



# The Advocate's Gateway

The Inns of Court College of Advocacy

## Additional factors concerning children under seven (or functioning at a very young age)

### Toolkit 7

15 December 2015

These are copyrighted materials. Please refer to the copyright notice overleaf.



The Advocate’s Gateway toolkits aim to support the early 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. The handling and questioning of vulnerable witnesses and defendants is a specialist skill (*[Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court](#)*, 2011). Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

### Copyright notice

- The Council of the Inns of Court (COIC) is the owner or the licensee of all copyright in this toolkit. All rights reserved.
- You may read, print one copy or download this toolkit for your own personal use.
- You may not make commercial use of this toolkit, adapt or copy it without our permission.
- Every effort has been made to acknowledge and obtain permission to use any content that may be the material of third parties. COIC will be glad to rectify any omissions at the earliest opportunity.
- Use of this toolkit is subject to [our terms of use](#).

---

# CONTENTS

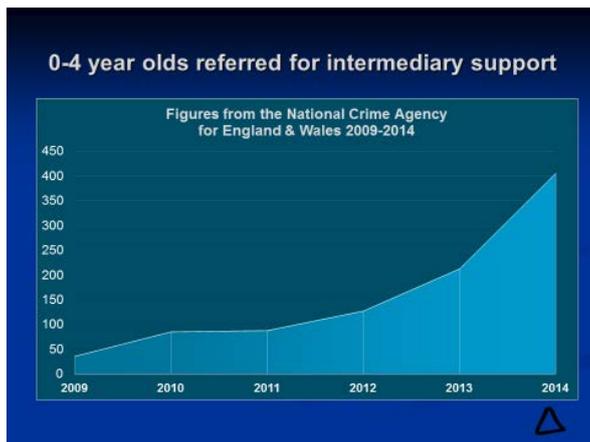
This toolkit brings together policy, research and guidance relating to:

- 1. INTRODUCTION AND SUMMARY ..... 4
- 2. GENERAL PRINCIPLES..... 7
- 3. FOUNDATIONS OR ‘SETTING CONDITIONS’ ..... 9
- 4. EXPRESSIVE COMMUNICATION: MAKING SURE YOU ARE UNDERSTOOD .....20
- 5. RECEPTIVE COMMUNICATION: MAKING SURE YOU UNDERSTAND.....29
- ACKNOWLEDGEMENTS AND REFERENCES.....31

---

## 1. INTRODUCTION AND SUMMARY

- 1.1 Since this toolkit was first written in 2012, there has been a significant increase in very young children giving evidence in England and Wales, as well as an increase in referrals of under fours for intermediary support (See Figure 1)



**Figure 1: 0–4-year-olds referred for intermediary support (National Crime Agency)**

### Making sense of young children’s communication

- 1.2 Children as young as three can be very competent communicators and can give accurate and reliable evidence if properly questioned (Hershkowitz et al, 2011; Marchant, 2013). The child’s communicative competence is very dependent on the competence of the questioner to adapt their communication in line with the child’s needs.
- 1.3 Very young children do not organise events in their minds in the same way as adults. They often leave out settings, descriptions, chronology and emotions in the telling of a past event. They can be particularly suggestible. However, when expectations are clear and questioning is modified appropriately, children as young as two can recall and report past experience accurately. Increasing numbers of children under seven give evidence at trial. At least 100 four-year-olds, and a small number of three-year-olds have now given trial evidence in England with intermediary assistance.
- 1.4 The conventions of courtroom testimony are unfamiliar and very different from young children’s previous experience of communicating with adults. Even bright, intellectually able children find court communication challenging simply because of

their age. Young children have difficulty adapting to formal Q&A sequences at court because:

- in young children's experience, adults generally know the answers to questions they ask the child and are asking to check that the child has understood or to teach them the answers;
- in everyday conversation, adults actively facilitate children's communication, e.g. 'scaffolding' children's accounts by helping with structure and sequencing;
- in everyday conversation, adults take responsibility for noticing and correcting miscommunication, clarifying meaning and assisting a child who is struggling to explain.

**1.5** Young children's ability to understand and use language is at an early stage of development. They are less able to respond to open questions, tend to provide briefer accounts and are more likely to respond erroneously to suggestive questions (*'That didn't happen, did it?'*), forced-choice questions (*'Was the car red or blue?'*) and yes/no questions (Powell and Snow, 2007; Lamb et al, 2008; Hershkowitz, et al, 2011; Lamb et al, 2011):

*... avoiding difficult words only scratches the surface ... questions can be complicated because of their structure and their implications, not just because of their words* (Lyon, 2010: 92).

**1.6** **The communicative competence of very young children** (and therefore the accuracy, completeness and coherence of their testimony) depends heavily on the competence of interviewing teams, intermediaries, advocates and the judiciary.

**1.7** **Most young children understand more language than they can use.** Comprehension is normally ahead of expression. For example, if you ask a child *'Who is X?'*, they can point to the person (i.e. they know their name) but often don't have the vocabulary to explain *'He's my neighbour/uncle/social worker'* etc. In court recently a child was asked *'Who is Michael to you?'* and the child replied *'He's Michael.'* Defence counsel suggested to the court that, as the child being questioned couldn't even say who the other child was, what was the point in further questions? Similar confusions are very common.

Q: *'What's mummy's name?'*

A: *'Mummy'*

**1.8** Advocates are expected (Judicial College, 2012, [\*Bench Checklist: Young witness cases\*](#), section five:

- to discuss and agree ground rules before a child gives evidence – this includes how the child will be questioned and how to address challenges to the child’s evidence;
- to ask developmentally appropriate questions to enable the child to give the best evidence of which they are capable;
- to formulate short, simple questions which put essential elements of the defendant’s case to the child;
- to avoid language and questions likely to create confusion;
- to inform the jury of aspects of evidence believed to undermine the child’s credibility, but not necessarily to address them in detailed cross-examination of the child.

---

## 2. GENERAL PRINCIPLES

- 2.1 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 Cokesix 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, nursery and so on.

- 2.2 Always work with the child's familiar or preferred communication strategies** because accuracy, coherence and completeness of testimony from a vulnerable child or somebody with communication needs can be significantly improved if the child's preferred communication strategies are adopted, including the use of communication aids (see [Toolkit 14 - Using communication aids in the criminal justice system](#)).
- 2.3 Always consider assessment of a young child by an intermediary**, even if one was not used at interview. Assessment by an intermediary should be considered if the child seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories ([Equal Treatment Bench Book 2013](#), para 46).
- 2.4** The intermediary's assessment will advise on the most effective means of communication with the individual child. The report is available to all parties. Issues likely to be addressed include:
- spoken language: it is normal for young children to leave out, mix up or add consonants or vowels; some children are softly spoken so the intermediary may need to repeat answers;
  - the maximum length of question that the child is likely to understand.
  - the child's ability to understand that others have beliefs, desires, knowledge and intentions different from one's own. This 'theory of mind' usually develops between three and four years of age. Most children under the age of 4 will not yet

have a robust theory of mind. This means they will need help to make sense of the process and assistance to tailor their answers to questions because they do not have the ability to monitor the comprehension of others. Nor do they see any reason to explain events because they do not realise that someone else's experiences of the world may differ from their own.

---

## 3. FOUNDATIONS OR ‘SETTING CONDITIONS’

These basic foundations for effective communication will enable young children to provide the best possible evidence

**3.1 Adjust the environment if needed** because young children can be easily distracted. Some children 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:

- screening the defendant’s view of the live link screen where a vulnerable child or young person is very fearful of being seen by the defendant;
- using a remote link from another court or non-court site where a vulnerable child or young person is very anxious or fearful of being in the same building as the defendant ([Toolkit 9 - Planning to question someone using a remote link](#));
- child-friendly facilities, with doors that a child can open;
- child-sized furniture in the live link room so a three-year-old could be properly seated with their feet on the floor, with a table for communication aids/calming play materials;
- providing a live link with an adjacent bathroom;
- close in focusing providing a clear view of the child’s face and hands to capture non-verbal communication;
- microphones located appropriately for a child who whispers.

### GOOD PRACTICE EXAMPLE

A child whispered answers using ‘rude’ words to the intermediary who, as agreed at the ground rules hearing, repeated the child’s 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.

### GOOD PRACTICE EXAMPLE

A child with urinary urgency was given a live link room with an adjacent bathroom. The ground rules hearing agreed that the child could go immediately to the bathroom without waiting for permission, using a toilet symbol card provided by the intermediary.

### GOOD PRACTICE EXAMPLE

A child with autism struggled to make sense of live link. His need for space and his behaviour when stressed meant that bringing counsel to the live link room for questioning would not have helped. The live link room was cleared of all risky or distracting objects; all microphones in the court room were switched off when not in use to reduce background noise; the picture-in-picture was covered with a small towel so he did not need to see himself on screen; sound and vision were switched off for frequent brief breaks; blinds were drawn so light levels were stable.

- 3.2 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 and intermediary read through the statement together. This made memory refreshing quicker and also saved court time.

- 3.3** 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 witness's communication to revise the transcript to include a written record of use of signs and communication aids.

- 3.4 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.

### GOOD PRACTICE EXAMPLE

The judge directed an intermediary who was familiar with the child's speech to check the draft transcript. She was able to understand 100 % of the words marked 'inaudible'.

- 3.5 **Keep key people in the person'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 person's anxiety, and help the person understand what is expected of them. Explaining things very simply is crucial at all stages, not just during questioning. Delays should be explained very clearly, e.g. *'You have done all your getting ready jobs. But the court is not ready for you. So there will be two more sleeps till you come back.'*
- 3.6 **Any steps that can reasonably be taken to reduce the anxiety of a child 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.

- 3.7 **Facilitate a pre-trial visit, including a practice with live link** because children need to properly understand the court process and what is expected in terms of their communication. A pre-court familiarisation visit is essential (Wheatcroft, 2013). Here children 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/supporter and their caregiver will be whilst they are providing testimony ([Achieving Best Evidence](#), Ministry of Justice, 2011). A trained person can also help children understand their witness role using the Young Witness Pack booklets or resources at [youandco.org.uk](http://youandco.org.uk). This can be an intermediary or an individual from Witness Support if they are confident with very young children.

- 3.8** 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 pre-trial 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.

- 3.9** 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). The intermediary can assist with court familiarisation.
- 3.10** 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 a 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 who is trusted by the child; ideally, it should be the person preparing the child or for court. Others may be appropriate ([Achieving Best Evidence](#), Ministry of Justice (2011), section 5.34, appendix L.2.1) and need not be an usher or

court official ([Criminal Practice Directions \(CPD\) 2015 Evidence 18B.2](#): Witnesses giving evidence by live link).

#### 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'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.

### 3.11 Plan memory refreshing carefully including when how and where because

- The child 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 or nursery), 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 in words or actions ([CPD 2015 Evidence 18C: Visually Recorded Interviews: Memory refreshing and watching at a different time from the jury](#)).
- Young children 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 (Judicial College, 2012a, [Bench Checklist: Young witness cases](#)).

#### GOOD PRACTICE EXAMPLE

A four-year-old was filmed viewing his original police interview. While watching, he extended his account, adding new information. On this basis additional charges were laid.

**3.12 Introduce yourself to establish rapport before questioning starts** because although very young children may not grasp completely the gravity of the situation they may still find everything very unfamiliar and unsettling. Spending time with the child will also help you to build an understanding of the child's communication techniques before you begin questioning.

**3.13** Many children are taught not to speak to strangers and may not understand why they should answer questions from someone that on a TV screen they have not met. It is also 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 young children prefer that wigs and gowns be removed, but others prefer them to be worn.

- 3.14** 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.

- 3.15** 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))*

- 3.16** **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.

- 3.17** 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 okay 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 the child (Marchant, 2013). Rules may include:

- ‘*Tell the truth*’ – explaining in language familiar to the child, 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’.*

**3.18 Be aware of the impact of stress on communication** because children who are feeling stressed may function at a lower level making it harder for them to remember accurately and think clearly (Almerigogna et al, 2007). 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.

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

**3.20** 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). Further information about the presentation and impact of trauma can be found in Toolkit 18 Working with traumatised witnesses, defendants and parties.

#### **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'.

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

- Some children 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 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 supporting the individual in the live link room should have an agreed way to alert the court about this. If this person is an intermediary then this would be covered in the ground rules hearing.

Some young children's communication is significantly impaired across live link. Sometimes this can be quickly resolved.

#### **GOOD PRACTICE EXAMPLE**

A four-year-old practised over the live link. Questions that prompted him to point and gesture were included so that he realised he could see and be seen.

**3.22** 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, where children's communication, attention or behaviour are better in face-to-face contact.

**3.23 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 young children need everything to go more slowly, some need extra thinking time to process information before answering a question, others need quite a brisk pace between their answer and the next question or they will lose attention or no longer connect the next question with the previous answer. Adjust your pace in line with the child's responses.

**3.24** Many young children communicate best in short bursts.

#### **GOOD PRACTICE EXAMPLE**

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

**3.25** Be prepared to pause during questioning if the child moves out of range of the live link camera. 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.

### **3.26 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.
- 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 children 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 may become non-responsive or repeat '*I don't know*' even if they know the answer.
- Using the child or young person's preferred name at the start of questions can help them to focus and attend.

### **3.27 Be alert to possible miscommunication** because minor miscommunications can escalate quickly, and can create other difficulties with stress and attention span 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.
- Most young children will not recognise when difficulties occur.
- Monitor non-verbal clues such as puzzled or frustrated looks, knitted eyebrows, downcast eyes and long pauses.
- Young children 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 young children to say they do not understand.

### 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'.

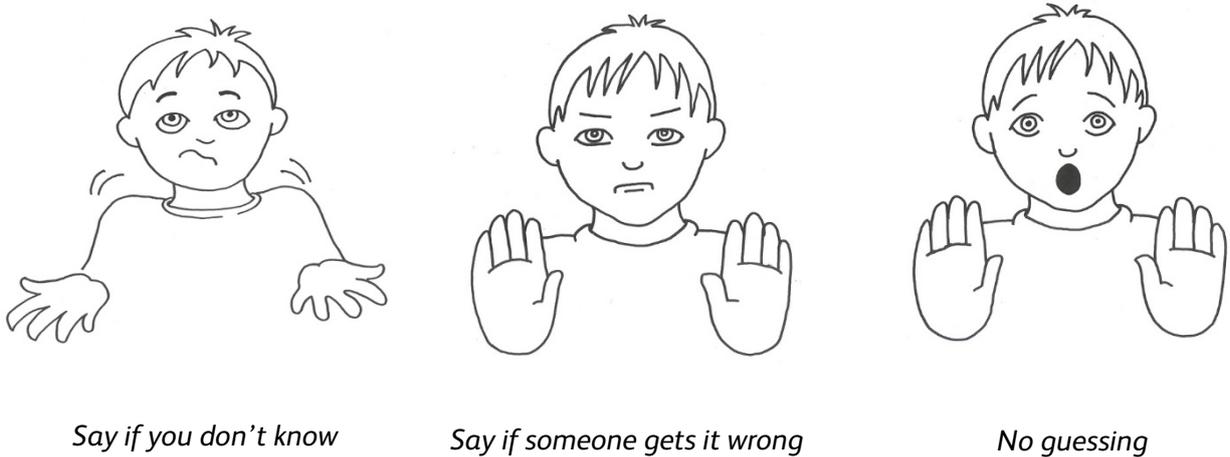


Figure 1. Rule cards with symbols ([Triangle](#))

### 3.28 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.

3.29 See [R v Cokesix 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.

---

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

- 4.1** The most significant factor in effective communication with a young child is the questioner's ability to adapt and respond to the child. 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).
- 4.2** 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 the abandoning of pre-planned questions. An intermediary can provide recommendations for how to question the child based on the child's 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](#)).
- 4.3** **Plan questions in topics and be clear about changes of topic** because this helps the child make sense of the process and allows transition time to focus on the next subject. Signpost the subject and explain when the subject is about to be changed.
- Signpost the subject and explain when the subject is about to be changed.
  - 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.

### 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.

**4.4 Write out draft questions in advance** because this will help to identify potential problems in advance and minimise intermediary interventions during questioning. 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.’*

**4.5 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 the questions are asked consecutively or interspersed with others. Children’s experience from school is that, if the teacher repeats the question, their first answer was wrong or unsatisfactory.
- 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).

**4.6 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 (a six-year-old asked a barrister during a pause in questioning *‘What, are you having a think?’*).
- There are particular issues with eye gaze for young children. When asking questions look directly at the person or, if using live link, look straight at the camera, not at papers. Most adults look away or close their eyes to concentrate and remember information. Gaze aversion when thinking or speaking is a skill that develops with age (Doherty-Sneddon, 2003). Young children may need adult help to avert their gaze during cross-examination. It can be helpful if the advocate looks away after asking a question. Calming, quiet things to fiddle with can help some children to avert their gaze while thinking (for others, they may be distracting).

**4.7 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?'*

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

- Young children need you to use simple words with which they are familiar.
- 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?'*

**4.9 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 (e.g. a three-year-old, in response to *'I am going to run through a few things'* began to run around the live link room).
- 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?'*

- Use of numbers does not mean that they are understood. For example, the ability to count does not mean that a child 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.

**4.10 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. Young children 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.’*

**4.11 Take care with questions that suggest 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.

**4.12 Carefully plan questions about intimate touching or sexual acts**, because it is inappropriate to ask children 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](#).

**4.13 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. Children 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 child keep track of the information you are referring to.

**4.14** Using the child's preferred name can also help keep them focused. Identify relevant adults (e.g. the police officer) by the name known to the child rather than by professional role.

**4.15** **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.

- Children begin to use words relating to time (e.g. 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?'*

A: 'No.'

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

A: 'Yes' (asked of a six-year old). Better alternatives include: *'What were you wearing?'*

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. Children learn that ‘how many’ questions seek a number response well before they can reliably estimate or count. (e.g. ‘*It happened 1000 times*’) can simply mean ‘lots of times’. Instead of ‘*How many?*’, try ‘*One time or more than one time?*’ using hand gestures.
- Some children have limited ability to process ‘when’ questions. A question about when something happened could be answered ‘yesterday’, meaning any time in the past. Such questions should be linked to familiar knowledge or concrete events such as: ‘*Was it light or dark or don’t you know?*’, or ‘*Was it a nursery day?*’, or holidays, birthdays, home routines (e.g. meal times) or what was on TV. Even very young children can do this.
- 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 *Peppa Pig*).
- 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.
- Young children often reverse ‘why’ and ‘because’, e.g. ‘*I fell over that’s why I was running.*’
- Under-fives often confuse words such as inside/outside/on/under/behind/above/below/beside. These are often the subject of mistakes. They can usually respond to a request to place an object ‘in’ or ‘under’ before they can reliably describe where an object is or was.

**4.16 Make sure the structure of questions is developmentally appropriate – keep questions short and the structure simple** because in order to answer accurately, the child needs to be able to remember and process the whole question and young children’s working memory is still developing.

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?*’).

### 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.

**4.17 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 child 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.

**4.18 Ask all questions about past events in the past tense** because the use of the present tense is likely to cause confusion or distress.

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.'*

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?'*

**4.19 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 a child to understand, e.g. *'It was not dark yet?'* (asked of a 4-year-old), *'Did Dad not like you watching TV?'* (asked of a seven-year-old).

**4.20 Be careful about questions in the form of statements** because these may not be understood as requiring a response.

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).

**4.21 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, e.g. 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?’*

**4.22 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 a young 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 child 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

- 4.23** If yes/no questions are the only option (because a child 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, 1992). 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'*.
- 4.24** **Be careful when asking forced choice (closed) questions** because these create significant opportunities for error as the correct alternative may be missing. The child/young person may assume that one of the alternatives must be correct, for example, *'Was the shower hot or cold?'* 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?'*).
- 4.25** **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, e.g. *'Do you remember telling Mummy your bottom was sore?'* If the child answers *'No'* this could mean *'No, I don't remember'* or *'No, my bottom wasn't sore'* or *'Yes, I remember telling Mummy but no my bottom wasn't sore.'*

---

## 5. RECEPTIVE COMMUNICATION: MAKING SURE YOU UNDERSTAND

- 5.1 Make sure you and the jury can see and hear the child clearly** because almost all young children 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.
- 5.2 Attend to gestures and actions as well as words** because children may be more competent to demonstrate what happened, rather than just explain in words (*Achieving Best Evidence*, section 3.107). Showing and telling can be an important part of communication. If they realise 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.'*
- 5.3 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.
- 5.4** Young 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 child and be more familiar with their communication style. Listen to what the child says and try to understand what the child means. A young child often uses words before fully understanding them.
- 5.5 Ask the child to repeat what they said if you didn't hear properly, but say why** because young children may change their answer if asked to repeat without knowing why. Children sometimes speak very quietly, especially when feeling anxious or fearful. Microphones can be relocated closer or higher, or the child seated lower. However, if you do not hear what the child has said then 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.
- 5.6 If you need to check back on what was said, use the child'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 that may not be accurate. This may affect the accuracy of their subsequent account of events.

**5.7 Gain some familiarity with the child’s communication aids** because this will enable two-way communication during questioning.

- 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](#));
- There are risks and pitfalls as well as advantages (Ministry of Justices, 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).

**5.8 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** (e.g. [‘How it is: an image vocabulary for children’](#) (2002) Triangle; [Living your Life](#), Brook; Plotnikoff and Woolfson (2009), Annex B, ‘Good practice guidance in managing young witness cases and planning to question children’). The child has to be able to use a body map correctly for demonstrative purposes.

---

## ACKNOWLEDGEMENTS AND REFERENCES

The development of this toolkit was funded by The Advocacy Training Council and the Legal Education Foundation.

### Author:

- Ruth Marchant; Intermediary, Triangle

### Contributors:

- Dr Kimberley Collins Intermediary, Triangle
- HHJ Heather Norton
- Gabby Henty, Barrister
- Vanessa Hurst Intermediary, Triangle
- Rowan Jenkins, Barrister
- Jennie Knight, Barrister
- HHJ Christine Laing
- Dr Michelle Mattison Intermediary, Triangle
- Carly McAuley Intermediary, Triangle
- Moira Pook, Intermediary
- HHJ Janet Waddicor
- *A primary source for this toolkit is R Marchant (2013) 'How young is too young? The evidence of children under five in the English criminal justice system', Child Abuse Review, Wiley Online Library*

### This toolkit summarises key points from:

- *Advocacy Training Council Raising the Bar: The handling of vulnerable witnesses, victims and defendants at court (2011) part 5*
- *Almerigogna, J, Ost, J, Bull, R and Akehurst, L, 'A state of high anxiety: how non-supportive interviewers can increase the suggestibility of child witnesses' (2007)*  
*21 Applied Cognitive Psychology 963–974*
- *Brennan, M and Brennan, K, Strange Language: child victims under cross-examination (1989)*  
*Criminology Research Council, Australia*
- *Brubacher, S et al, 'Children's ability to recall unique aspects of one occurrence of a repeated event' (2011)*  
*25(3) Applied Cognitive Psychology 351–358*

- *Brubacher, S et al, 'Retrieval of episodic versus generic information: does the order of recall affect the amount and accuracy of details reported by children about repeated events?' (2012)*  
48(1) *Developmental Psychology* 111–122, American Psychological Association
- *Chomsky, C, 'Creativity and innovation in child language' 189(3) (2008/09)*  
*Journal of Education* 37-47
- *Chomsky, C "'Ask" and "tell" revisited: A reply to Warden' (1982)*  
9(3) *Journal of Child Language* 667-678
- *Criminal Procedure Rules and Practice Directions 2015*
- *Crown Prosecution Service, Safeguarding Children as Victims and Witnesses (2012)*
- *Crystal, D, Listen to your Child: A parent's guide to children's language (1989)*  
Penguin Department for Education (2013) Working Together to Safeguard Children
- *Doherty-Sneddon, G, Children's Unspoken Language (2003)*  
Jessica Kingsley
- *Doherty-Sneddon, G and McAuley, S, 'Influence of video-mediation on adult-child interviews: implications for the use of the live link with child witnesses' (2000)*  
14 *Applied Cognitive Psychology* 379–392
- *Hanna, K et al, Child Witnesses in the New Zealand Criminal Courts: A review of practice and implications for policy (2010)*
- *Institute of Public Policy, AUT University and New Zealand Law Foundation*
- *Hershkowitz, I, Lamb, M E, Orbach, Y and Horowitz, D, 'The development of communicative and narrative skills among preschoolers: lessons from forensic interviews about child abuse' (2011)*  
83(2) *Child Development* 611–622 doi/10.1111/j.1467-8624.2011.01704.x/full
- *Judicial College, Bench Checklist: Young witness cases (2012)*
- *Judicial College, Fairness in Courts and Tribunals (2012)*
- *Lamb, M E et al, Children's Testimony: A handbook of psychological research and forensic practice (2011)*  
Wiley Blackwell
- *Lamb, M E, Hershkowitz, I, Orbach, Y and Esplin, P W, Tell Me What Happened: Structured investigative interviews of child victims and witnesses (2008)*  
John Wiley & Sons
- *Lyon, T D, 'Applying suggestibility research to the real world: the case of repeated questions' (2002)*  
65 *Law and Contemporary Problems* 97–126
- *Lyon, T D, 'Investigative interviewing of the child' in D N Duquette and A M Haralambie (eds), Child Welfare Law and Practice (2010)*  
2nd edn, Bradford, Denver CO

- **Marchant, R, 'Show me what happened: children's unspoken communication' (2010)**  
paper presented at International Investigate Interviewing Research Group Conference Stavern, Norway
- **Marchant, R, How young is too young? The evidence of children under five in the English criminal justice system' (2013) Child Abuse Review**  
Wiley Online Library –his article describes the work of the organisation Triangle to ensure children's evidence and views are heard.
- **Marchant, R and Page, M, Bridging the Gap: Child protection work with children with multiple disabilities (1993) NSPCC**
- **Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011)**
- **Nathanson, R and Saywitz, K J, 'The effects of the courtroom context on children's memory and anxiety' (2003)**  
31 Journal of Psychiatry and Law 67–98
- **Plotnikoff, J and Woolfson, R, Intermediaries in Action (2011)**  
Ministry of Justice and NSPCC
- **Powell, M B, Mattison, M L and McVilly, K, 'Guidelines for interviewing people with communication impairments' (2013)**  
67(2) Australian Police Journal 58-63
- **Saywitz, K, 'Developmental underpinnings of children's testimony' (2002)**  
in H Westcott et al (eds), Children's testimony: a handbook of psychological research and forensic practice, Wiley Blackwell
- **Spencer, J and Lamb, M (eds), Children and Cross-examination: Time to change the rules? (2012) Hart**
- **Triangle, 'How it is: an image vocabulary for children' (2002)**
- **Van Der Kolk, B, The Body Keeps the Score: Brain, mind and body in the healing of trauma (2014) Penguin, New York**
- **Walker, A G, Handbook on Questioning Children: A linguistic perspective (1999)**  
ABA Center on Children and the Law
- **Wheatcroft, J M, 'Witness evidence in court: the impact of witness preparation and cross examination on witness testimony accuracy and confidence' (2013)**  
in 32nd Conference of the ASTC, The M Resort
- **Wurtzel, D, 'Children and cross-examination: time to change the rules?' (November 2012)**  
Law in Action, Counsel Magazine
- **Zajac, R et al, 'Disorder in the courtroom? Child witnesses under cross-examination' (2012)**  
32 Developmental Review 3, 181–204

The original version of this toolkit (dated 21 October 2013) can be found in the [archive section](#) of The Advocate's Gateway website.

**The Advocate's Gateway**

9 Gray's Inn Square,  
London  
WC1R 5JD

T: 020 7822 0763  
E: [info@icca.ac.uk](mailto:info@icca.ac.uk)

The Council of the Inns of Court. Limited by Guarantee  
Company Number: 8804708  
Charity Number: 1155640

Registered Office:  
9 Gray's Inn Square, London WC1R 5JD