TOOLKIT 12

PLANNING TO QUESTION SOMEONE WITH A SUSPECTED (OR DIAGNOSED) MENTAL HEALTH DISORDER

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The Advocate's Gateway

CONTENTS

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 are specialist skills.

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.

1. INTRODUCTION

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

A. Areas of difficulty affecting communication because of a diagnosed or potential mental health disorder;

B. The framing of questions; and

C. Case management.

The term 'mental disorder' covers a wide spectrum of mental health conditions but, for the purposes of this toolkit, learning disabilities are excluded from consideration since a separate toolkit already exists which provides guidance for dealing with such vulnerability (**Toolkit 4**).

Similarly, there is a toolkit which gives guidance in relation to screening individuals for various vulnerabilities (**Toolkit 10**) which should be read in conjunction with this toolkit, as well as a toolkit dealing with a person giving evidence by means of remote video link (**Toolkit 9**).

There are also toolkits for ground rules hearings for people with vulnerabilities such as mental disorders (**Toolkit 1**) and a toolkit dealing with case management generally (**Toolkit 1a**).

Many people with mental health disorders may also have co-morbidities or 'dual diagnosis', as explained later in this toolkit, and so reference may also need to be had to other toolkits.

Information about an individual's specific capabilities or condition is essential and, if not supplied, should be requested. This toolkit contains **general** guidance and is not a replacement for an intermediary's or psychiatrist's assessment, or a report made by liaison and diversion services, which would provide advice specific to the individual.

The involvement of a Registered Intermediary should be considered, in jurisdictions where such a scheme exists, if a witness is unlikely to be able to recognise when they do not understand something, or to tell the questioner that they have not understood or have some other communication difficulty; this is necessary even where no intermediary was used at a previous investigative interview stage because giving evidence in court is qualitatively different from the experience of an investigative interview. An intermediary's report can advise about the most effective means of communication tailored to the specific individual's needs and the vocabulary required by the particular case.

2. GENERAL PRINCIPLES

'Mental Disorder' is defined in England and Wales by the Mental Health Act 1983 (section 1, as amended by the 2007 Act) as 'any disorder or disability of the mind'.

Population research consistently finds that one in three/four people are likely to experience some form of mental health issue during their lifetime. There is a similar definition in Code C of the Police and Criminal Evidence Act (PACE) 1984 Codes of Practice of England and Wales with 'mentally vulnerable' meaning 'any detainee who because of their mental state or capacity may not understand the significance of what is said, of questions or of their replies'.

Clinical diagnoses of mental disorders are made in the UK mainly by using the International Classification of Diseases (ICD). Version 11 (ICD11) of this was published in January 2022 but is not yet in general use so diagnoses are still referred to by ICD10 terms. Some clinicians also use the Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association 2013 (DSM-5).

Someone with a suspected (or diagnosed) mental disorder would fall within the definition of a 'vulnerable witness' for cases within the criminal courts in England and Wales under section 16(1)(b) Youth Justice and Criminal Evidence Act 1999 as the quality of their evidence is likely to be diminished because they suffer from a mental disorder within the meaning of the Mental Health Act 1983. When determining whether an individual's quality of evidence is likely to be "diminished", the England and Wales courts must consider its likely 'completeness, coherence and accuracy' (section 16(5)).

A witness in criminal proceedings is presumed to be **competent**, whatever their age, according to section 53 of the YJCEA 1999 unless 'it appears to the court that he is not a person who is able to—

(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.'

Any issue regarding the competence of a witness should be determined at the beginning of a trial. Competence may be raised by a party to the proceedings or by the court itself.

In criminal trials a defendant's **fitness to plead** may also be determined.

Definitions

Dual diagnosis is a term used where someone is suffering from a mental health disorder as well as a substance abuse problem. Substance misuse includes alcohol, drugs, and inappropriate use of prescribed medications. Some substances (e.g. cannabis) can cause mental disorders and this, and others, may exacerbate existing mental disorders. Withdrawal and dependency may affect someone's ability at court. Self-medication, with more than one type of substance, can provide a variety of attributes and problems. These problems can be extremely common amongst people who offend.

Co-morbidity exists when the person has more than one co-existing mental health disorder. This can, for instance, be a personality disorder as well as a disorder such as bipolar affective disorder or schizophrenia. The term co-morbid can also be used when a person has a mental health disorder as well as having a learning disability, learning difficulty, or a neurodevelopmental disorder e.g. autism spectrum. Co-morbidity is common amongst people who are involved within the criminal justice system. A person may be more prepared to disclose that they have a learning disability rather than a mental disorder. Should an advocate be concerned that a person may have a learning disability, **Toolkit 4** offers further guidance. It is important that individual assessment is carried out at the earliest possible opportunity to lessen the risk of misdiagnosis and inappropriate services being used.

3. EXPERT ASSESSMENTS AND EVIDENCE

If there are concerns about a person's **mental capacity** (i.e. a person's ability to make their own decisions), or their credibility or reliability as a witness, an advocate may seek the opinion of an expert witness prior to the commencement of proceedings.

In England and Wales, an advocate may request proceedings be adjourned for a medical report of the person to be obtained if there are concerns relating to their mental condition.

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Medical records can also be disputed, and one expert's opinion may vary greatly to another especially in relation to the potential specific diagnosis of mental disorder e.g. distinguishing between schizophrenia or schizoaffective disorder. Medical information may be challenged and information that is available about a person may also be used as rebuttal in evidence in proceedings or to support an application.

Potential questions for an expert assessment

It is important for specific questions to be asked of the expert and for a person's medical records to be analysed robustly, for example:

a) Does the individual have symptoms indicative of a potential mental disorder, co-morbidity or dual diagnosis?

b) If so, how might the nature or extent of the person's mental health condition affect their ability to give evidence, particularly with reference to their:

   i) response to questioning;

   ii) concentration and attention;

   iii) ability to communicate and

   iv) interaction with other people.

However, it should be noted that simply because it is established a person is suffering from a mental disorder does not mean that they are unable to participate in a hearing, or that their condition automatically undermines their ability to give reliable and/or credible evidence.

4. PRACTICAL ISSUES

If a defendant is found to be fit to plead and if they or the witness with mental health issues are deemed competent to give evidence then the following practical issues ought to be considered:

Psychiatric medication has a number of potential side-effects, all of which may impact on the person's ability to communicate.

These may include:

- blurred vision;
- dizziness;
- drowsiness;
- loss of mental sharpness;
- memory problems;
- muscle stiffness
- poor concentration;
- rapid heartbeat;
- shaking or muscle spasms;
- sleep disturbance;
- slowed thinking;
- slurred speech;
- abnormal movement of jaw, lips and tongue.
- excessive salivation

Mental distress can fluctuate – people may have periods where they experience no symptoms at all or may have particularly difficult days or times of day which, if possible, ought to be avoided. Impromptu and frequent breaks may also be needed to help calm a person's anxieties or lower their stress levels. If a person is drowsy, due to medication, this can be more apparent at certain times of day depending on when they take the medication, and breaks may be needed. The most sedative medications are prescribed to be taken at night, so people may take some time in the morning to appear alert.

Assessment by an intermediary may help ensure that the most effective means of communication is developed, tailored to the individual's needs and the vocabulary required by the case, but their role is not to deal with issues of competency or capacity to give evidence (See Toolkit 12).

Communication is closely linked to emotional containment. An intermediary may be able to assess the need for the use of certain strategies which assist with emotional containment. Without this underpinning, effective communication and participation can easily break down.

Intermediaries may recommend the use of some form of stress ball or fidget object. Many people find 'doodling' a useful method of containment. Some individuals may need to rock or keep moving or make repetitive hand movements to reduce stress so they are able to think and remain present during the process of giving evidence. Any such behaviours may need to be explained to decision makers to prevent potential misunderstandings.

In cases of dissociation (i.e. feeling disconnected from themselves and the world around them) and/or high anxiety, it may be necessary to ascertain from the person beforehand whether there are specific strategies which may help avoid fragmentation of their personality. Likewise, when a person is distressed and uncontained, it is important to find out what can help them to reintegrate and return to calmness.

Some people need certain sensory stimuli (such as aromas e.g. lavender, a touch on the arm/shoulder, or calling their name) to help them return to a contained level so that communication can take place. It is vital these strategies are assessed and used, if appropriate, as being touched unexpectedly, for example, may instead heighten distress.

Breathing techniques are often helpful in managing elevated levels of stress. It may be necessary to have breaks for the person to be able to use these.

Pre-trial visits and receiving information in an 'easy-read' format is likely to help to reduce a person's anxiety and put them more at ease. Do check though that an easy-read format is appropriate before offering it – some people with mental disorders may be offended if an assumption is made that they have a learning difficulty when they do not.

Difficulty with concentration is a common symptom of many mental health conditions. However, there is a difference between finding it difficult to concentrate and being unable to concentrate, and it should not be assumed that difficulties concentrating preclude a person's ability to give evidence. If someone is experiencing obsessive thoughts or hallucinations, then it can be very challenging to concentrate on anything beyond these experiences. Other symptoms such as a lack of energy, or feelings of despair, can make it difficult for someone to give their full attention to situations and may also have an impact on the clarity or tone of their responses.

Consideration should be given in advance of any trial to what assistance can be made available to the witness, including from the Witness Service. Any special measures should be applied for in advance, not least so that the witness is able to indicate, in advance, their preference and so that they know what the Judge has decided will be the manner in which they give their evidence. Different special measures may have differing benefits:

- Screens can help people to focus and concentrate on cross-examination, particularly where they may experience obsessive thoughts or hallucinations.
- Removing wigs and gowns (worn in the Crown Court in England and Wales) may reduce the risk of a person becoming anxious, distressed, or experiencing feelings of paranoia or panic, particularly where people have difficulties with authority figures or unfamiliar procedures and environments.

Although not a special measure, consideration should be given to the vetting of questions in advance, bearing in mind that the witness may experience disordered, obsessive, or intrusive thoughts which create a particular challenge when trying to follow the thread of questioning. The judge would check written questions in advance, as would any intermediary that has been appointed. These matters should be aired at a Ground Rules hearing, together with any other measures such as the use of picture symbols.

Triggers

Taking steps to minimise common **triggers** that can exacerbate a person's mental distress is likely to also be helpful. Some are triggers as they remind people who have been detained in hospital, perhaps with police assistance, of an acute hospital environment. Others are triggers as they require the person to remain in a stressful situation for a long period.

Triggers include:

- high levels of noise;
- unexpected noise, such as alarms;
- interruptions;
- room environment and unfamiliar surroundings;
- too many people or conversations;
- over-stimulation or sensory overload;
- being given lots of (new) information;
- being asked to concentrate – including reading, writing and talking (especially for long periods);
- time pressures, demands and deadlines;
- long sessions (interviews, meetings and court sittings);
- unfamiliar dress and unknown rules;
- presence of technology such as closed-circuit television that may provoke mistrust or paranoia and which may therefore indicate that requesting live link as a special measure may not be appropriate;
- change of arrangements such as the location of the court or personnel;
- authority figures and official procedures;
- questioning or feeling 'interrogated';
- feeling trapped;
- feelings of not being listened to or believed;
- loss of control or choices, feeling excluded from decision-making;
- feeling of being pushed, rushed or hushed;
- shocks and sudden changes;
- having personal or psychiatric history made public.

People with mental distress have also told the charity Mind that the following reasonable adjustments may be helpful, in addition to special measures, although what might be appropriate in any particular case would always need to be checked with the individual themselves:

- interviews and/or hearings taking place in rooms with natural light;
- shorter sittings and/or the opportunity to take regular comfort breaks;
- staying seated while giving evidence and during cross-examination;
- permission to get up and walk around if this reduces discomfort, as some medication can cause restlessness;
- allowing a supporter or carer to accompany the person at all times - including when giving evidence;
- ensuring witnesses are comfortable with court procedures and environment, such as explaining why there are closed circuit television cameras present;
- asking police officers to remove hats and helmets to reduce distress caused by unfamiliarity or authority figures (as with wigs and gowns);
- requesting the witness be spoken with directly;
- displaying patience and sensitivity when explanation is necessary, or distress becomes acute and
- considering whether the court should go in to private session, if not already, where sensitive medical information is raised for the first time and its relevance needs to be determined.

5. APPROPRIATE QUESTIONING STYLES and STRATEGIES

There is still a great deal of negative stigma surrounding people with mental health conditions and a person's mental state is going to have an enormous impact upon their ability to communicate. Accordingly, be respectful to the person with the mental disorder because if they feel respected and heard they are more likely to return respect and consider what is being said to them. Empathy and understanding to build rapport are therefore key from the outset.

Acknowledge how the person is feeling but rather than labelling the emotion, consider providing supportive statements instead, e.g. 'It can be really stressful to be in court.'

Feeling that they have been heard and of being appreciated, understood, accepted, and valued can help a person's cognitive functioning return to normal.

Seek to avoid the potential triggers of mental distress listed above.

Apply the **ABC** of communication:

> **A**void confrontation,
>
> **B**e practical,
>
> **C**larify the person's feelings and offer comfort.

When dealing with someone who has been diagnosed as suffering with hallucinations and/or delusions (whether visual or auditory) never seek to suggest that you experience their reality too. Be aware that the hallucinations or the delusions the person experiences are their reality. The person may be accustomed to others not experiencing or ignoring their reality and you are very unlikely to be able to talk them out of their reality. They may experience these thoughts as real and be motivated by them.

Never appear to lie to them as it could break any rapport you might want to establish, especially if they are suffering with paranoia.

If needed, set limits with the person as you might others. For example: 'I only have five topics to ask you about.'

Also, if you do not understand what they have said, say so, and ask them to repeat what they have said. You could also repeat back to them what they have told you, say that you don't quite understand, and ask them to explain it further. If they can't explain, you have the option of making suggestions on what they might mean by the statement and see if they agree. This can help but the person may be suggestible.

A card with a symbol/words on indicating 'Don't understand' can also be used for the vulnerable person to point to if words escape them. Further guidance on the use of communication aids can be found in other toolkits (e.g. **Toolkit 14**).

Specific Best Practice Guidance

1. Establish and maintain eye contact in a natural way but be careful of staring at the person for too long or equally of not looking at them at all. Generally, people may be able to inform an intermediary, if instructed, during their assessment, how they feel about eye contact and what helps them best. Some people need to look away to think whilst others do not make eye contact due to cultural factors.

2. Allow plenty of time for their response, repeating questions if necessary, and rephrase them if the person is confused or distressed. Most people with mental disorders are used to others taking notes. It is a useful way to check that you have understood them 'Can I just check what you have told me....' and to show you are taking their statements seriously. If the person is unable to tolerate being questioned e.g. they can't sit down or get up to leave - try the '5 questions tip'. Hold up your hand, palm facing you, say you have 5 questions for them, ask them quickly and, as they answer, tick the questions off on your fingers. This may help the person tolerate five questions and you can then suggest a break before five more questions. However, some people may relax into answering, after the five questions, and be able to continue without a break.

3. Use plain language, avoiding jargon and legal terminology.

4. Ask straightforward questions in a logical chronological order such as 'What happened first?', 'What did you do next?', 'What was the last thing you remember?' rather than compound questions like 'After the man ran away, what did you do, did you notice anything?' Some people may have problems with sequential thinking with the additional possibility of intrusive thoughts interrupting them which makes answering unstructured questions much harder. Questions that jump around in time or appear to be unconnected are likely to only exacerbate difficulties if someone is suffering with thought disorder (i.e. a disturbance of the organisation and expression of thought).

5. Ask short, simple questions, one idea at a time. Someone with a mental disorder may have a limited

working memory and therefore be unable to remember all aspects of a multi-part/compound question in order to respond accurately.

6. Where the person with a mental disorder is accompanied by a carer, mental health advocate, or intermediary, address remarks to the person with the mental disorder rather than to the person accompanying them.

7. Repeat names, places and objects using their preferred name at the start of questions (making sure you have found out what the person wants to be called including any title, e.g. Mr, Ms, Mx etc.).

8. People with disordered thinking find it hard to keep a logical order to their ideas and their thoughts and speech may be jumbled and disconnected, giving the impression that they lack credibility. Recounting the experience of events may also reawaken or intensify feelings of fear and distress, and an advocate should be prepared for this possibility during questioning.

9. Visual timelines can be very useful. Consider using a visual timeline or similar device (especially if advised by an intermediary) if the person is likely to have difficulty in responding to questions about times, dates, or separate events or locations.

10. Drawing can be a particularly useful communication tool. Likewise the use of figurines.

11. Indicate, when questioning, when one topic is coming to an end. Signpost the next subject to be asked about. This gives the person transition time to focus on the next subject. It can also be helpful to schedule breaks at a change of subject.

12. Check directly on the person's understanding, using simple words. It is good practice to ask someone to say when they do not understand a question, but do not assume that they will be able to do so. Some people with a mental disorder may have difficulty recognising when they do not understand something and, even if they do realise this, are likely to be reluctant to say so. Never simply ask 'Do you understand?' as the person may invariably state that they do. It is helpful to ask them to repeat, in their own words, what they have understood.

13. Be flexible.

GOOD PRACTICE EXAMPLE

A young woman with mental health problems, language disorder and autism was allowed to give her evidence with her back to the video screen because she couldn't bear any sort of direct communication if she could actually see the person. She was supported by a Registered Intermediary who repeated at a louder volume her whispered answers. Some of these answers were quite aggressive, insulting, and dismissive and the young woman also ran out of the room many times. However, with patience, understanding and support she was able to give clear, lengthy evidence.

Some question types carry a substantial risk of being misunderstood or producing unreliable answers including:

- `tag' questions which make a statement then add a short question inviting confirmation – these are powerfully suggestive and linguistically complex (Toolkit 6 goes into this in more detail);
- other forms of assertion, including questions in the form of statements, which may not be understood as questions;
- forced choice questions which create opportunities for error when the correct alternative may be missing;
- 'Do you remember...?' questions requiring complex processing, particularly when the person is asked, not about the event, but about what they told someone else;
- questions containing one or more negatives (these can be actual negatives, such as 'not', or implicit, such as 'without') make it harder to decipher the underlying meaning. Questions containing negatives increase the complexity of questions and the risk of unreliable responses.
- questions that offer suggestibility. This is where a person accepts messages from formal questioning which effects their subsequent behaviour such as: (a) compliance - which occurs due to the person being eager to please and to avoid conflict and (b) acquiescence - when a person simply answers 'yes' to

all questions put to them, regardless of what is asked.

Whilst repetition of questions may be needed in instances where the person responding is confused the simple repetition of questions (consecutively or interspersed with others) by one or more authority figures (investigators, advocates or judges) does risk reducing the overall accuracy of the responses of some people with a mental disorder. The person may conclude that the first answer they gave was wrong or unsatisfactory if someone in authority repeats the question, or it may prompt anger, irritation, or some other form of mental distress.

Feelings of anxiety and low self-esteem may be exacerbated by questioning and individuals may become agitated or distressed finding it difficult to speak in public. Anxious witnesses may also be eager to please and/or keen for the experience to be over, and therefore may give quick answers that they believe the questioner wishes to hear. It may be difficult for people suffering from a mental disorder to remain focused and give a measured response if they are experiencing some of the symptoms associated with schizophrenia and psychosis, such as hearing voices – this can be very distracting, like listening to two conversations at once.

Because an individual may be struggling to comprehend information they have been given, they are likely to begin to feel more confused, which in turn increases anxiety levels. This increased anxiety interferes with the person's ability to comprehend, to think rationally, and to actively engage in deductive reasoning.

6. ISSUES WITH CROSS-EXAMINATION

It is important to keep the questioning in cross examination simple with basic language, concise questions, and questions appropriately focussed. The techniques often used by advocates to lead a witness in cross-examination in common law jurisdictions are unlikely to be effective when questioning someone with a mental health disorder. This is because often those with a mental health disorder are prone to comply and acquiesce with suggestions which may possibly mislead the court and threaten both the interests of justice and the fairness of the proceedings.

POOR PRACTICE EXAMPLE

'You and Susan went to the park, you played on the swings, you drank some vodka, and nothing else happened did it'?

An intermediary or Registered Intermediary (if used) can comment on the proposed questioning ahead of any proceedings. This ensures that after an initial assessment is made, the approach to questioning can be tailored to the individual. An advocate should be aware of this process and be ready to discuss with their opponent and the decision maker any concerns they may have relating to the type of proceedings and the questions that will be required to be put to the witness.

Advocates should avoid using 'court room tactics' with witnesses with a mental disorder such as: smirking, rolling of their eyes, making gestures that may intimidate or confuse a witness, being boisterous, or officious. Such strategies may only confuse or intimidate the witness.

Questions should not be asked that may indicate approval or disapproval of an answer due to the risk of suggestibility as identified earlier.

POOR PRACTICE EXAMPLE

'I think that would be wrong, what do you think'?

An advocate should observe and respond to any indicators of distress displayed by the witness throughout cross examination. Things such as: requesting a short adjournment, reviewing, and modifying a style of questioning and approaching the subject matter of the questions in a different order or manner are all likely to lead to a more efficient cross examination of the witness.

7. QUESTIONNING CHECKLIST

- Tailor questions to the individual's needs and abilities.
- Demonstrate empathy and understanding, especially if the person seems particularly angry or agitated.
- Use a calm and reassuring tone.
- Use responsive body language.
- Avoid constant direct eye contact which can be threatening.
- Signpost the subject and explain when the subject is about to be changed.
- Ask short, simple questions, one idea at a time.
- Whilst the use of 'open' questions may be appropriate to begin with (e.g. 'Tell me about ...', 'Describe ...') if the individual appears confused then 'closed' questions (i.e. those seeking simply a 'yes' or 'no' response) can be introduced.
- 'Yes/no' or 'Did' questions can then be followed up using a 'wh' question i.e. what/where/when/who. 'How' and 'Why' are complex questions as high levels of language for thought and reasoning is required to answer them. Such questions may also be interpreted as being accusative.
- Use simple words, unambiguous language and avoid figures of speech/idioms such as 'Does that ring a bell?' since these may cause confusion. There is a greater risk of this when the person is giving evidence as when processing under stress, particularly with mental health difficulties, interpretation becomes very literal. In the example given it may cause the listener to envisage 'bells'.
- Speak slowly and allow the person enough thinking time to give a full answer.
- Repeat names, places and objects often. Use these names rather than pronouns such as 'he/she/they'.
- Follow a logical, chronological order. Use a timeline/ symbols/pictures.
- Reflect back information obtained and summarise facts given to demonstrate that you have been listening, e.g. Answer 'I live at 14 Acacia Avenue'; follow-up question 'How long have you lived at 14 Acacia Avenue?'
- Some question types carry a substantial risk of being misunderstood or producing unreliable answers and ideally should be avoided as mentioned earlier. Such problematic question types should be discussed at a ground rules hearing.

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TOOLKIT 4: Planning to Question Someone with a Learning Disability

TOOLKIT 5: Planning to Question Someone with 'Hidden Disabilities'

TOOLKIT 6: Planning to Question a Child or Young Person

TOOLKIT 7: Additional Factors Concerning Children under Seven

TOOLKIT 8: Effective Participation of Young Defendants

TOOLKIT 9: Planning to Question Someone using a Remote Link

TOOLKIT 10: Identifying Vulnerability in Witnesses

TOOLKIT 11: Planning to Question Someone who is Deaf

TOOLKIT 12: Planning to Question Someone with a Suspected (or Diagnosed) Mental health Disorder

TOOLKIT 13: Vulnerable Witnesses in the Family Courts

TOOLKIT 14: Using Communication Aids

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TOOLKIT 16: Intermediaries: Step by Step

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