

# The Advocate's Gateway

**Planning to question a child or  
young person**

**Toolkit 6**

15 December 2015

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*The Advocate's Gateway* toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process.

*'Advocates must adapt to the witness, not the other way round.'* Lady Justice Hallett in [R v Lubemba; R v JP](#) [2014] EWCA Crim 2064, para 45.

The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

*'We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in R v Rashid (Yahya) (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.'* Lord Thomas of Cwmgiedd, CJ in [R v Grant-Murray & Anor](#) [2017] EWCA Crim 1228, para 226.

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## 1. INTRODUCTION

- 1.1 Tailor your approach to the individual child and be flexible** because no two children have the same profile of communication strengths and weaknesses.

*Advocates must adapt to the witness, not the other way round. ([R v Lubemba; R v JP](#) [2014] EWCA Crim 2064)*

Obtaining a full picture of the child's communication capabilities is essential and an intermediary can help with this by requesting information, e.g: about the child's education; whether he or she has additional support at home, school, college and so on.

- 1.2 Always consider assessment of a child by an intermediary** because all children under 18 are eligible to be considered for the intermediary special measure (Ministry of Justice, 2011, [Achieving Best Evidence](#); section 16, [Youth Justice and Criminal Evidence Act 1999](#)). Just because a child appears to be able to communicate well, does not mean that they will be able to understand complex legal questioning during a cross examination, or feel able to say when they do not understand.

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## 2. GENERAL PRINCIPLES ABOUT CHILDREN'S COMMUNICATION

**2.1 Child development occurs across four main areas;** physical, cognitive, emotional and social, all of which interact. Due to these factors a range of communication skills are acquired over time, for example:

- the ability to understand what others say and do;
- the ability of the child to express themselves;
- knowing how to communicate in a range of social situations;
- the ability to successfully manage stress and anxiety.

**2.2 Children do not approach communication in the same way as adults** and do not use, process or understand language in the same way as adults.

**2.3 Within the 'normal range' of communication for a child's age, ability can vary widely (Doherty-Sneddon, 2003).** Effective communication needs to take account of the individual child's chronological age, developmental stage, emotional state, education and culture, as well as any other condition that affects communication (see other toolkits e.g. Toolkit 3 - Planning to question someone with an autism spectrum disorder, Toolkit 4 - Planning to question someone with a learning disability, Toolkit 5 Planning to question someone with hidden disabilities and Toolkit 15 - Witnesses and defendants with autism: memory and sensory issues).

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## 3. CASE MANAGEMENT

- 3.1 Information about the individual child’s communicative needs is essential and, if not supplied, must be requested.** All children under 18 are eligible to be considered for the intermediary special measure (Ministry of Justice, 2011; [Youth Justice and Criminal Evidence Act 1999](#)). If a child cannot participate in criminal proceedings or provide their best evidence then assessment by an intermediary should be considered, even if not initially used at interview. Intermediaries should be considered in all child sexual abuse cases.
- 3.2 Familiarisation:** a trained person should help children understand their witness role. They should practise on the live link, and see screens in place, to be able to express an informed view about special measures ([Application for Special Measures Direction](#), parts B5, B6) as research demonstrates that children given a choice about whether or not to use the live link were assessed as giving more effective testimony, irrespective of the method of testimony (Cashmore and De Haas, 1992). The special measures requested should be kept under close review.

### GOOD PRACTICE EXAMPLES

The prosecutor attended the court visit and asked the child non-evidential questions (prepared by the intermediary) over the live link. This helped the child understand the communication rules at court and contributed to the intermediary’s assessment. In another case, an intermediary supplemented the live link experience for a child with face-to-face phone calls using a tablet computer and smart phone.

- 3.3 A ground rules hearing must be carried out between the intermediary, advocates and the judge** ([Criminal Practice Directions](#)). Guidance on the format of the ground rules hearing can be found in Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court. Ground rules hearings are essential because they allow the intermediary the opportunity to provide clear recommendations and guidance for questioning the child based on their communication assessment. This guidance is there to help the court gain best evidence from the child. Ground rules hearings also allow the

judge/advocates the opportunity to ask for clarification and guidance on any of the points raised in the intermediary's report about the child's communication ([Criminal Procedure Rules](#)).

- 3.4 Ensure that equipment is working and sound quality is good before the child enters the live link room.** Check camera angles (crucial if the child relies on gesture). Change the angle to get the best picture; do not instead seat the child on additional cushions.
  
- 3.5 If the child's understanding of truth and lies is questioned,** and this has not been appropriately covered in the Achieving Best Evidence interview, then an intermediary's guidance should be sought about how to assess this in a developmentally appropriate way. See Triangle's Truth and Lies DVD for an example of a child-appropriate method for assessing children's understanding of truth and lies.

For case management issues, see also Toolkit 1 - Ground rules hearings and Toolkit 1a - Case management.

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## 4. FOUNDATIONS OR ‘SETTING CONDITIONS’

**4.1** These basic foundations for effective communication will enable the best evidence of a child witness or the best participation of a young defendant.

**4.2 Adjust the environment if needed** because ensuring the child feels comfortable can reduce anxiety and facilitate recall. Communication live link allows more control of the immediate environment than in the courtroom but there can be complications. Some people struggle with the slight delay between speaking and being heard, or with the drop in volume when two people speak at once. Others find hearing themselves over the link or seeing themselves on screen very difficult. Practice can help with all of these things as can creative adaptations. The intermediary can also offer guidance on how to adapt the environment to make it more suitable for the individual child:

- screening the defendant’s view of the live link screen in cases where a child is very fearful of being seen by the defendant.
- consider using a remote link from another court or non-court site in cases where a child is very anxious or fearful of being in the same building as the defendant (Toolkit 9 - Planning to question someone using a remote link);
- consider using child-friendly facilities, with doors the child can open;
- consider using child-sized furniture in the live link room so, for example, a three-year-old could be properly seated with their feet on the floor, with a table for communication aids/calming play materials;
- make sure the camera is adjusted to ensure a closer focus to provide a clear view of the child’s face and hands so as to capture non-verbal communication;
- locate microphones appropriately for a child who whispers.

### GOOD PRACTICE EXAMPLE

A child whispered answers using ‘rude’ words to the intermediary. As agreed at the ground rules hearing, the intermediary repeated the responses with exact intonation and phrasing and sat near a microphone so that the child’s whispers had the best chance of being picked up.

- 4.3 Think ahead about visually recorded interviews as evidence-in-chief** because they may be too long, or contain sections that are not relevant or not admissible. Transcripts may not be complete. Editing should take place before memory refreshing and before the planning of cross-examination questions.

#### **GOOD PRACTICE EXAMPLE**

A statement was made to condense a lengthy DVD interview. The intermediary and police officer agreed that the intermediary would review the statement for vocabulary, grammar phrasing and suggest any amendments. Then the officer, child or young person and intermediary read through the statement together. This made memory refreshing quicker and also saved court time.

- 4.4** Ensure interview transcripts include important non-verbal communication, especially where a child indicates yes/no by nodding and shaking their head without words. Also ensure that relevant communication through gesture, drawings or communication aids is clearly referred to in the transcript. An intermediary can help provide a more complete account of non-verbal communication, e.g. describing gestures without interpretation ('points at genital area of drawing', 'puts finger in own mouth').

#### **GOOD PRACTICE EXAMPLE**

The judge directed an intermediary who was familiar with the child or young person's communication techniques to revise the transcript to include a written record of use of signs and communication aids.

- 4.5** Minimise transcript passages marked 'inaudible', especially where these are central to the evidence. An intermediary may be able to transcribe sections marked 'inaudible' to assist the court.
- 4.6 Keep key people in the child's life informed about what is happening** because parents and caregivers will have to answer the child's questions prior to court attendance and may have to explain what to expect. Proper preparation can help alleviate the child's

anxiety and help the child understand what is expected of them. Both of these factors will improve the child's ability to provide a comprehensive account during questioning. The intermediary and the Witness Service can offer guidance on this information, e.g. who needs to be informed and what types of information the caregiver and child will need to know.

- 4.7** Children and young people should be kept informed as far as is possible as to any changes to the schedule of the hearing. Each stage of the trial should be explained to them in appropriate language and they should be informed of what will be happening next and their understanding of this checked. If an intermediary has been appointed, they will take responsibility for arranging this. Any steps that can reasonably be taken to reduce the anxiety of a witness or defendant should be taken as this will be likely to increase the quality of the child's communication throughout the trial.

#### **GOOD PRACTICE EXAMPLE**

A five-year-old was sent a series of photo letters to be shared with her by her foster carers, preparing her for each step pre-trial and at trial.

- 4.8** Facilitate a pre-trial visit, including a practice with live link and/or screens because people need to properly understand the court process and what is expected for their communication. A pre-court familiarisation visit is essential (Wheatcroft, 2013). Here people are shown the court and live link room and the process is explained to them. They are enabled to make an informed choice about using screens or live link. They are made aware of where they, the intermediary/support person, child and their caregiver will be whilst they are providing testimony (Ministry of Justice, 2011, *Achieving Best Evidence*). A trained person can also help children understand their witness role using the Young Witness Pack booklets. The trained person can be an intermediary or an individual from the Witness Service.
- 4.9** The pre-trial visit will also provide an opportunity to adjust the environment of the live link to suit the individual child. See above in section 4.2 and below for examples.

**4.10** If the child's carer/supporter is not going to be with them when they give evidence, helping children to separate from their accompanying adult at the pretrial visit can help to reduce stress and anxiety. 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 and when needed and come back when ready.

#### **GOOD PRACTICE EXAMPLES**

These include giving the child the option to practise with the live link and/or screens by questioning the child about something unconnected with the facts of the case using the court facilities.

**4.11 Pre-trial visits and practice with the live link are an extremely important part of court communication preparation with children and young people** because children are not familiar with the court environment and lack of familiarity can have a detrimental impact on the detail and accuracy of information provided (Nathanson and Saywitz, 2003; Almerigogna et al, 2007).

#### **GOOD PRACTICE EXAMPLE**

At the pre-trial visit the intermediary asked the court usher to play the role of the advocate and gave him a list of neutral questions about the child witness's recent visit to the beach. The usher then questioned the child over the live link and the child was able to practise responding to questions using this method and was then also familiar with the intermediary's support for communication during questioning.

**4.12** If an intermediary is not used then a neutral supporter trusted by the child should always be considered as a special measure because of potential benefits to recall and stress reduction. The court must take the child's wishes into account ([Application for Special Measures Direction](#), part C3; [Coroners and Justice Act 2009](#), section 102). This

neutral supporter can be anyone who is not a party or witness, has no detailed knowledge of evidence and is trusted by the child; ideally, the person preparing the witness for court. Others may be appropriate (Ministry of Justice, 2011, [Achieving Best Evidence](#), section 5.34, appendix L.2.1) and need not be an usher or court official (CPD 2015 Evidence 18B.2: Witnesses giving evidence by live link).

- 4.13 Plan memory refreshing carefully including when how and where** because the child or young person is entitled to refresh their memory in advance of the trial if appropriate. This should take place in a neutral environment (not home or school for children), in the presence of an appropriately trained person able to provide clear guidance and act as witness if the child extends, clarifies or contradicts their account (CPD 2015 Evidence 18C: Visually Recorded Interviews: Memory refreshing and watching at a different time from the jury).
- 4.14** Memory refreshment should generally not occur at the same time as the jury watches the DVD (Judicial College, 2012, [Bench Checklist: Young witness cases](#)). Earlier viewing allows children to take breaks as necessary. In certain circumstances, the child need not watch the DVD at all if there is a better way to refresh their testimony. Some children and young people may prefer to read a transcript of their DVD evidence or to listen to, but not watch, the DVD.

#### **GOOD PRACTICE EXAMPLE**

A 13-year-old with significant emotional problems refused to watch his DVD and was allowed instead to read the transcript with the intermediary.

- 4.15** Children and young people generally watch their evidence-in-chief at a different time than the jury, so that they can control the pacing of the viewing and attend fully. Careful note should be taken of anything the child says or does in response.
- 4.16 Introduce yourself to establish rapport before questioning starts** because children will often feel intimidated by the court environment. This may induce further anxiety and have a negative impact on the accuracy of the information provided.

- 4.17** Many children are taught not to speak to strangers and may not understand why they should answer questions from someone on a TV screen they have not met. It will also help you to build an understanding of the child's communication techniques before you begin questioning. It is a good opportunity to resolve the wigs and gowns question, if this hasn't yet been done, showing how you look with and without. Some children prefer wigs and gowns to be removed, but others prefer that they are worn.
- 4.18** For some children this can be a very brief introductory session, for others it may take longer.

#### **GOOD PRACTICE EXAMPLE**

One at a time, on a pre-trial visit, the defence advocate and judge spent about 10 minutes with a four-year-old with speech impairment, tuning into his communication with the help of the intermediary.

Some children 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. ([Child Focussed Approach to Safeguarding](#) (London child protection procedures))*

- 4.19 Explain the 'rules' of communication prior to questioning** because the rules of court communication are very different to the rules of everyday conversation. Children need to understand that the court does not know what happened and it is their role to answer questions and tell the court what they know. An intermediary or a witness service volunteer or an advocate can help the child understand what is expected of their communication in court and often this is covered in pre-trial preparation.
- 4.20** It can help to explicitly teach the 'rules', for example, that the child does not need to agree with suggestions put to them when questioned unless they are true; that it is OK to say 'I don't know' or 'I don't understand'. Explanations of communication 'rules' like this should be explored with the child beforehand, rather than first being introduced at the start of questioning. The intermediary can help with this. It is essential that the

'rules', including their wording and their presentation, are adapted to the needs of each child (Marchant, 2013). Rules may include:

- *'Tell the truth'* – explaining in language familiar to the person, e.g. being honest/not telling fibs/porky pies; only talking 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'* – explaining that sometimes you get muddled up, *'You tell me if I get muddled up';*
- *'Stop when you need to'; 'Come back when you're ready.'*

**4.21** Be aware of the impact of stress on communication because some children and young people have low confidence and self-esteem, rendering them prone to stress reactions where their coping strategies break down and their impairments become even more pronounced. Frustration and stress are heightened by poor communication, not knowing what is going to happen and delays. Responses may include feelings of panic and mental overload, leading to total shutdown or the urge to provide any answer to bring questioning to an end.

**4.22** Children who are experiencing stress may function at a lower level: making it harder for them to remember accurately and think clearly (Almerigogna et al, 2007). Causes of anxiety include: delay before/at trial; fear of seeing the defendant/his or her supporters; feelings of shame or guilt; fear of retribution; and anxiety about giving the wrong answer, not being believed or being overwhelmed by emotion in the presence of strangers. Signs of stress are not restricted to crying and include:

- appearing numb, passive or falling silent;
- agreeing, in order to bring questioning to an end;
- answering with a series of *'I don't know'* and *'I don't remember'* responses;
- other seemingly strange behaviours, e.g. tapping arms or legs, pulling at clothes or hair, inappropriate laughter.

**4.23 Be aware of the impact of trauma on communication** because children and young people may be traumatised by their experiences and the trauma can negatively affect their ability to participate in questioning, specifically their ability to communicate information and recall sufficient detail.

**4.24** Questions relating to traumatic events may trigger responses that effectively shut down the ability to process or use language: for example, to freeze, fight, flee or flop (see Van Der Kolk, 2013).

#### GOOD PRACTICE EXAMPLES

A seven-year-old with significant emotional difficulties was helped to manage their own anxiety through quiet, calming, play materials, controlled breathing and use of 'stop', 'pause' and 'go' cards to manage pacing.

A four-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 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'*.

**4.25 Be aware of the impact of live link on communication** because although live link can improve the detail and accuracy of children's testimony and reduce their suggestibility, live link can also disrupt communication in different ways (e.g. Doherty-Sneddon and McAuley, 2000; Marchant, 2010; 2013):

- Some children and young people find it more difficult to understand/be understood over the live link and need to practise, or may require help from an intermediary.
- The 'picture in picture' on the child's live link screen (where they see themselves) can be distracting. If this is the case it should be disabled or covered.
- The attention of those in court may need to be drawn to the child's gestures or body language over the link by the intermediary – not interpreting, just commenting (e.g.

‘you’re nodding’ ‘you’re pointing’). This also provides a record for the audio recording of cross-examination.

- If visual aids are to be used they must be visible over the link.
- Some children and young people are much more effective communicating face to face.
- Early signs of the child’s confusion, tiredness or stress are often not apparent over the live link. The person who is supporting the child in the live link room should have an agreed way to alert the court about this. If the child or young person has an intermediary, then this eventuality would be covered in the ground rules hearing.

**4.26** Some children’s communication is significantly impaired across livelink. Sometimes this can be quickly resolved.

#### **GOOD PRACTICE EXAMPLE**

A four-year-old practised over the live link, including responding to questions that prompted him to point and gesture so he realised he could see and be seen.

**4.27** Sometimes this cannot be resolved, and in these situations cross-examination with the advocates in the live link room may be helpful.

#### **GOOD PRACTICE EXAMPLE**

The Intermediary assessed a five-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 (Wurtzel, 2011) and has since been replicated in many trials in which children’s communication, attention or behaviour are better in face-to-face contact.

**4.28 Adjust your pace to the child's needs** because pacing is key to successful communication. This means the pace of questioning itself as well as the speed at which you speak. Some children and young people need a 'normal' pace of communication, some need everything to go more slowly, some need extra thinking time to process information before answering a question, and others need quite a brisk pace between their answer and the next question or their attention wanders or they no longer connect the next question with the previous answer. Adjust your pace in line with the child's responses.

#### **GOOD PRACTICE EXAMPLE**

A 4-year-old was cross-examined in 10-minute bursts, with breaks for calm play in the live link room in between.

**4.29 Be prepared to pause during questioning if the child moves out of range of the live link camera** because young children need to play and to move around and should not be expected to sit still for long periods. An intermediary can assist with pacing questioning and keeping the child focused.

- Be alert to loss of concentration and take breaks from questioning because breaks should be based on the child's concentration span. This will vary with time of day, stress levels and situation. An intermediary assessment may assist.
- A child's typical level of concentration is likely to be shorter than usual at court.
- Early signs of loss of concentration may not be evident over the live link.
- Do not rely on a child to ask for a break, or to say they need one if asked. They may elect to keep going to 'get it over with'. The child may lack the ability to anticipate when they need a break and may quickly reach overload under cross-examination.
- When a break is requested, it may be needed immediately. This should be accommodated. These can be brief, non-adjourned breaks where the court waits for the child to be ready to resume.
- Children's concentration span is generally shorter than that of adults and some have specific difficulties with attention.

- Some children attend best when engaged in calm play. Others need to give their full attention to the questioner for brief periods in between play.
- When tired children become non-responsive or repeat 'I don't know' even if they know the answer, using the child's preferred name at the start of questions (find out what the child wants to be called) can help them to focus and attend.

**4.30 Be alert to possible miscommunication** because minor miscommunications can escalate quickly and can create other difficulties with stress and attention if there is persistent miscommunication.

- An intermediary in the live link room often identifies signs of confusion before these are picked up by those in court.
- Many children and young people will not recognise when difficulties occur or will be too embarrassed to admit this.
- The child may try to answer a question even if they do not understand it or when they have no knowledge about the subject matter.
- Do not rely on children (even adolescents) to say they do not understand. It is good practice to ask children to say when they do not understand a question. However, they often try to answer even if they do not understand or have no knowledge. Reasons for failing to say they do not understand include: reluctance; perception of the questioner as an authority figure; the child does not want to look stupid; and because they think that they understand the question when they do not. Be alert to non-verbal clues of misunderstanding, e.g. puzzled looks, knitted eyebrows, downcast eyes and long pauses. The intermediary can help with this by practising 'ground rules' with the child prior to questioning. The intermediary can provide visual cues to help the child with this. The intermediary will also monitor the child's verbal and non-verbal communication and can highlight when they think the child might not have understood.

#### **GOOD PRACTICE EXAMPLE**

Before trial, a four-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' (see Figure 1).

**4.31 Draw the court’s attention to improper or inappropriate cross-examination** because such questions should be immediately challenged as they can create significant miscommunication and inaccuracy and also produce high levels of distress. Both the prosecutor and defence advocates have the responsibility to alert the judge.



**Figure 1. Rule cards with symbols (Triangle)**

**4.32** See *R v Lubemba; R v JP* [2014] EWCA Crim 2064: a trial judge ‘is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate.’

**GOOD PRACTICE EXAMPLE**

A defence barrister asked a six-year-old ‘Did you do twerking for the men at the party?’ The prosecution barrister intervened before the child was required to answer, on grounds that this question was inappropriate.

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## 5. EXPRESSIVE COMMUNICATION: MAKING SURE YOU ARE UNDERSTOOD

- 5.1 At least 50% of young witnesses, across age groups, do not understand questions they are asked at court.** This rises to almost 90% for those aged 10 and under (Plotnikoff and Woolfson, 2009).
- 5.2** The most significant factor in effective communication is the questioner's ability to adapt and respond to the child or young person. The aim is to enable the child to understand questions and give answers that he or she believes to be correct. This means adopting an appropriate manner and tailoring questions to the needs and abilities of the individual child (Agnew et al, 2006; Bull, 2010; Powell et al, 2013).
- 5.3** Adapting questions requires considerable skill, and questioning children in court is very different to questioning children in a family context. Advanced preparation on the part of the questioners is necessary, as is the ability to respond flexibly during cross-examination. This may require further adaptation or even abandoning of pre-planned questions. An intermediary can provide recommendations for how to question the child based on their individual needs and can help advocates prepare questions prior to questioning in court and provide communication support during questioning (see Toolkit - 16 Intermediaries step by step).
- 5.4 Plan questions in topics and be clear about changes of topic** because this helps the child make sense of the process and gives them transition time to focus on the next subject.
- For example: *'Now we're going to talk about . . .'* It can be helpful to schedule a break at a change of subject.
  - For example: *'We've finished talking about when you were at the swimming pool. Now I want to talk about what happened the next day. I want to talk about what you said to Mum about Tom.'*
  - Follow a logical, chronological order.
  - Signpost the subject and explain when the subject is about to be changed.

### GOOD PRACTICE EXAMPLE

The defence advocate prepared 24 questions for a seven-year-old, divided into six topics. The intermediary prepared a card for each topic which was turned over as that topic began.

**5.5** Write out draft questions in advance because this will help to identify potential problems in advance. In *R v Lubemba, R v JP* [2014] EWCA Crim 2064 the Court of Appeal (para 43) stated that: *'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the GRH [ground rules hearing] to invite defence advocates to reduce their questions to writing in advance.'*

**5.6** **Ask each question once unless there is a good reason to repeat it** because . . .

- Questions repeated by one or more authority figures risk reducing the child's overall accuracy. This is the case whether asked consecutively or interspersed with others. Children's and young people's experience from school is that, if the teacher repeats the question, their first answer was wrong or unsatisfactory.
- Anxiety, combined with the desire to please someone in a position of authority, can cause even typically developing children to change their first answers, regardless of initial accuracy. If a question needs to be repeated for clarity (even with changed wording), explain that you want to check your understanding of what the child said, e.g: *'Thank you, but I want to be really sure I understand. Tell me again . . .'* (followed by the question).

**5.7** **Ensure tone and body language are neutral and maintain attention** because the child needs to know that you are speaking to them and listening to them.

- Regularly using the child's preferred first name and looking at the camera (if using live link) can help to maintain attention when questioning.
- Explain when you need time to read or think, so that the child understands the delay.
- Eye contact is an important part of communication but can be disrupted by live link. Generally, direct eye contact is helpful, so when asking questions look directly at the child or, if using live link, look straight at the camera, not at papers. However, there may be cultural or other specific reasons to avoid direct eye gaze.

**5.8 Ensure tone and body language are neutral** because . . .

- assertive non-verbal responses (such as nodding or shaking your head or expressing disbelief through facial expression or body language) can cause compliance or acquiescence;
- some children will be particularly attuned to your facial expression, tone of voice and body language e.g. a seven-year-old asking the intermediary about counsel during cross examination: *'Is he cross or what?'*

**5.9 Make sure the content of questions is developmentally appropriate – use simple, everyday words, because these are much more likely to be understood.**

- Children and young people will not be familiar with complex language that does not form part of their everyday vocabulary – use simple words with which the child is familiar.
- Jargon or complex vocabulary may not be understood.
- It is easier for a child to process questions if the words used are consistent throughout.
- Always use the simplest word you can find, e.g. instead of 'Who was present at the time of the incident?' ask *'Who was there when that happened?'*; instead of *'Have you ever actually observed your father physically assaulting your mother?'*, try *'Have you seen your Dad hit your Mum?'* and then check *'Did you see that with your own eyes?'*

**5.10 Use concrete words and say what you mean** because some words have more than one meaning and this can create significant confusion.

- Instead of *'I want to take you back'*, say *'I want to ask you about.'*
- Metaphors, non-literal language and figures of speech may be interpreted literally;
- Avoid figures of speech, e.g. *'I am going to run through a few things.'*

- Deciphering underlying meanings can be problematic, ‘Are you sure?’ or ‘Is that true?’ are better alternatives than ‘Is that right?’ because the word ‘right’ has two meanings in this context (‘accurate’ or ‘morally right’).
- Young children often interpret words in a highly literal way, e.g.

Q: ‘Have you ever seen a “blue movie”?’ (asked of a four-year-old)

A: ‘Not just blue.’

Q: ‘Are you OK to go on?’ (asked of a five-year-old)

A: ‘What on?’

Q: ‘So is it a cul de sac?’ (asked of a 12-year-old)

Q: ‘Were you told you’d get into trouble for retracting your version of events?’ (asked of a 15-year-old).

- Use of abstract words by a vulnerable person does not mean the person understands them. For example, the ability to count does not mean that somebody can answer accurately ‘How many times?’ something happened.

### GOOD PRACTICE EXAMPLE

A five-year-old witness to murder was asked at the start of cross-examination ‘Do you remember the day Mummy went to hospital?’. She said no. The intermediary clarified, and the child meant she couldn’t remember if it was a Monday or another day. When asked ‘Do you remember what happened the day Mummy went to hospital?’, the child said yes.

- Instead of ‘Is that right?’, try ‘Is that true?’
- Instead of ‘I’m going to jog your memory’, try ‘I’m going to ask about when . . .’
- Instead of ‘Let’s get down to the facts’, try ‘Now I’m going to ask you about something important.’
- Instead of ‘Did you see eye to eye with Jane?’, try ‘Did you and Jane agree about things?’

- Instead of ‘Were you and Jane close?’, try ‘Did you like Jane?’

**5.11 Check understanding of crucial evidential** words because these provide the foundation for clear communication about essential evidence. For example, children may have learnt new language for private body parts since their interview; learning disabled adults may use the word ‘sex’ to mean very different things. A young child may interpret ‘touch’ quite narrowly, as relating only to hands, e.g:

Q: ‘Did he touch you?’ (asked of a four-year-old)

A: ‘No. He washed me on my private, everywhere.’

Q: ‘Did he touch you?’ (asked of a six-year-old)

A: ‘No’ (later) ‘He licked me.’

**5.12 Take care with questions suggesting the child is lying or confused** because these question types are likely to have an adverse impact on concentration and accuracy, particularly if repeated. If a challenge is developmentally appropriate, it should be addressed separately, in simple language, at the end of cross-examination. Children should not be asked ‘Do you tell lies?’ unless there are grounds to think that the child or young person is a habitual liar. It is not enough that the child’s evidence contradicts that of the defendant (Ministry of Justice, 2011, [Achieving Best Evidence](#)).

**5.13** Carefully plan questions about intimate touching or sexual acts, because it is inappropriate to ask someone to demonstrate intimate touching or sexual acts at court using their own bodies. Such questions can be addressed using the child’s own drawings made at interview or a diagram or body map identified by the intermediary, e.g. ‘How it is: An image vocabulary for children’ (Triangle, 2002). The child or young person has to be able to use a body map correctly for demonstrative purposes. Refer to Toolkit 14 - Using communication aids in the criminal justice system and CPD 2015 3E.6: Ground rules hearings to plan the questioning of a vulnerable witness or defendant.

### GOOD PRACTICE EXAMPLE

An eight-year-old was reluctant to name the place on her body where she alleged she was touched. The intermediary provided a body outline of an undressable young girl and the child was able to point clearly to indicate the place.

**5.14 Be clear about places, names, objects and subjects** because pronouns are complex to master and can often be mixed up.

- Instead of he, she, it, there; name the person or place.
- Instead of *'When did he do that?'*, try *'When did Robert break the window?'*
- Instead of *'What did he say?'*, try *'What did Tyrese say?'*
- Instead of *'Was it inside?'*, try *'Was the money in the wallet?'*

**5.15** People are less likely to become confused if names are used to identify objects, actions and places, e.g. 'there' is open to interpretation.

Q: *'Was mummy there?'* (asked of a four-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, e.g. *'Where was mummy when Jim came into the bedroom?'* or *'Was mummy with you when Jim came into the bedroom?'* or *'When Jim came into the bedroom, was mummy with you in the bedroom?'* This will help the person keep track of the information you are referring to.

**5.16** Using the child's preferred name can also help keep them focused. Identify the police officer (and other relevant people) by the name known to the person. Identify names and places.

Q: *'How often does she let you do that?'* (asked of a nine-year-old)

Better alternatives include, e.g. *'How often does your mum let you go to the chip shop?'*

**5.17 Carefully plan questions about abstract concepts** because understanding of time concepts (dates, duration and frequency of events) and weight, height and age

estimates is acquired gradually as children develop and may not have been acquired at all by some people.

- Children begin to use words relating to time (eg now/before /after/then), distance, relationships, size, positioning etc before they fully understand their meaning.
- Abstract, 'concept' words can be problematic. For example: numbers; measurements; before/after; in front of/below/behind; always/never; different/same; and more/less.
- The child or young person may not connect 'category' and 'subcategory' words and may interpret them literally, e.g:

Q: *'Did you have your clothes on?'* (asked of a six-year old)

A: *'No.'*

Q: *'Did you have your pyjamas on?'*

A: *'Yes.'*

Or:

Q: *'Did you go to Jim's home?'*

A: *'No. But I went to his flat.'*

- A question about *'How many times>'* something happened may result in a different answer each time the question is posed. People learn that 'how many' questions seek a number response even if they cannot reliably estimate or count. Unbelievable responses (e.g. *'It happened 1000 times'*) can simply mean 'lots of times'.
- Some people 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: *'How old were you when x?'*; *'Was it light or dark or don't you know?'*; or *'You said that you played football that day, was that before or after you saw Robert?'*

- Consider the use of a visual timeline or similar device if the child is likely to have difficulty in responding to questions about times, dates or separate events or locations.
- If the alleged offence involved several incidents in different locations, the intermediary (if appointed) can prepare prompt cards, each with a photo and symbol to represent each location.
- Young children have few ways to estimate the duration of an event. Again they will learn the words for time concepts (days, hours, minutes) well before they fully understand them. Children can be helped to estimate duration with forced alternatives relating to: familiar time periods (e.g. did it last longer than school playtime?); holidays, birthdays, home routines (e.g. meal times): or what was on TV. Even very young children can do this.
- Instead of *'How many?'*, try *'One time or more than one time?'*, using hand gestures.
- Instead of *'when'*, try, *'Was it before or after you . . .'* or *'Was it daytime or night time or don't you know?'* or *'Was it light or dark outside or something else?'* or *'How old were you when . . . ?'*
- Young children cannot process a question about whether *'they ever saw something'* or *'anything like this'* happened before, as *'any'* and *'ever'* invite the child to search for every possibility.

**5.18 Make sure the structure of questions is developmentally appropriate – keep questions short** because in order to answer accurately, the child needs to be able to remember and process the whole question.

- The child may have difficulty remembering all of a multi-part question.
- *'Front-loaded'* questions are more difficult to process, e.g. *'I suggest to you that . . .'; 'I put it to you . . .'*
- Phrases such as *'Do you follow?'* at the end of questions make it harder for the child to retain the key information they need in order to respond to the question.
- Redundant words and phrases can cause confusion (e.g. *'In fact'*, *'To your knowledge'*, *'I put it to you'*, *'I wonder if you can tell me'*, *'Do you follow?'*).

- Instead of *'When was the last time you say he did this to you before the time on that day in the summer that we have been speaking of?'*, try *'You said that michael touched you one day in the summer. did he touch you on any other days?'*
- Instead of *'Is it correct that Susan put you up to making these allegations, because Mr and Mrs Hobbs have refused to allow Susan to live with them?'*, try *'Did Susan want to live with your Dad and Step Mum?'* or *'Did your Dad and Step Mum say no to Susan living with them?'*

#### GOOD PRACTICE EXAMPLE

At the ground rules hearing for a child who had just turned four, the content and length of three questions asked by the prosecutor and two questions asked by the defence was agreed by the judge, intermediary and both advocates.

**5.19 Keep questions simple in structure** because complex questions are likely to result in incorrect or 'I don't know' responses, even though the child knows the answer and could respond accurately if the question is phrased simply. A question with multiple topics can cause confusion as the person may have a limited working memory and may be unable to remember all of a multi-part question or decipher embedded clauses.

#### GOOD PRACTICE EXAMPLE

An advocate wanted to ask a five-year-old a series of specific questions about the detail of an alleged sexual assault, but was unsure how to do this with a very young witness. This issue was raised during the ground rules hearing and the intermediary and advocate were able to spend time prior to the court case going over the most age appropriate way in which to do this.

**5.20 Ask all questions about past events in the past tense** because the use of the present tense is likely to cause confusion or distress; instead of *'So you are in bed and he's taken your pyjamas off, now what's happening?'*, say *'You were in bed and he took your pyjamas off, then what happened?'*

**5.21** Avoid use of present tense, e.g:

Q: *'Are you in school at the moment?'* (asked of a five-year-old across the live link)

A: *'No, I'm in this room with the cameras so I can talk to you.'*

**5.22 Beware of negative and passive language in questions** because this can reduce clarity and increases the likelihood of confusion and inaccurate responses.

- Questions containing a negative are more difficult for people to understand, e.g. *'That is not a lie?'* (asked of a 12-year-old), or *'It was not dark yet?'* (asked of a 4-year-old), or *'Did Dad not like you watching TV?'* (asked of a 7-year-old).
- Double negatives are even more problematic, e.g. *'Doesn't Mr Smith not only allow one child in his car at a time?'* (asked of a 10-year-old with autism) or *'Didn't you dislike that?'*
- Questions in the passive form are unnecessarily complex and difficult to understand. For example, e.g. *'Were you to have been taken to school that day?'*
- Questions which remove personal references and objectify the action are also harder to process, e.g. *'Did you tell the police about what is in that statement about the matter, about the touching of the boobs?'* Better options include: *'Did you tell the police that Tony touched your boobs?'*

**5.23 The one exception to this is that some children may give an inaccurate reply if the question implies that the child was active in the event, e.g:**

Q: *'Did you touch John's willy?'*

A: *'No'* (later) *'He put his willy in my hand.'*

**5.24 Be careful about questions in the form of statements** because these may not be understood as requiring a response. For example, *'You wanted Jim out of your house.'* A better alternative is *'Did you want Jim out of your house?'*

**5.25** When an adult in a position of authority formally suggests that something is a fact, it becomes extremely difficult for children, even 11 or 12-year-olds, to disagree and to maintain verbally what they believe to be true. The younger the child, the riskier 'assertion' questions become. The previous Lord Chief Justice described the use of assertions with children and young people as 'particularly damaging' ('Half a century of

change: the evidence of child victims' Toulmin lecture, 20 March 2013, King's College London). Children have difficulty with these for a number of reasons. For example:

- *'I suggest to you that', 'I believe you told us', 'In fact', 'Isn't it a fact that'* lengthen the question as well as suggest the answer, therefore increasing the likelihood of miscommunication and unreliable responses;
- or *'You saw what happened next, didn't you?' and 'It was late, wasn't it, when you left the pub?'*;
- the child may interpret statements as comments, not as questions that require responses, e.g. *'You didn't want your mum to think you had been naughty'* (asked of an eight-year-old).

**5.26 Be particularly cautious about the use of tagged questions** because questions that make a statement and then add a short question inviting confirmation are powerfully suggestive and linguistically complex. Judicial guidance recommends that this form of question be avoided altogether with children and that a direct question be put instead:

- instead of *'John didn't touch you, did he?'*, it would be safer to ask *'Did John touch you?'* or *'Did John really touch you?'* or *'Are you sure John touched you?'*
- instead of *'You saw her at the cinema, didn't you?'*, try *'Did you see her at the cinema?'*
- Instead of *'And he would sometimes come to your house, is that fair?'*, try *'Did X sometimes come to your house?'*
- Instead of *'It was sunny that day, wasn't it?'*, try *'Was it sunny that day?'* or *'What was the weather like that day?'* or *'Was it sunny or rainy that day, or don't you know?'*
- Instead of *'Now you had a bruise, did you not?'*, try *'Did you have a bruise?'*

See Judicial College (2012) [\*Bench Checklist: Young witness cases.\*](#)

**5.27** Children are particularly susceptible to answering incorrectly questions that suggest the answer (Bruck and Ceci, 1999). If a question supplies information that did not originate from the child, it becomes more leading. Research suggests children may agree with the information in the question, even if it is not accurate, for a number of reasons. These

include the fact that the child may not remember the answer but does not want to seem stupid, or is feeling intimidated by the process that in turn makes them more likely to agree with the questioner. Potentially problematic question types should always be discussed at a ground rules hearing.

**5.28 Be careful with questions requiring a yes/no response** because a series of propositions or leading questions inviting repetition of either 'yes' or 'no' answers is very likely to affect accuracy. These questions carry a risk that an acquiescent child will adopt a pattern of replies 'cued' by the questioner and will cease to respond to individual questions, leading to inaccurate replies.

- If only 'yes'/'no' questions are asked, it is difficult to determine if the person is having problems with the questions.
- Similarly, they may also be interpreted literally if the question starts with 'can', 'do' or 'will' (e.g. *'Can you tell me who was in the room?'* 'Yes'; *'Do you know the name of the man?'* 'Yes').
- Yes/no questions should be interspersed with open and specific questions to allow the child to stay focused on the topic. This will also help the intermediary monitor his or her understanding.

**5.29** If yes/no questions are the only option (because a person is unable to respond to more open question types), then ensuring a mix of yes and no responses (by reversing some questions) will increase the chance of accurate responses. This apparently tiny change can make a big difference to accuracy (see Marchant and Page, 1993). For example, instead of *'Did you used to live with Mummy?'*, 'Yes', *'Do your brothers live with Nanny now?'*, 'Yes', you could try *'Did you used to live with Mummy?'*, 'Yes', *'Do you still live with Mummy?'*, 'No', *'Now do you live with Nanny?'*, 'Yes'.

**5.30 Be careful when asking forced choice (closed) questions** because these create significant opportunities for error as the correct alternative may be missing. The child or young person may assume that one of the alternatives must be correct, e.g. *'When you went to the flat, did John or Bill open the door?'* In instances where forced choice questions are necessary, offer *'I don't know'* or *'something else'* as a third alternative

(e.g. *'Was it red, blue or another colour?'*, *'Were you under the blanket, on top of the blanket, or something else?'*).

**5.31** If asked open, free recall questions (eg *'What happened?'*), children or young people can provide accounts with accuracy rates broadly similar to the general population.

**5.32** Be careful with *'Do you remember?'* questions because these require complex processing. Children are particularly likely to be confused when they are not asked about the event but are asked about what they told someone else. . Use of quotes aggravates the problem, e.g. *'Do you remember when you were being asked by the sergeant what was said, you said that your father said, "He loved me" that's all he really said. Do you remember?'* (asked of an 11-year-old)

**5.33** Answers may also be ambiguous, especially with *'Do you remember?'* questions that are also tagged, e.g. *'Now you had a bruise, did you not, near one of your breasts? Do you remember that?'* (asked of a 12-year-old). If the child answers *'No'* this could mean *'No, I don't remember'* or *'No, I didn't have a bruise there'* or *'Yes, I remember but no I didn't have a bruise there.'*

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## 6. RECEPTIVE COMMUNICATION: MAKING SURE YOU UNDERSTAND

- 6.1 Even bright, intellectually able children find court communication methods, and language, challenging simply because of their age.** The ‘rules’ of court communication are very different from those used in everyday conversation. For example, children are not used to having to provide elaborate accounts. In everyday conversation gist information is enough. In addition, children are often told to listen and wait to speak. They are not used to being the main information providers (Lamb and Brown, 2006).
- 6.2 Make sure you and the jury can see and hear the child or young person clearly** because many children and young people use their faces and hands to support their communication. This may require close in focusing, or moving the microphone closer. Check before your first question.
- 6.3 Attend to gestures and actions as well as words because** children may be more competent to **demonstrate** what happened, rather than just explaining in words (Ministry of Justice, 2011, [Achieving Best Evidence](#), section 3.107). Showing and telling can be an important part of communication. If the person realises you are not looking or not noticing or not responding, they may stop showing (Marchant, 2010). Commenting can also assist: e.g. *‘You’re showing me with your hands.’*
- 6.4 Ask for clarification if you don’t understand or aren’t sure** because pretending to understand will create further confusion. You may need to request clarification and double check, but be clear that this is what you are doing rather than requesting a different answer.
- 6.5** Some children’s speech may not be easily intelligible, especially at first meeting. Sound substitutions and pronunciation errors are common and use of verbs, pronouns and plurals may be at an early stage. Again, an intermediary can be asked to help clarify what has been said; they will have assessed the person and be more familiar with their communication style.

- 6.6** Listen to what the child says, and try to understand what the child means. A young child often uses words before fully understanding them.
- 6.7** **Ask the child to repeat what they said if you didn't hear properly, but say why** because a child may change their answer if asked to repeat something without knowing the reason. Children sometimes speak very quietly, especially when feeling anxious or fearful, or providing information that they are embarrassed about. Microphones can be relocated closer or higher, or the young child seated lower. However, if you do not hear what the child has said, gently tell them that you cannot hear and ask them to say it again, or ask them to speak a bit louder. It is also possible to ask the intermediary to repeat back what the child has said.
- 6.8** **If you need to check back on what was said, use the child or young person's own words because** they may not understand if alternative words are used instead. By using alternative words, you are at risk of creating confusion or suggesting an interpretation of events to the child or young person that may not be accurate. This may affect the accuracy of their subsequent account of events.
- 6.9** **Gain some familiarity with the person's communication aids** because this will enable two-way communication during questioning. Communication aids can support and augment a child's communication.
- Asking a witness to demonstrate intimate touching on their own body is never appropriate – use a body map or diagram (see Toolkit 14 - Using communication aids in the criminal justice system).
  - Using formal communication aids almost always requires intermediary involvement and should be explored prior to questioning.
  - Aids may allow children to both show and tell (see Toolkit 14 - Using communication aids in the criminal justice system). The intermediary can help with the selection of appropriate communication aids (See 'How it is: an image vocabulary for children' (2002) Triangle).
  - There are risks and pitfalls as well as advantages (Ministry of Justice, 2011, [\*Achieving Best Evidence\*](#), sections 3.103–3.122). 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).

**6.10** The intermediary can assist in identifying appropriate safe aids and help the child create aids to augment their communication. Examples have included:

- **the child's own drawings of people, places and objects** to clarify who/where/with what (if produced or used at interview these will be exhibits at trial and copies need to be available to the child at cross-examination);
- **a visual pain scale** with numbers and faces balanced along a scale of 0–5 to clarify how much something hurt;
- **pre-cut gender-neutral 'gingerbread people'**, or anatomically accurate drawings, with removable clothes to clarify body parts;
- **small dolls or human figures** (e.g. pipe-cleaner figures in different colours and sizes, with polystyrene heads that can be drawn on to represent different individuals) to clarify positions;
- **small furniture** (e.g. dolls house furniture or Lego models) to clarify locations; and
- **body maps** if the child is able to use a body map correctly for demonstrative purposes.

**6.11** Full acquisition of language is a gradual process that evolves over time. This can have implications for court including the following:

- children cannot remember long and complicated sentences and so questions should contain only a certain number of words suitable for their stage of development – an intermediary can offer guidance on how long questions/sentences should be;
- some adolescents may have delayed language capabilities due to trauma, neglect or insufficient communication support at home (McFadyen and Kitson, 1996).

Adolescents are at particular risk of miscommunication because of their reluctance to ask for clarification and adults' higher expectations of their ability to understand.

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