (3.3)
- signpost a change of subject and set the scene for the new topic (5.6)
- pause during questioning if the child moves out of range of the live link camera (2.6)
- watch the child's gesture and facial expression. Young children rely on non-verbal communication more than older children (3.6)
- consider using communication aids to allow children to expand their answers and respond to questions non-verbally (3.7)
- avoid using the words 'ask' and 'tell'. Say 'We're going to talk about...' rather than 'I'm going to ask you some questions' (5.5).

1. EXPECTATIONS

1.1 **Advocates are expected** (chapter 5, [Equal Treatment Bench Book](#) 2013; [Bench Checklist Young Witness Cases](#) 2012):

- to discuss and agree ground rules before a child gives evidence. This includes how the child will be questioned and how to address challenges to the child's evidence. For an alternative approach in which the challenge is explained to the jury but not put to the child, see Toolkit 1(c) Ground Rules, section 3;
- to adapt questions to enable the child to give the best evidence of which they are capable;
- to formulate short, simple questions which put essential elements of the defendant's case to the witness;
- not to ask tag questions such as '*Jim didn't hit you, did he?*' (see Toolkit 6, Child or Young Person, section 5);
- to inform the jury of aspects of evidence believed to undermine the child's credibility, but not necessarily to address them in detailed cross-examination of the child.

2. DIFFICULTIES AFFECTING THE YOUNG CHILD'S COMMUNICATION AT COURT

2.1 ***Very young children do not organise events in their minds in an adult way*** They often leave out settings, descriptions, chronology and emotions in the telling of a past event. They can be particularly suggestible. However, when questioning is modified appropriately, children as young as 3 can recall and report past experience accurately. Increasing numbers of children under 7 give evidence at trial. In 2011, a 4-year-old gave evidence competently and credibly assisted by a Registered Intermediary¹, even though the trial took place 21 months after an assault when he was 29 months old.

2.2 ***The conventions of courtroom testimony are unfamiliar*** and vastly different from the child's previous experience of communicating with adults. Even bright, intellectually able children find court communication challenging simply because of their age. Young children have difficulty adapting to formal Q and A sequences at court because:

- in the child's experience, adults know the answers to questions they ask the child;
- in every-day conversation, adults take responsibility for noticing and correcting miscommunication, eg assisting a child who is confused or hard to understand.

2.3 ***There is a high risk of unreliable responses*** when children under 7 are asked tag questions, eg '*Jim didn't do it, did he?*'; questions in the form of a statement asserting something as a fact, which may not be recognised as a question; repetitive questions; forced choice questions; and '*Do you remember...*' questions, eg '*Do you remember talking about Jim to the police? Do you remember taking to them about him on the video that we watched yesterday? Can you remember that?*' asked of a 4-year-old.² (For detail on these and other points, see Toolkit 6, section 5).

¹ 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.

² 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.

2.4 **Children under 7 need almost twice as much time to answer questions**

2.5 **Tailor your approach to the individual child and be flexible** This task requires advance preparation as well as the ability to respond flexibly to the child's communication during cross-examination (the Registered Intermediary will assist with this). Taking account of the child's needs may mean further adaptation or even abandonment of pre-planned questions.

2.6 **Pause during questioning if the child moves out of range of the live link camera** Young children have difficulty maintaining their attention and train of thought. They are very likely to move around. The intermediary can assist in keeping the child focused.

2.7 **Identify a few key questions** **Good practice example:** At the ground rules hearing for a child who had just turned 4, the content and length of three questions asked by the prosecutor and two questions asked by the defence were agreed by the judge, Registered Intermediary and both advocates.

2.8 **If questioning is not adapted to the needs of the child, the judge may have to take over questioning** **Good practice example** of retrieving a situation that had broken down: at the ground rules hearing, the judge asked counsel to keep questions simple for a six-year-old witness. During cross-examination, the judge and intermediary had to intervene with each question until the child refused to answer and ran out of the live link room. The trial was adjourned. The next day, when the child saw defence counsel on the screen he ran out, shouting that he would not answer any more questions. The intermediary could not persuade the child to continue but the judge suggested he would talk to the child (having met the child before his evidence started). The judge took time to make the child feel comfortable. The child agreed to answer six questions asked by the judge. The judge asked defence counsel's questions in a simplified way. The child answered calmly and confidently.

3. REGISTERED INTERMEDIARY ASSESSMENT

3.1 **The intermediary's assessment will advise on the most effective means of communication with the individual child** The report is available to all parties. Issues likely to be addressed include:

- spoken language. It is normal for young children to leave out, mix up or add consonants or vowels. Some are softly spoken. The intermediary may need to repeat answers;
- the maximum number of words in a question this child is likely to understand;
- the child's ability to understand that others have beliefs, desires, knowledge and intentions different from one's own. This 'theory of mind' usually develops between 3 and 4 years of age. Children under the age of 4, and children and adults with autism, see no reason to explain events because they do not realise that someone else's experiences of the world may differ from their own.

3.2 **Use of pronouns, adverbs and prepositions** Young children:

- have difficulty in keeping track of who or what is meant by 'he /we /they /that /it /that/ there' etc. It is important to use names and identify objects, actions and places, eg *'When did Robert break the window?'*, not *'When did he do that?'*
- 'there' is open to interpretation:
Q: *'Was mummy there?'* (asked of a 4-year-old). A: 'Yes'. This could mean *'in the house'* or *'in the room with me'* (where the alleged offence took place). Better alternatives include eg *'Was mummy with you when Jim came in the bedroom?'* or *'When Jim came in the bedroom, was mummy with you in the bedroom?'*;
- may confuse the meaning of 'first' and 'last' (one reason why it is vital to ask questions in logical, chronological order);
- are more likely to give reliable replies to open-ended 'who /what /where /how' questions requesting a narrative, multi-word response, rather than closed questions which can only be answered yes or no;
- have some ability to answer a 'why' question about something in the present:
Q: *'Why are you crying?'*. A: *'Cos I hurt my knee'*
but are unable to answer a 'why' question that requires an inference about what happened in the past or why someone did something. They often reverse 'why' and 'because', eg *'I fell over that's why I was running'*;
- under 5 often confuse words such as 'inside /outside /on /under /behind /above /below /beside'. These are often the subject of mistakes. They can usually respond to a request to place an object 'in' or 'under' before they can reliably describe where an object is or was;
- cannot process a question whether *'they ever saw something'* or *'anything like this'* happened before, as 'any' and 'ever' invite the child to search for every possibility.

3.3 **Measurements, time references and other concept words** eg dates, length and frequency of events; and weight, height and age estimates. These are only acquired gradually as children develop. Questions relying inappropriately on the grasp of such concepts are likely to produce unreliable responses:

- children begin to use words relating to time (eg now /before /after /then), distance, relationships, size, positioning etc. before they understand their meaning;
- a question about *'How many times'* something happened may result in a different answer each time the question is posed. Unbelievable responses eg *'It happened 1,000 times'* can be a metaphor for *'lots of times'* or simply a recognition that a question about numbers needs an answer with a number. Better alternatives include *'Did x [specify event] happen one time? Or more than one time?'*;
- children have limited ability to process 'when' questions. A question about when something happened could be answered *'yesterday'*, meaning any time in the past. Such questions should be linked to familiar knowledge or concrete events such as holidays, birthdays, home routines (eg meal times) or what was on TV. Even very young children can do this.

3.4 **Understanding of crucial evidential words** A young child:

- may interpret 'touch' quite narrowly, relating only to hands, eg
Q: 'Did he touch you?' (asked of a 4-year-old). A: 'No. He washed me on my private, everywhere'.
Q: 'Did he touch you?' (asked of a 6-year-old). A: 'No. (later) He licked me';
- may give an inaccurate reply if the question implies that the child was active in the event, eg
Q: 'Did you touch John?' A: 'No'. (later) 'He put his willy in my hand and in my mouth'.

3.5 **Length of testimony and frequency of breaks, taking account of concentration span** **Good practice example:** a 4-year-old was cross-examined in 10-minute periods, with breaks in between.

3.6 **Use of gesture and facial expression** Young children rely on non-verbal communication more than older children.

3.7 **Communication aids** Children may be more competent to demonstrate what happened, rather than explain in words. Aids may also allow children to both show and tell (section 3.107, [Achieving Best Evidence](#) 2011). There are risks and pitfalls as well as advantages (sections 3.103-122). They 'should be used with caution and never combined with leading questions' (section 3.108) and should not prevent the child from gesturing (section 3.111).

3.8 **The Registered Intermediary can assist in identifying appropriate, neutral aids** and help the child create aids to augment their communication. Examples have included:

- the child's own drawings of people, places and objects;
- pictures showing an (evenly balanced) range of emotions;
- a visual pain scale, with numbers and faces balanced along a scale of 0-5;
- pictures of a child, with removable clothes;
- precut gender-neutral 'gingerbread people';
- doll house furniture; Lego models; and pipe cleaner figures in different colours and sizes, with polystyrene heads that can be drawn on to represent different individuals;
- body maps (eg '[How it is](#)' Triangle; 'Living Your Life' Brook; Annex B, [Good practice guidance in managing young witness cases and planning to question children](#)). The child has to be able to use a body map correctly for demonstrative purposes.

4. STRATEGIES TO FACILITATE BEST EVIDENCE

4.1 **The Registered Intermediary will recommend strategies tailored to each child's needs** to help him/ her give evidence more accurately and completely. These may include:

4.2 **Helping the child to understand and try out communication rules** Children learn that in conversation, a question requires an answer. The answer 'yes' indicates cooperation and is often perceived to be the answer the adult wants. The child needs to understand:

- this is not what is required of them at trial;
- the advocate is going to ask questions because people at court do not know what happened, even though the child has already 'told' one or more people.

4.3 **Identifying what communication rules the child needs at court** and explaining them to the child. The rules may include:

'Tell the truth' (explaining in language that the child understands, only talk about things that really happened; things you're sure about; things you saw/ heard/ felt. Don't leave anything out. No lying/ pretending/ making things up/ guessing);

'Say if you don't know, 'Say if you don't remember', 'Say if you don't understand';

'Say if I get it wrong' (sometimes I get muddled up. You tell me if I get muddled up);

'Stop when you need to'. 'Come back when you're ready'.

4.4 **Explanations using visual aids** **Good practice example**: before trial, a 4-year-old was introduced to simple communication rules, with symbols. At trial she had them in front of her to help her remember the 'rules'.

4.5 **Modified arrangements for memory-refreshing** At trial, it is increasingly common for young children not to watch their evidence-in-chief at the same time as the jury. Memory-refreshing should occur when the young child can take as many breaks as necessary, with a note taken of anything the child says in response. **Good practice example**: a 5-year-old was filmed viewing his original police interview. While watching, he extended his account, adding new information. On this basis additional charges were laid.

4.6 **A child-friendly environment with which the child is familiarised before trial** **Good practice examples** include:

- using a remote link from another court or non-court site;
- child-friendly facilities, with doors the child can open:
 - the police sourced child-sized furniture for a 4-year-old in the live link room and the Witness Service allocated him a separate waiting room attached to the video suite
 - a child with urinary urgency was given a live link room with an adjacent bathroom. She used a symbol card to indicate to the Registered Intermediary when she needed to use the toilet. The ground rules hearing agreed that the child could leave the live link room without waiting for permission
- a plasma screen live link providing a clear view of the child's face and hands to capture nonverbal communication;
- microphones located appropriately for a child who whispered. She whispered answers using 'rude' words to the Registered Intermediary, who, as agreed at the ground rules hearing, repeated the responses with exact intonation and phrasing and sat near a microphone so that the child's whispers were picked up.

4.7 **Establishing rapport** It is vital to do this before questioning starts:

- many children are taught not to speak to strangers and may not understand why they should answer questions from a stranger on a TV screen. **Good practice example**: one at a time, on a pre-trial visit, the defence advocate and judge spent about 20 minutes with a 4-year-old, tuning into his communication with the help of the Registered Intermediary;
- the child may need to meet the advocates and judge more than once. 'Children may need time, and more than one opportunity, to develop sufficient trust to communicate

any concerns they may have, especially if they have a communication impairment, learning disabilities, are very young or are experiencing mental health problems' (para 5.64, [Working Together to Safeguard Children](#) 2013).

4.8 ***The presence of a neutral supporter, trusted by the child*** This has potential benefits to recall and stress reduction and should always be considered as a special measure. The child's wishes must be taken into account (part C3, [Application for a special measures direction](#); section 102, [Coroners and Justice Act 2009](#); Judicial College [Bench Checklist Young Witness Cases](#) 2012).

4.9 ***Preparing the child to separate from the accompanying adult*** The child needs to know ahead of time:

- where their accompanying adult will wait;
- that the child can go to the adult if the child needs to, and should practise doing so;
- that the child can stop the questioning as needed to and come back when ready.

4.10 ***Helping the child to manage their own anxiety*** through quiet, calming play materials, controlled breathing and use of a 'stop' card to indicate the need for a break. Children under stress may function at a lower level making it hard for the child to remember accurately and think clearly. **Good practice example:** A 4-year-old was allowed to pause cross-examination by going under the table or behind a curtain in the live link room, or by leaving the room. Resuming cross-examination after a break, the advocate wanted to ask the child *'four more questions'*. The child agreed but said he wanted to count them. He and the Registered Intermediary quickly made four playdough candles, to help him count. After the fourth question, the child left the live link room saying *'candles are all gone'*.

4.11 ***Enabling the child to look away*** Most adults look away or close their eyes to concentrate and remember information. Gaze aversion when thinking or speaking is a skill that develops with age. Young children may need adult help to avert their gaze during cross-examination. It can be helpful if the advocate looks away after asking a question. Calming, quiet things to fiddle with can help some children to avert their gaze while thinking (for others, they may be distracting).

4.12 ***Cross-examination with the advocates in the live link room*** Some children's communication is significantly impaired by use of the live link. **Good practice example:** the Registered Intermediary assessed a 5-year-old who used gestures and facial expressions to support her communication, both to help her explain things and to let others know whether she understood. Her receptive and expressive communication was most effective when she was face-to-face. Practising on the live link revealed that she was less likely to use gesture or facial expressions. The intermediary recommended that the prosecution and defence advocates be in the live link room for cross-examination. This was agreed at the ground rules hearing. The advocates and intermediary had a practice session in order to reorganise chairs and camera angles. A table was provided for photos and the child's drawings, which the child, intermediary and defence advocate could look at together. This innovative process worked well at trial.

5. FRAMING YOUR QUESTIONS (for more detailed guidance, see Toolkit 6)

5.1 **Keep language simple in the child's presence** including instructions. Arrange for the Registered Intermediary declaration to be given in the courtroom, or at least *before* the child enters the live link room.

5.2 **Ask simple questions, one idea at a time** Subject, verb, object (if any), with as few additions as possible; without negatives in any form, which inhibit a child's understanding. Not, eg *'So you don't tell fibs and Jane asked you – in the tape – whether Sam ever touched you and you said he didn't. Sam never touched you with his willy, did he?'* (32-word question, asked of a 4-year-old).

An open question is a better alternative: *'What happened in the bathroom with Jim?'* or a sequence of shorter questions, eg: *'Did Jim touch you?'; 'Where did Jim touch you?'; 'Which part of you did Jim touch?'; 'Which part of Jim touched you?'* (Consider use of a body map if the child can use this correctly for demonstrative purposes. See 3.11 above).

5.3 **Young children cannot infer underlying meaning and therefore interpret words in a highly literal way** eg *'Have you ever seen a "blue movie"?'* (asked of a 4-year-old); Q: *'Are you OK to go on?'* (asked of a 5-year-old). A: *'What on?'*. The child may not connect 'category' and 'subcategory' words and interpret them literally, eg

Q: *'Did you have your clothes on?'*. A: *'No'*

Q: *'Did you have your pyjamas on?'* A: *'Yes'* (asked of a 6-year-old).

Better alternatives include: *'What were you wearing?'*

5.4 **Avoid idioms and figures of speech** eg *'I believe that may be a complete red herring'* (said to a 6-year-old). Avoid language likely to confuse or upset the child, eg use of the present tense *'So you are in bed and he's taken your pyjamas off, now what's happening?'* or a metaphor such as *'I want to take you back [to the house where it happened]'*.

5.5 **Children of this age may use 'ask' when they mean 'tell' and vice versa** Equally, they can be confused when these words are addressed to them. It is therefore better to explain *'We're going to talk about...'* rather than *'I'm going to ask you some questions'*.

5.6 **Signpost a change of subject and set the scene for the new topic** eg *'We've finished talking about when you were at the swimming pool. Now I want to talk about what happened the next day. You were in your bedroom with mum. I want to talk about what you said to her about Tom.'*

The development of the original version of this toolkit was funded by the Nuffield Foundation. This update was funded by Lexicon Limited. It uses as a primary source:

Marchant R. (2013) [How Young is Too Young? The evidence of children under five in the English criminal justice system.](#) Child Abuse Review, Wiley Online Library. This article describes the work of the organisation [Triangle](#) to ensure children's evidence and views are heard.

Ruth Marchant, a Registered Intermediary, contributed significantly in drafting this toolkit. It draws also on the experience of other Registered Intermediaries (in particular Judy Clegg, Ali Cousins, Jan Jones, Moira Pook, Donna Ravening, Bridget Towning, Sharon Richardson and Rosemary Wyatt) and comments from Professor Penny Cooper (Kingston University London); Dr Kirsten Hanna (Institute of Public Policy, AUT University, New Zealand); Dr Emily Henderson (barrister); Dr Michael Lamb (Professor of Psychology, University of Cambridge); Andrea Middleton JP (Registered Intermediary, on behalf of Royal College of Speech and Language Therapists); and Lisa McCrindle, NSPCC. The toolkit summarises key points from:

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