

# The Advocate's Gateway

**Witnesses and defendants with autism:  
memory and sensory issues**

Toolkit 15

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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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## Summary

- A person with autism has a developmental disorder that affects how they make sense of the world around them. Their autism will affect their social understanding and communication with other people. Each person with autism has their own communication strengths and weaknesses; their disabilities may be masked by coping mechanisms or ‘hidden’ by their apparent strengths in expressive language.
- Overall, the needs and difficulties associated with communication, memory and sensory issues with autism will be greatly increased for the person when they are with unfamiliar people, in unfamiliar places and experiencing stressful events.
- Advocates (and interviewers) must plan their questions carefully, for example, avoiding tag questions or non-literal language/idioms.
- Communication aids may assist questioning but used in an unplanned way they may easily confuse or overload the witness.

- People with autism have a good memory for facts and knowledge of the past (semantic memory), but they can struggle to remember specific episodes from the past (episodic memory).
- People with autism can find it difficult to recall all of the elements of a past experience when the questioning is open-ended and provides no particular structure – the who, what, where, when and how – and how these fit together. However, if individuals with autism are given more support/structure to help them remember – such as (non-leading) cues or prompts – they can often recall these details to a similar level as people without autism.
- The cognitive interview in its traditional form does not help witnesses with autism remember more details, but drawing might assist memory if properly administered by a skilled interviewer. An intermediary will be best placed to advise on appropriate interviewing techniques based on the profile of the individual witness in question.
- People with autism tend to recall fewer social details of an event (e.g. relating to people and actions), although their recall of non-social details such as objects and surroundings is usually good.
- There is no evidence that people with autism are more suggestible than other people. However, they may also be more compliant in some situations. In other words, a witness with autism may be more likely to publicly acquiesce to a questioner's suggestion; even though they are no more likely privately to believe that detail as something they had witnessed themselves.
- Many people with autism find it difficult to process everyday sensory information, such as sights, sounds and smells. Things that might not be noticed by others (e.g. a vibrating mobile phone in someone's pocket in the courtroom/a certain perfume worn by a dock officer) might be a serious distraction to the person with autism who is particularly sensitive to the noise/smell.
- People with autism can be over- or under-responsive (often termed hyper- or hypo-sensitive, respectively) in any or all of the seven sensory areas: sight, sound, touch, taste, smell, balance and body awareness.
- It can sometimes be difficult to identify that sensory difficulties are causing a person's behaviour. It is good practice to ask the person with autism (or their parent/carer) whether they have any sensory difficulties and if any adaptations or coping strategies are necessary. It helps to be aware of how sensory difficulties may impact on a person with autism and to ask advice

from parents, intermediaries and other professionals, and/or the person with autism themselves regarding what the problems are, how these may manifest themselves in certain settings (e.g. during interview, at court) and how best to deal with them.

- Advocates should be aware of and responsive to the array of sensory difficulties that a person with autism may experience. Can you notice anything in the environment that is creating any difficulties? Can you change anything to assist them?

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## 1. GENERAL PRINCIPLES

- 1.1** Advocates must treat every person with autism as unique. Memory and sensory differences may be marked, mild or, at times, they may not even be apparent. It is important that expert evidence is available to the advocates and court about the individual and how their condition affects them. At a ground rules hearing, the judge and advocates should discuss whether the jury will be assisted by an explanation about the defendant's condition so as to avoid potential misinterpretation of his or her behaviour in court or behaviour relating to the offences charged (for example, see [\*R v Thompson\*](#) [2014] EWCA Crim 836 where the defendant had Asperger syndrome).

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## 2. DEFINITIONS

- 2.1** Autism is a developmental disorder that affects how a person makes sense of the world around them. Autism particularly affects social understanding and communication with other people. Autism is not a mental illness or a disease. However, it is formally defined in the two sets of criteria used to classify all behavioural and psychological disorders: the fifth edition of the American Psychiatric Association's Diagnostic Statistical Manual of Mental Disorders (DSM-5 2013) and the tenth edition of the World Health Organization's International Classification of Diseases (ICD-10 1994). DSM-5 uses the heading 'Autism Spectrum Disorder' and subsumes Asperger syndrome within this broader group of conditions. However, people diagnosed prior to 2013 retain their diagnosis and label they were originally given (e.g. Asperger syndrome). Individuals diagnosed since the DSM-5 revisions in 2013 will likely receive an autism spectrum disorder diagnostic label. ICD-10 is likely to adapt these changes in its next revision (expected 2017), but will potentially retain the reference to the term Asperger syndrome (currently separately categorised in ICD-10, under the reference F84.5).
- 2.2** Although all people with autism share certain difficulties, these affect each person differently and they tend to manifest themselves in different ways across the developmental maturational milestones. These may frequently be inconsistent with expected chronological age-appropriate milestones. Existing studies in children and young people report around 1 per cent of the population may have autism and the condition is more common in males. However, women and girls may go undiagnosed or be misdiagnosed because they can appear to adapt more successfully to daily life and may be better at seeming sociable. Autism is often described as a 'hidden disability' because it is not always obvious that someone is on the autism spectrum. Some people with autism choose to carry an 'autism alert' card; others may voluntarily disclose their diagnoses verbally, for example. However, not every person with autism is willing or able to volunteer information about their condition and others may have autism but not yet be aware of it, or may have never received a formal diagnosis. This is why it is important to be alert to the key features of autism spectrum disorders (often abbreviated to ASD or ASC, the latter referring to autism spectrum conditions).

**2.3 Autism is described as a spectrum condition** because, at one extreme, a person may have extremely limited social skills, little or no language and severe learning disabilities (often referred to as classic autism or Kanner-type autism, after the physician who first described autism, Leo Kanner). At the other extreme, individuals may be highly articulate and be able to express themselves well, but display unusual, one-sided social behaviour and function in high-achieving professional roles (in those with a diagnosis of high-functioning autism or Asperger syndrome). Many people with autism fall somewhere between these extremes. **Asperger syndrome** is a form of autism, but people with Asperger syndrome are often of average or above average intelligence and tend not to have experienced delayed language development (which is what differentiates individuals with Asperger syndrome from those with a diagnosis of high-functioning autism). Both autism and Asperger syndrome are subgroups on the autism spectrum, sharing the following characteristics:

- a. Difficulty with social communication and interaction, including inflexible/rigid thinking and an inability to ‘see the bigger picture’ or to see things from another person’s point of view. People with autism and Asperger syndrome may have difficulty forming friendships, be vulnerable to bullying, and appear socially isolated and withdrawn. They can be blunt and honest to the point whereby it may be viewed as rudeness, particularly by someone who is unaware of the condition.
- b. A strong preference for routines and repetition: novel and new places, as well as changing and unpredictable events, may be stressful. Not knowing when an event will take place or how it might unfold can cause severe anxiety.
- c. Narrow, repetitive ‘obsessional’ interests in highly specific topics: an individual with autism/Asperger syndrome may focus on an area and return to it repeatedly. They may be able to talk articulately and knowledgeably about it.

While these three traits may be common features of autism/Asperger syndrome, it must be noted that all three might not be obvious (or appear present) in all individuals who have an autism spectrum disorder. Further, the extent to which the traits are visible varies a lot from person to person and will sometimes be masked or ‘covered up’ with coping strategies.



- 2.4 In contrast to people with autism who have co-occurring learning disability (classic autism or Kanner-type autism), those diagnosed with high-functioning autism or Asperger syndrome have average or above average intelligence.** Although the condition still affects how individuals with an Asperger syndrome diagnosis (or equivalent) interpret things and make sense of the world, the difficulties of this group are often masked because they may be highly articulate, particularly when talking about areas of special interest. Despite this, their receptive language (understanding/comprehending language that is read or heard) is usually significantly less well developed than their expressive language abilities (putting thoughts into words or sentences to communicate with others). This means that understanding may lag behind verbal expression, particularly when the topic of conversation is not a specific area of interest. It is therefore very important not to assume that individuals with high-functioning autism or Asperger syndrome have only 'mild' difficulties; they may have developed strategies (e.g. by rote learning, modelling or copying) that may conceal their difficulties. Moreover, if within an unsocialised environment, such strategies may lead to copying of dissocial, rule-breaking presentations and breaches of the law and individuals may not comprehend the social consequences to themselves or others. They can therefore come into conflict with the law as a direct result of such neurocognitive developmental impairments.
- 2.5 People with autism often have other co-occurring conditions** which can hide the full extent of the person's needs. Around 50–80 per cent of those with autism also have a learning disability and up to one-third have been found to suffer from complex epilepsy conditions. Tic disorders are significantly more prevalent, as are hearing and visual impairments. A very significant proportion of the autism population also has other co-existing neuropsychiatric/neurodevelopmental conditions, especially attention deficit hyperactivity disorder (ADHD) and dyspraxia. Trait anxiety and anxiety disorders (with or without panic attacks), depressive illnesses and mental health problems (including anxiety and eating disorders) are also common. Indeed, people with Asperger syndrome and high-functioning autism often feel socially isolated, which may make them particularly prone to depression and anxiety.
- 2.6 Someone with autism falls within the definition of a vulnerable witness:** section 16(2)(a) of the Youth Justice and Criminal Evidence Act 1999 covers those whose quality

of evidence is likely to be diminished (and who need support to give best evidence) because they have a mental disorder within the meaning of the Mental Health Act 1983 (defined in section 1 as ‘any disorder or disability of the mind’). This covers the full range of autism spectrum disorders, including those occurring alongside a learning disability or any other kind of disorder (section 34.18 of the Mental Health Act 1983 Code of Practice, Department of Health 2008). In some rare criminal cases, a Mental Health Act 1983 opinion may be needed for a defendant with autism and other psychiatric disorders, either for fitness to plead or a sentencing disposal.

**2.7 Courts must make reasonable adjustments to remove barriers for people with disabilities, including autism** (*Fairness in Courts and Tribunals*, Judicial College, 2012, giving effect to the Equality Act 2010) and incorporating the Autism Act 2009 principles. In order to consider a range of adjustments it is important to have staff with the relevant expertise and experience. Adjustments must be made on the basis that they are, where possible, less restrictive of the person’s rights (section 20.33 of the Mental Health Act Code of Practice consultation document (Local Government and Care Partnership Directorate 2014)). The Criminal Procedure Rules govern the nature of the reasonable adjustments and are required to meet both the Autism Act 2009 and the European Convention on Human Rights legislation on such vulnerable defendants and witnesses within UK Law.

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## 3. MEMORY ISSUES IN AUTISM

**3.1** There is consistent evidence that people with autism have specific strengths and weaknesses regarding different aspects of their memory, and this impacts on how they understand and relate to the world around them (Boucher et al 2012).

### **3.2 Memory for events**

Most people know that the capital of France is Paris. However, few of us will recall when or where we learnt that piece of knowledge. These two instances form different types of memory: (1) knowledge-based information, such as the names of capital cities, refers to semantic memory; and (2) memory for an event or a specific episode is called episodic memory.

**3.2.1** People with autism generally have good *semantic* memory (knowledge-based information), but sometimes display poor *episodic* memory (memory for specific events, including, potentially, the sequence in which events occurred) (Crane and Goddard 2008; Bigham et al 2010). In particular, they often have **difficulty recollecting past personally experienced events, and typically remember fewer of them (and take longer to do so)** than people without autism (Goddard et al 2007; Crane et al 2012). For example, they may remember that their brother usually hits them when he gets angry (semantic memory), but fail to recall a specific example of this, such as the time their brother came home from work earlier than usual and was really angry because his girlfriend had just broken up with him and he threw a vase (episodic memory). In such a situation, it may be that the person with autism can remember the details of the event but not when it happened, or they may remember the general aggression but not the individual details of the event. Although the former may be more common, this varies dependent on the individual.

**3.2.2** Generally, people are better at recalling aspects of an event that they personally participated in; however, people with autism do not always spontaneously (i.e. without specific or cued questions) focus their recall more on their own personal involvement. Importantly, however, **if prompted, then they are usually able to recall their own actions** (Maras et al 2013).

### GOOD PRACTICE EXAMPLE

The advocate signposted the witness to a particular detail they had previously mentioned (*'You said that Mr Jones had been told that the shop was closed.'*), then asked them to specify who performed that action (e.g. *'Did you tell Mr Jones that the shop was closed or did someone else tell him?'*).

### 3.3 Memory for who, what, why, when and where

'Source monitoring' is the term psychologists use to describe memory for who, what, why, when, where and how something has happened. In order to recall an event, 'markers' of time, space, place, meaning and emotion need to be tied together in one's mind, so that we can remember the event as a whole episode, not just isolated parts of it. For example, we may recall that last Tuesday we met our friend Joe and had lunch in a new café by the river, during which time Joe told us that he had been offered a new job. This forms an episodic memory, i.e. a memory for a specific event. In order to monitor the **source** of our memory that Joe has a new job (i.e. how we learnt that information), we need to recall the other pieces of the episode (that he told us when we met him for lunch in the **café by the river on Tuesday**).

### GOOD PRACTICE EXAMPLE

A man (B) with Asperger syndrome had been the victim of a financial scam. He was able to answer direct questions about it and sometimes gave considerable detail, but he was not able to independently develop and expand his narrative account of events relevant for the investigation. Given that B was an avid reader, the intermediary (a trained communication specialist who can assist vulnerable witnesses and defendants) suggested that the police officer ask him if he kept a diary, which he did. This gave a detailed written account of the day-to-day contact that B had had with the alleged perpetrators.

**3.3.1 People with autism sometimes have difficulty in remembering all of these pieces of information together (the who, what, why, when, where and how)** (Bigam et al 2010; Maister et al 2013) – so they may remember that Joe has a new job and they may also know that they had lunch with him, but they may not link the two together. Thus, they may not recall that they know about the job

because he told them when they had lunch last Tuesday. Other examples of these 'source monitoring failures' might include: (1) incorporating things they have read about, learned or seen in other contexts into their own descriptions without realising it; (2) confusing who performed which actions; or (3) confusing the order in which things have taken place (before/after an alleged crime, for example). Importantly, this tends to occur in very open questioning, for example, with a 'tell me everything' prompt, when individuals are unsupported in their recall (see section 2.4 for further details). Therefore, when asked to recall what happened in respect of a particular event, without any further cues or questions, **people with autism may be more susceptible to mixing up details about events.** Witnesses and defendants with autism appear better able to answer supported direct questions (Where? Who? What?), often struggling to answer questions that require explanation (How? Why?); particularly questions that require an understanding of what another person is thinking or feeling.

### **3.4 Supporting people with autism to remember events more effectively**

In spite of the difficulties just described, **when people with autism are appropriately supported they can often recall as much as people without autism** (who are of a similar level of intellectual ability). For example, empirical memory research has shown that, when asked to recall items from, for example, a shopping list that has been previously well learnt, people with autism often recall fewer items than people without autism (Tager-Flusberg 1991). However, when recall is more structured, via using cues (e.g. informing the person that the list contained items of fruit or giving them a number of possible options), individuals with autism are able to recall and recognise items from the list at a similar rate and accuracy as people without autism (Bowler et al 1997).

**3.4.1** The *task support hypothesis* has been proposed to explain and ameliorate the problems that people with autism experience with source monitoring (remembering the who, what, why, when, where and how). It specifies that the **difficulties that people with autism have with remembering are often reduced or eliminated altogether when they are provided with appropriate cues and prompts** (Bowler et al 2004).

### GOOD PRACTICE EXAMPLE

Rather than being asked to ‘Tell me everything that happened in the park’, the witness, who had Asperger syndrome, was asked to think about when he was in the park (drawing could be supportive) before being asked a series of prompts: ‘Tell me one thing you saw or heard’, ‘Tell me one more thing about X.’

### CASE EXAMPLE

*A man (with Asperger syndrome) was sitting on a wall and witnessed a violent assault happening some way along the street from where he was. When he initially tried to inform the police, his narrative was sequentially jumbled. This led the police to interpret his recall as false and taken from a newspaper article. Eventually, with the support of an intermediary, he was able to describe (verbally, through the use of more focused questions, and with drawing) the full details.*

Advocates may need to provide more (non-suggestive) cues or directive questions for people with autism to help them remember specific details that may not be recalled spontaneously in response to more open-ended prompts.

- 3.4.2** A key characteristic of people with autism is the qualitative impairment in social reciprocity. This may manifest itself in various ways, including impaired insight into others’ thoughts and intentions and the potential consequences of their own actions on self and/or others. As a result, they can fail to demonstrate ‘street wise’ avoidance of public situations that might put themselves or others at risk. At a less immediately serious level, the individual may fail to ‘read between the lines’ and interpret questions very literally. It is important to be patient as the person with autism will sometimes report details that the questioner is not looking for.

## CASE EXAMPLE

*A victim with autism was asked about how he felt when he was robbed for his mobile phone: 'Were you upset that you lost the phone?' He replied: 'I did not lose the phone.' It would have been better to ask: 'When the phone was taken [set the scene], how did you feel [ask the question]?' It can also be helpful to offer visual cues, words and/or pictures of emotional states and, wherever possible, offer a blank alternative.*

### 3.5 Emotion and memory

People with autism show difficulties with processing and responding to emotionally significant information, such as faces, body language and social scenes. There is some mixed evidence that, in contrast to people without autism, individuals with autism do not always show better recall of emotionally arousing information compared to neutral information (Gaigg et al 2008). However, it is worth noting that most of the existing research has used less ecologically valid stimuli, such as words. In one study that used more ecologically valid event-based stimuli, people with autism did recall more of an emotionally arousing video of a shooting compared with a video that had the same actions but no violence (Maras et al 2012). It may be that the salience and narrative impact of an eyewitness event provides a form of scaffolding for event memory in people with autism. Nevertheless, in reality, questioning someone with autism about a traumatic event may engender even more heightened levels of anxiety than the already elevated levels associated with autism. This is likely to affect both their communication and their memory. It is crucial that measures are taken to minimise the witness's levels of anxiety to allow them to provide their best evidence.

## CASE EXAMPLE

*When questioned about an assault that he was the victim of, a 45-year-old witness with autism became increasingly distressed. He began ignoring the questions he was asked and just repeated his version of events as a response to each question. He had a 'time out' break with his intermediary whenever this happened. This helped to decrease anxiety and he was able to respond to questions after each break – provided that they were phrased appropriately.*

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## 4. WITNESS TESTIMONY IN AUTISM

### 4.1 Interviewing people with autism

The cognitive interview (an evidence-based police interviewing technique) is useful for assisting most witnesses to remember more details about a witnessed event. However, it has been shown that the cognitive interview is not usually helpful for people with autism (Maras et al 2010). It is likely that the series of ‘context reinstatement’ instructions (e.g. to remember contextual details surrounding the event) ‘overloads’ witnesses with autism, who already struggle to filter out irrelevant information (Maras et al 2014). However, some recent work suggests that drawing to reinstate the context – when conducted by an experienced intermediary – helps people with autism to recall an event (Mattison et al forthcoming). Best practice would be to either use a simple structured achieving best evidence (ABE) interview or a drawing technique, rather than a cognitive interview. Importantly, this should be conducted by an officer or intermediary trained in ABE interviewing, rather than relying on mainstream officers to attempt to interview a witness or defendant with autism. Further advice and guidance on interviewing a witness or defendant with autism can be obtained from an intermediary who will be able to recommend appropriate techniques based on the strengths and weaknesses of the person (e.g. visual or verbal cues).

### 4.2 Types of details that people with autism report in interviews

Autism is characterised by, among other things, impairments in social reciprocal (verbal and/or non-verbal) interactions and social understanding. It is not surprising, therefore, that an individual with autism may recall fewer details (sometimes also with less accuracy) about people and actions. However, they may be just as good as those without autism in reporting in interviews details about surroundings and objects (Maras and Bowler 2014).

### 4.3 Suggestibility of people with autism

*Suggestibility* is the extent to which people come to accept messages that are (implicitly or explicitly) communicated to them and subsequently interpret these messages as their own thoughts. Consider, for example, a mugging where the perpetrator is not wearing a hat, but when questioned in court the barrister asks: ‘*What did his hat look like?*’ A



witness might accept that the perpetrator was wearing a hat, and even go on to form a false memory of the hat, which they describe in subsequent statements about the event.

*Compliance*, on the other hand, is where people consciously go along with suggestions even though privately they do not agree with them. This may be for a number of reasons including a desire to please others or avoid conflict or confrontation.

To date there is no evidence that people with autism are more *suggestible* than people without autism. A limited number of studies have explored suggestibility to misinformation (e.g. hearing false details about a previously witnessed event) and suggestive questioning styles (e.g. ‘Describe his red sweater?’) in children and adults with autism and all have reported that people with autism are no more or no less suggestible than people without autism of the same intellectual level (Bruck et al 2007; McCrory et al 2007; Maras and Bowler 2011). In other words, individuals with autism are just as (but not more) likely than people without autism to incorporate misinformation from others into their reports and they are equally prone to acquiescing to misleading and suggestive questions. Research also indicates that people with autism are not more or less likely to succumb to negative feedback by changing their answers. However, research to date has focused on intellectually able people with autism. Many individuals with autism also have a learning disability, which may confer a greater susceptibility to suggestion. Further, one study has found that people with autism may be *more compliant* in some situations, which could indicate, for example, increased compliance to interrogative pressures (North et al 2008). Higher levels of compliance might prevent an individual with autism from asking for help or alerting the court to the fact that they have lost concentration and need a break. Moreover, for a defendant with autism, being compliant to repeated suggestions by counsel that he or she has indeed committed the crime could have life-changing effects, potentially resulting in self-incrimination and a possible wrongful guilty verdict. However, a general lack of research in this area indicates that this assertion should be interpreted with caution. An intermediary will be able to provide a detailed individual assessment and further advice.

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## 5. QUESTIONING SOMEONE WHO HAS AUTISM

### 5.1 Appropriate cues and prompts that may prove useful for witnesses and defendants with autism include the following.

- Signpost the topics: e.g. *'I am going to ask you some questions about where you live.'*
- Make frequent references to names of people: e.g. rather than saying *'Did you go to the shop with him?'* say, *'Did you go to the shop with Paul?'*
- Forced choice questions create opportunities for error when the correct alternative may be missing. If they have to be used, give options: e.g. *'Was it red, blue or a different colour?'* Although people with autism often benefit from more focused/cued recall, it is important to stress that questions should always include an open aspect (e.g. *'none of the above'*) to avoid leading the witness or defendant.
- Ask the witness or defendant to *'draw what happened'* or to draw a map/place/person, for example, as this can act as a salient memory cue. This is because self-drawn images usually have a stable representation in the person's mind. An intermediary can check this by making a deliberate naming error during assessment.

#### GOOD PRACTICE EXAMPLE

During assessment and in preparation for an interview, it is useful to prepare visual prompts of familiar people (e.g. body-foam shapes, cardboard cut-outs etc.) for a vulnerable witness. If the witness maintains the name of each 'person', this indicates that these will be useful cues. During assessment this can be checked and rechecked by asking 'Who is this?' or making deliberate 'naming errors' (e.g. 'So this one is Paul?' when it is actually James).

- Drawings can also be used to encourage the witness or defendant to provide more detail than might otherwise be possible, with follow-up prompts that can be referenced to the relevant area of the picture: e.g. 'Tell me more about that bit.'

## CASE EXAMPLE

*During several police interviews an eight-year-old child with autism was asked to recall years of abuse. He had free access to drawing materials and small world figures, which he was encouraged to use with the prompt: 'It's OK to show and talk.' He used the drawing materials; continually drawing as he described recalled events.*

- Due to source monitoring difficulties (described in section 2.3), 'when' questions are often problematic for people with autism: they can find it difficult to recall event details together in context (such as time-based information) unless specifically prompted. It may prove useful to provide the witness or defendant with a timeline (a line with different points drawn on and labelled); for example, rather than saying 'What time did you go there?', ask them to point on the timeline: 'Was it before/after breakfast/lunchtime/dinnertime?'; 'Was it before/after Christmas/your birthday/your holiday?' If a timeline is to be used, it is essential to provide all parties with a copy and seek the permission of the judge for the timeline to be used in the witness box. The use of these should be part of the intermediary recommendations and discussed during the ground rules hearing.

## CASE EXAMPLE

*An intermediary used a timeline with a 12-year-old defendant with autism. He could not tell the time so the intermediary suggested that everyone called it 'times in the day'. There was a picture for breakfast, lunch and dinner, all of which the witness had drawn and labelled himself. He referred to it during cross-examination; the judge and barristers all had a copy. The barrister also used it when asking questions; he held it up for the defendant to see, although the defendant also had a copy in front of him.*

- The use of post-it notes can be helpful in many ways, including giving reference to verbal comments, helping the witness recall a series of events and encouraging and

supporting the witness in self-correcting. For example, using coloured post-it notes to represent each event (for multiple offences) may prove useful to structure the memory of a witness or defendant who has autism. It may be helpful to label each 'post-it' note to correspond to each offence (e.g. the time at school; the time at Christmas; the time at home). Refer to the 'post-it' note during questioning (e.g. *'Now we are going to talk about the time at ...'*). This can be used to check back with the witness that all of the details are correct and noted.

- Coloured pipe cleaners or non-anatomically correct dolls (anatomically correct dolls may heighten suggestibility) can be used to represent different people and to 'show' what happened, rather than 'tell'. Note, however, that the use of small world figures, asexual figurines and sexually explicit models should always be carried out with care. They should only be used to support verbal explanations and offered as an additional communication aid after an initial 'disclosure' has been made. They should not be offered to encourage or prompt comment. The use of such additional communication aids should not be categorically denied, however, as they may be the only way a witness is able to 'show and tell' what happened.
- All communication aids/props to be used in interviews/court should be tested with the person prior to interview/giving evidence – usually this is done by an intermediary. Indeed, part of an intermediary's instructions is 'to make recommendations as to special measures to enable the best communication' (Registered Intermediary Procedural Guidance Manual 2012). With this in mind, the appropriateness of using a range of communication aids should be considered during the intermediary's assessment process.

See also [Toolkit 14 - Using communication aids in the criminal justice system](#).

## 5.2 Question types and responses

**Avoid complex questions, which may confuse.** These may come in various forms.

- Avoid stacked and multi-part questions (e.g. *'Was Paul at the park when you arrived and did he stay there?'*). Ask one point per question (e.g. *'Was Paul at the park when you arrived? Did Paul stay in the park?'*).

- Avoid questions that are statements (e.g. *'You went to the park?'*) and using intonation to indicate a question. Ask direct questions (e.g. *'Did you go to the park?'*).
- Avoid leading questions (e.g. *'After lunch did you go to the park?'*). Instead ask questions that do not include a possible answer (e.g. *'After lunch, where did you go?'*).
- Avoid 'tag' questions (e.g. *'You went to the park, didn't you?'*) or encouraging tags (e.g. *'You went to the park, that's correct is it?'*). Ask the question directly without a tag (e.g. *'Did you go to the park?'*).
- Avoid questions posed in the present tense (e.g. *'So, now are you in the park and talking to Paul?'*). Use the past tense for events that have already happened (e.g. *'When you were in the park, did you speak to Paul?'*).
- Avoid non-literal language (e.g. *'When you spoke with Paul, what passed between you?'*). Use simple, plain English (e.g. *'What did you and Paul say to each other?'*).
- Avoid double negatives (e.g. *'You wouldn't disagree that you like Paul, would you?'*). Ask direct questions (e.g. *'Do you like Paul?'*).
- Avoid questions or statements that use insinuation or that require inference, deduction, or abstractive extrapolation (e.g. *'But you still went to the park at midday exactly?'*). Ask direct, literal questions (e.g. *'Did you know that Paul was going to be late?'*).
- Note that, although communication aids (e.g., drawing, using props) may be helpful, it may be confusing for the witness or defendant with autism if too many of these are used in combination. It may prove helpful to find out which aids/props work best with the particular individual and then use these throughout the whole process (e.g. at interview, in court). The earlier these aids are used, the better for helping an individual with autism and making them feel comfortable.
- The court should be aware that the process of giving evidence could take significantly longer for a witness or defendant with autism.
- Difficulties with memory should not be confused with the tendency, particularly with those with high-functioning autism/Asperger syndrome, to be over-inclusive in the

information they give, coupled with an inability to monitor (through eye contact) whether what has been said is sufficient or appropriate.

### **5.3 Directions to the jury and expert opinion**

Prior to giving evidence, the judge and jury should be made aware of common features of autism which might impact upon the evidence, including in the domains of memory and sensory processing (*R v Thompson* [2014]). This can be done by calling expert evidence or by reading to the jury a list of features that have been agreed upon by the prosecution or defence (e.g. difficulties with recalling time-based information; taking a long time to answer a question; good accuracy for factual knowledge of events, but difficulty differentiating specific details between episodes; extreme hyper-sensitivity to high-pitched sounds such as chairs scratching on the floor). Such evidence should be provided by those with relevant neuropsychology/neuropsychiatry, autism and forensic expertise.

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## 6. SENSORY ISSUES IN AUTISM

**6.1** Many people with autism find it difficult to process everyday sensory information such as sights, sounds and smells. This can have a profound effect on the person's ability to give evidence as a witness or defendant and exacerbate the difficulties that the person experiences when communicating with criminal justice professionals. When people with autism struggle to cope with sensory information in the environment, they may become stressed or anxious and may even experience physical pain. Sometimes, this may lead to the individual behaving in a manner that requires police involvement. Overall, this poses a serious problem for many children and adults with autism.

### **6.2 Examples of sensory difficulties**

Although sensory difficulties might lead people with autism to behave in a way that might be interpreted as unusual, these behaviours may be coping mechanisms (Local Government and Care Partnership Directorate 2014). People with autism can be over- or under-responsive (often termed hyper- or hypo-sensitive, respectively) in any or all of the seven sensory areas: sight, sound, touch, taste, smell, balance (vestibular) and body awareness (proprioception) (Bogdashina 2003; Crane et al 2009). General sensory overload is also common, whereby people with autism struggle to process information from more than one sense simultaneously. Intermediaries working with people with autism will be aware of these issues; they will address these concerns with individual witnesses/defendants and make appropriate recommendations to the police/court. The intermediary should discuss this with the relevant parties in advance: with the police when preparing for an interview and with the Crown Prosecution Service when preparing for a trial. This is to ensure that adequate adaptations are made in order to be certain that sensory difficulties do not prevent the witness from participating as fully as possible in an interview or at trial.

Examples of common sensory problems across each of the seven senses are given below.

## **Sight**

- Colours (sometimes one colour in particular) or lights may be too bright to look at directly or for prolonged periods of time (e.g. if in a courtroom for a significant period).
- Distortions: static objects or lights may appear to move around.

## **Sound**

- Individuals with autism may be particularly sensitive to certain sounds (e.g. police sirens, raised voice of the questioner), which can cause significant distress.
- An inability to block out background noise can occur, which may lead to difficulties with concentration (e.g. people coming in and out of the courtroom during court proceedings may prove very distracting).

## **CASE EXAMPLE**

*A witness repeatedly flicked his lighter on and off to help block out extraneous sounds and smells. Through discussion and a follow-up social story with an intermediary, a substitute distractor (blu-tack) was agreed.*

## **Touch**

- Even the slightest touch may be painful or uncomfortable (either from people or objects, e.g. handcuffs).
- Individuals with autism may display an intense dislike of certain textures (e.g. leather chairs, cotton clothing).
- Individuals with autism may wear a particular type of clothing that may be part sensory (e.g. soft unstructured clothing) but may also offer them some perceived protection (e.g. wearing military clothing). In the stressful setting of a court hearing, it is particularly important that the advocate discusses this with the witness/defendant.



## CASE EXAMPLE

*The witness felt more comfortable sitting with the back of his chair against the wall. Reasonable adjustments were made to accommodate this, such as moving some furniture around, to ensure that he was still visible on camera during his interview.*

### **Taste**

- Some individuals with autism have a tendency to eat everything (e.g. paper, hair) – this is known as pica. This is very rare compared to some of the other sensory issues, particularly in comparison to those relating to sight, sound and touch.
- Others may lick things to get a better sense of what they are.

### **Smell**

- Certain smells may be intense and overpowering, leading to concentration difficulties. In a court setting, this could cause unpredictable problems if certain smells are present.
- Some individuals can develop a dislike of people with strong or distinctive perfumes, deodorants etc.

### **Balance**

- There can be a desire to rock, swing, or spin; and this may be used as a coping strategy.
- Motion sickness may also occur and could affect travel to and from court.

### **Body awareness**

- Some individuals with autism may stand too close to others as they are unable to measure their proximity to people/objects and judge their own personal space.
- There may be difficulties with navigating around rooms; some individuals with autism may move their whole body to look at something.

### **6.3 How to identify sensory problems in people with autism**

It can sometimes be difficult to identify that sensory difficulties are causing a person's behaviour. People with autism may develop coping strategies to deal with their sensory problems (e.g. rocking, swinging) and these may be seen as the 'problem behaviours' that need to be addressed, rather than the underlying sensory difficulty.

It helps to be aware of how sensory difficulties may impact on a person with autism and to ask advice from parents, professionals (e.g. intermediaries) and/or the person with autism themselves regarding what the problems are, how these may manifest themselves in certain settings (e.g. during interview, at court), and how best to deal with them. It may be possible to make adjustments to the usual court practice (e.g. the intermediary might be permitted to take an iPad into the dock with the defendant to keep him or her focused, or to distract them if they are finding it distressing to hear or see the evidence), provided it is explained beforehand to the judge and permission sought. Providing the witness or defendant with autism with the opportunity to visit the court in advance would be beneficial in terms of identifying potential sensory problems and reducing anxiety and stress.

### **6.4 How sensory problems affect behaviour**

If a person with autism is overloaded with sensory information from the environment, they may find it difficult to concentrate; it may prove difficult for them to listen to the questions being put to them, or to respond adequately.

## **CASE EXAMPLE**

*The witness would make loud remarks about the body odour of a member of the court staff (apparently unaware that he might cause upset). Had it not been for the regular breaks at trial, the witness's sensory issues would have caused significant problems with concentration.*

As mentioned earlier, people with autism may develop coping strategies to deal with their sensory difficulties. These may be overt (e.g. closing their eyes, humming to drown out external noise) or covert (e.g. blocking out speech to focus on body language). It is unadvisable to try to stop the individual from engaging in such behaviours in case they

## CASE EXAMPLE

*During the intermediary assessment, it was apparent that the witness put his hands over his ears as his anxiety rose, particularly when in unfamiliar places. The witness described places as being 'too noisy'. With his family, he had developed a strategy of wearing a hat covering his ears. The intermediary recommended to the police, and subsequently to the court, that the witness be allowed to wear his hat. Through explanation and a follow-up social story, the witness understood and was able to adapt his coping strategy so that he wore his hat but lifted it off his ears when prompted (with a visual cue) to do so by the intermediary.*

It is possible that sensory problems experienced by individuals with autism may lead to criminal involvement. For example, a person with autism who is averse to touch may overreact to being innocently knocked in the street and lodge an accusation of assault; equally, an extreme sensory reaction that a person is unable to cope with may lead to them lashing out and assaulting another person. If this is the case, then expert evidence might be required to explain the common features of autism so that the jury can consider the behaviour in context and draw their own conclusions about it.

### 6.5 Strategies for dealing with sensory problems in autism

**6.5.1** It is good practice to have professional expert evidence as well as 'expert by experience' evidence (**ask the witness or defendant with autism and their parent/carer whether they are aware of/have been told they have any sensory**

**difficulties and whether any adaptations are necessary).** For example, the witness or defendant may respond better if the lights in the room are dimmed, or if items of a certain colour/texture are removed. An intermediary can carry out an assessment which would provide useful information on this.

- 6.5.2** Be aware of the array of sensory difficulties that a person with autism may experience. Can you notice anything in the environment that is creating any difficulties? Can you change anything to assist them (e.g. considering whether handcuffs are necessary, incorporating regular breaks into the interview,

## CASE EXAMPLE

*The witness had very acute hearing. He could hear what was being said in the next room when others could not. For example, when being cross-examined, the witness stopped mid-sentence and could not be persuaded to speak. It transpired that one of the jury had left a mobile phone on in court. It was on silent but was vibrating. Counsel was closer to the jury and had not heard it, but it had overwhelmed the witness. Similarly, the noise of the clock and the turning of papers threw him completely. The trial judge asked that everyone was careful to avoid making noise, however slight, and the entire court was given breaks every half an hour to avoid sensory overload. Those breaks were essential.*

- 6.5.3** It may prove useful to create a ‘feelings’ scale for a witness or defendant with autism (e.g. 1=calm/okay, 5=scared/upset) and to regularly ask where they are on the scale. This can help to actively monitor their emotional state, identify if a line of questioning is causing particular anxiety (and rethink the approach to questioning, for example) and to decide when breaks are required.

See also [Toolkit 14 - Using communication aids in the criminal justice system](#).



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## ACKNOWLEDGEMENTS AND REFERENCES

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