

The Advocate's Gateway

**Planning to question someone with
an autism spectrum disorder
including Asperger syndrome**

Toolkit 3

1 December 2016

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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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Introduction

This toolkit aims to provide a practical guide for advocates about questioning either a witness or a defendant with autism spectrum disorder (henceforth ‘autism’). The toolkit brings together policy, research and guidance relating to definitions of autism, how autism can affect communication, and what should be done to facilitate someone with autism’s effective participation in the court process. It includes examples of good practice. The Advocate’s Gateway hosts a range of toolkits relating to questioning vulnerable people in court. Many of the approaches recommended in these toolkits are also relevant for people with autism. To avoid duplication, references are made to these toolkits where appropriate. The guidance in this toolkit is not intended to be a replacement for a communication assessment by an intermediary, see Toolkit 16 - Intermediaries: step by step.

1. SUMMARY

- 1.1** No two people with autism will have exactly the same profile of strengths and weaknesses. Sometimes their needs may not be immediately obvious.
- 1.2** Many people with autism are capable of providing high quality evidence if adaptations are made to meet their needs and capitalise on their strengths.
- 1.3** In order for people with autism to communicate effectively, there must be: early identification of their needs; the acquisition of comprehensive background information about the individual; careful consideration given to the communication environment; appropriate preparation of the individual for what is expected during cross-examination and a planned and flexible approach taken during cross-examination.
- 1.4** Some question types carry a high risk of being misunderstood or producing unreliable answers.
- 1.5** Consideration must be given not just to the types of questions asked, but also to the manner of how this is done. Timings of evidence-giving, changes to scheduling and environmental factors (such as busy court buildings) are all likely to affect the overall quality of a person's evidence.
- 1.6** It is possible to 'put your case' to a witness or defendant with autism if it is done in a way that they can understand and respond to accurately.
- 1.7** Information will need to be provided to juries to explain why a person with autism may be behaving and/or communicating in a way that seems unusual and which may affect how they are perceived at court.

2. WHAT IS AUTISM?

2.1 Overview

Autism is a neurological condition that affects how a person ‘communicates with and relates to other people and how they experience the world around them’ (National Autistic Society (NAS) [‘What is autism’](#)). Approximately one in every one hundred people are thought to have autism. Autism can be a ‘hidden’ condition; it may not be immediately obvious that a person has it. Advocates may have to rely on the diagnosis being disclosed to them, but it is also possible that some individuals who display features suggestive of autism may not have received a formal diagnosis yet.

2.2 Diagnosing autism

To receive a diagnosis of autism, a person needs to display two key features:

- a. impairments in social interaction and communication (which may, or may not, include: problems with back-and-forth conversations; difficulties adjusting behaviours so they are appropriate for the context; unusual eye contact and/or body language; a lack of facial expression and/or non-verbal communication).
- b. restricted and repetitive behaviours, interests and activities (which may, or may not, include: an inflexible adherence to routines leading to distress at small changes; extreme sensitivity to sensory features of the environment; repetition of the same sounds/words or actions).

2.3 Subtypes of autism

Until recently, individuals with autism who appeared to be articulate and had an average or above average IQ were referred to as having ‘Asperger syndrome’ or ‘high-functioning autism’. Conversely, those who had limited language skills and also had intellectual disabilities were often referred to as having ‘classic autism’. There has been a move away from these sub-classifications in recent years. This is largely due to DSM-5 (*Diagnostic and Statistical Manual of Mental Disorders*), one of the manuals used to list the diagnostic criteria for autism, removing these sub-classifications and moving towards the umbrella term ‘autism spectrum disorder’.

2.4 The spectrum nature of the condition

Autism is referred to as a spectrum condition because it can impact on people's lives in a wide spectrum of ways. Some people are severely affected in their day-to-day functioning, whereas others are able to maintain independent lives, have successful social relationships and may also excel at study and work (providing they have some degree of support). Importantly, no two people with autism will have exactly the same profile of strengths and weaknesses. They may be exceptionally talented in some areas and yet struggle a great deal in others. Each person's capabilities will differ and their capability on a given day may also depend on the environment that they are in, as well as their levels of anxiety.

2.5 Autism and gender

Autism remains a condition predominantly associated with males, however, there is increasing awareness that this is likely to be due to the under-recognition of autism in females. Statistical studies have proved inconclusive, however, a recent study by the NAS (['Gender and autism'](#)) in 2015 suggests the male–female ratio may be three to one. The presentation of autism in females is thought to be subtly different to how it presents in males, and females with autism may appear more sociable than their male counterparts. It has been suggested that women and girls with autism are better able to engage in social situations because they are likely to observe and copy others in their social skills and/or use of language. Such strategies may mask any difficulties that they have and make them appear to be more able than they actually are.

2.6 Co-occurring conditions

Often, people with autism will have other co-occurring conditions. Autism tends to be the 'primary' diagnosis, which can sometimes lead to other conditions being overlooked and possibly undiagnosed. These conditions may include medical conditions such as epilepsy, intellectual disabilities (see Toolkit 4 - Planning to question someone with a learning disability), psychological conditions such as depression or anxiety (see Toolkit 12 - General principles when questioning witnesses and defendants with mental disorder) and behavioural conditions such as ADHD (see Toolkit 5 - Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)D).

2.7 Ability to give instructions and to give evidence

It is important not to make assumptions about an individual's capabilities based on their 'label'. Just because an individual appears to be articulate and intelligent does not mean that they do not need help and support. Equally, it should not be assumed that individuals who have limited verbal communication and/or intellectual disabilities cannot provide instructions/evidence.

People with autism are capable of providing high quality evidence, particularly if adaptations are made to support them. If questioned appropriately, they can recall past events (Maras et al 2013). In order for people with autism to communicate effectively and to have their communication fully understood by the court, there is a need for:

- early identification of their needs;
- background information obtained about the person from people who know them well, including family members and professionals involved in their care and, ideally, from the person themselves;
- careful planning (for example, to avoid unnecessary last-minute changes);
- consideration given to the environment to ensure it is conducive to effective communication;
- appropriate preparation of the individual, so they understand what will happen and what is expected from them (people with autism often work well within a clear 'rule-based' and structured framework);
- a flexible approach that plans for all known eventualities, given that what works for an individual on one specific day may be ineffective on another day;
- questioning to be adapted from more traditional forms of cross-examination;
- information provided to juries to explain why a person with autism may be behaving and/or communicating in a way that seems unusual and which may affect how they are perceived at court. This should be tailored to the individual.

3. THE IMPACT OF AUTISM ON COMMUNICATION AT COURT AND WHAT TO DO ABOUT IT

3.1 Behaviour and presentation

People with autism may display unusual behaviours that may reflect their own specific interests, anxiety, or difficulties about knowing what is socially appropriate in given situations. These behaviours are at risk of being misconstrued by the courts. For example, a person with autism may;

- avoid eye contact;
- change the topic of conversation to a 'preferred topic';
- laugh at inappropriate moments;
- have an odd, monotone or pedantic manner of speaking (Klin et al 2005; Foster 2015);
- have difficulty seeing things from other people's perspectives and therefore seem to lack empathy (e.g. Baron-Cohen 2003; Gillberg 1992);
- become verbally abusive or physically lash out because of difficulties keeping calm in highly stressful situations. This may be indicative of a 'meltdown', which is a temporary loss of behavioural control in response to an overwhelming situation (see National Autistic Society (NAS) '[Meltdowns](#)'). Meltdowns can take different forms, including screaming, crying, biting, or complete withdrawal. If this occurs it may take considerable time for the individual to recover in order to continue with questioning and; in some cases; may not be able to continue at all.

If the jury is not provided with any expert testimony regarding a defendant's autism diagnosis, their negative perception of a defendant's negative demeanour and lack of remorse may be particularly damaging (Haskins and Silva 2006; Cea 2014; Cooper and Allely 2016; and see also *R v Thompson* [2014] EWCA Crim 836). It may not be necessary to call an expert witness where the prosecution and defence can devise a set of simple and clear agreed facts – tailored to the individual – which can be read to the jury.

3.1.1 In advance of the trial, do:

- consider expert witness evidence to explain the person with autism's presentation during court proceedings (Archer and Hurley 2013; Woodbury-Smith and Dein 2014; Allely 2015).
- obtain background information about the 'triggers' for certain behaviours. This can be discussed at a ground rules hearing and plans agreed to try to both prevent and respond to these behaviours.

GOOD PRACTICE EXAMPLE

The seating layout of a live link room was altered to ensure that a woman with autism (who had in a previous trial destroyed furniture in a live link room when agitated) could exit the room with ease if required.

3.2 Anxiety

Most people with autism experience some degree of heightened anxiety, which can significantly affect their ability to understand what is said to them and to make themselves understood. The signs that someone is anxious may not be immediately obvious (for example, coughing, picking at skin, or yawning) and they may not themselves recognise that they are feeling anxious.

Their anxiety may be increased by issues at court such as:

- being in unfamiliar rooms/buildings;
- communicating with unfamiliar people;
- changes to usual routines;
- changes to what is expected, for example, delays in trial scheduling or changes of location.

3.2.1 In advance of the trial, do:

- **Ensure that effective planning occurs in order to minimise unexpected changes to timetabling.** 'Fixed date' trials should always be seen as preferential.

- **Obtain background information about how the court would recognise that the individual was becoming more anxious and also about what strategies would be likely to be effective in dealing with feelings of anxiety.** Many strategies are likely to be possible to adopt in a court environment, for example, having something calming to hold (like a plastic tangle chain or stress ball), having the opportunity to have some time alone in a quiet space, or taking deep breaths.
- **Ensure at least one court familiarisation visit occurs before the trial because this is likely to reduce anxiety on the day.** The person should practise on the live link and see screens in place so they can express an informed view about how to give evidence. They will need to see the actual rooms that they will use; if these rooms change they should be offered another visit.
- **Suggest that photographs of courtrooms/live link rooms are taken** (subject to court permission). This is likely to help with trial preparation because the person with autism can later be reminded of what they saw on the familiarisation visit.
- **Consider the use of visual aids** to help a person understand what will happen at court, for example, the use of ‘visual timetables’ (see [Toolkit 14 - Using communication aids in the criminal justice system](#), page 14). An intermediary can help to advise on the suitability of these.
- **Consider the use of remote live link** if the court building is likely to be overwhelming (see [Toolkit 9 - Planning to question someone using a remote link](#)). Consider that a defendant with autism may actually prefer to give evidence in the courtroom on the basis that, by the time they give their evidence, the courtroom may have become a familiar place whereas the live link room would still be a new, unfamiliar environment.

3.2.2 At trial, do:

- **Plan for the judge and the advocates to meet the individual in advance of questioning.**

- **Consider a neutral, trusted supporter being present** during the person's evidence as a special measure, to help reduce anxiety.
- **Allow an individual to bring a 'comfort item' if they have one they use regularly.** The object may help them to concentrate.
- **Do not try to stop/suppress repetitive behaviours (a key feature of autism),** such as hand-flapping, rocking or playing with a comfort object, as this may act as a coping/soothing mechanism for the individual.

GOOD PRACTICE EXAMPLES FOR WITNESSES

- An intermediary provided an autistic child witness with photographs of the advocates and judge in advance of the child meeting them. Then, instead of both judge and the advocates meeting the child all at the same time, the judge agreed to him meeting them one at a time to prevent him from becoming overwhelmed. The advocates then questioned him separately inside the live link room whilst the remaining advocates watched from the courtroom.
- A judge, finding that a trial had been moved to another court at the last minute, ordered that, for the day of the witness's evidence the trial should be relocated to the other court where the young man had done his pre-trial visit and was expecting to give evidence and then returned to the listed court to complete the rest of the trial.

GOOD PRACTICE EXAMPLES FOR DEFENDANTS

- The defendant was provided with a written plan of the stages in the case so that he knew what was coming next – this helped to reduce his anxiety.
- A neutral supporter sat alongside the defendant in the witness box and helped him manage the documents and follow instructions on how to find pages in the bundles.
- The defendant was on the point of not giving evidence because he did not want to go into the live link room as it was unfamiliar to him; he was also struggling with the courtroom, especially as the complainant and his family were in the public gallery. The judge ordered

the public gallery to be cleared and that there would be no access to the courtroom during the defendant's evidence. The defendant successfully gave his evidence from the witness box.

3.3 Attention and listening

A person with autism may have a limited attention span, especially for topics that do not particularly motivate them.

They may also have difficulties processing everyday sensory information, such as sights, sounds and smells. These sensations can be overwhelming (for example, a buzzing light or a ticking clock that some people may not even notice may appear loud to a person with autism) and will affect their ability to attend (see Toolkit 15 - Witnesses and defendants with autism: memory and sensory issues for more comprehensive information).

3.3.1 In advance of the trial, do:

- **obtain background information about a person's ability to pay attention in general**, including what strategies would help (for example, whether a physical 'movement break' would be needed during break times);
- **obtain background information about potential sensory issues before these are encountered;**
- **ensure that the pre-trial visit is used to establish what factors may affect the person's ability to concentrate on questioning**, for example, testing of the live link facilities during a pre-trial visit may indicate that a person is less able to attend to questioning via a screen and attends better to questioning when communication is 'face-to-face' rather than 'face-to-screen';
- **plan what adaptations to the environment can be made to ensure that it is quiet, calm and free of sensory distractions**, for example, by switching off strip lighting or removing unnecessary clutter from a live link room. Seating a child at a 'school-style' desk and chair in a live link room rather than on a soft chair can be an effective way to support their attention because it echoes what occurs at school.

3.3.2 At trial, do:

- **allow frequent breaks;**
- **use the person's name at the start of a question** (rather than at the end) as this will help to cue them so they know they are being addressed.

GOOD PRACTICE EXAMPLE

A judge ordered the removal of a computer from a live link room that was also used as an office because the intermediary advised that the computer would be distracting for a teenage witness with autism whose 'special interest' was playing computer games.

3.4 Understanding of spoken language

A person with autism may seem articulate, but this can often 'mask' difficulties with understanding spoken language, such as problems with the following:

- understanding non-literal language and taking what is said literally. For example, an advocate suggested to a witness that she was exaggerating by saying '*You blow things up*'. This turn of phrase caused the witness to become confused;
- understanding the actual sentence structure (the 'grammar' of a sentence);
- keeping a sentence in mind for long enough to analyse it for meaning (sometimes referred to as 'short-term auditory memory difficulties');
- inferring what is meant, when this is not clear;
- understanding the sort of detail the interviewer is interested in hearing, including what is and is not relevant. This can cause difficulties with very open, 'unsupported' questions/instructions (such as '*Tell me what happened*'), which can elicit fewer details from people with autism. For example, when asked at an ABE interview '*What was the first thing that happened?*' an autistic child replied '*I was born*';
- becoming 'overloaded' with spoken information;
- understanding tones of voice, for example, not recognising when a question is phrased as a statement, but with a rising intonation to indicate that it is a question rather than a statement of fact, or not recognising sarcasm.

3.4.1 In advance of the trial, do:

- **refrain from assuming that someone with autism has understood explanations of matters such as court proceedings**, as it may result in less than appropriate support, which may subsequently result in unfair treatment (NAS 2011; Brewer et al 2016);

- **consider in advance what questions will be asked and whether some form of visual support will be necessary to ensure the witness or defendant fully understands what is being asked.** An intermediary can ensure the visual support is tailored to the needs of the individual. Visual support may include the use of timelines or topic cards representing separate events (in the case of multiple events). See [Toolkit 14 - Using communication aids in the criminal justice system](#) for more information.

3.4.2 At trial, do:

- **ask additional questions that check the person’s understanding of longer explanations** (for example, of court processes). Asking simply ‘*Do you understand?*’ may not be sufficient; they may think that they understand when actually they do not, or they may be unwilling to demonstrate that they do not understand. Careful questioning based on the content of the previous explanation, such as ‘*What will happen next?*’ are more likely to highlight areas of misunderstanding;
- **plan questions in topics** – introduce the topic and be clear when it changes (*‘Now we are going to talk about ...’*);
- **follow a logical, chronological order in questioning;**
- **use questions and explanations that are short and simply phrased, unambiguous and ‘to the point’.** Be clear and precise in questioning; say what you mean. Do not expect the person to understand what you are inferring/getting at. They may not know what you know or need to know, unless you say so. Check your question for alternative meanings before using it;
- **Rather than using very open-ended questions/instructions** (e.g. ‘*Tell me everything*’), it can be helpful to set questions within more precise or narrow (but non-leading) parameters in order to reduce ambiguity (Maras et al 2013). As an alternative to ‘*Tell me what you saw yesterday*’, try asking, ‘*You told me that you went to a shopping centre yesterday ... [pause] Tell me more about that*’;
- **allow extra time for the person to respond;**

- Examples of questions that are complex in their structure and recommendations for simplifying them are outlined at length in other toolkits (see: [Toolkit 2 - General principles from research, policy and guidance](#), [Toolkit 4 - Planning to question someone with a learning disability](#) and [Toolkit 15 - Witnesses and defendants with autism: memory and sensory issues](#)). However, in summary, questions that are more likely to be misunderstood and risk leading to inaccurate answers include those with:
 - **multiple parts** (e.g. *'On the night of June 12th were you in the park, and on the following morning did you see John?'*);
 - **negatives and double negatives** (e.g. *'Is it not the case that he did not go outside?'*);
 - **'tags'** (e.g. *'You saw him enter the house, didn't you?'*) and **questions phrased as statements** (e.g. *'So you saw him enter the house?'*) may not be recognised as something that can be disagreed with. The latter should be re-phrased as a clear question (e.g. *'Did you see him enter the house?'*).

3.5 Use of spoken language

People with severe autism may use little or even no spoken language and may rely on alternative methods to communicate, such as symbols, photographs or sign language.

Verbal individuals may still find it difficult to explain what happened because of issues with:

- providing a clearly sequenced narrative of events (with events described in the correct order and with no omissions);
- 'finding the right words' to explain what happened (often called 'word-finding difficulties') – this might be indicated by pauses, saying *'Um'* or more explicitly 'I can't explain it';
- using complex words or phrases they do not fully understand – they may 'echo' words or phrases they have heard in other contexts without any understanding of what is meant (sometimes called 'echolalia').

3.5.1 In advance of the trial, do;

- **seek intermediary guidance about the use of communication aids** that help an individual to explain what happened, for example, visual timelines to support them in accurately sequencing events (see [Toolkit 14 - Using communication aids in the criminal justice system](#)).

3.5.2 At trial, do:

- **offer them alternative means to explain** – for example, the use of drawing;
- **be alive to someone’s natural use of gesture**, when this is being used to help them explain something that they may not have the words to do – such gestures will need to be brought to the attention of the court;
- **seek clarification of what people mean when they use complex and evidentially significant words, especially if these are being used in a way that seems out of context.**

3.6 Non-verbal communication

A person with autism may not understand facial expressions, for example, they may mistakenly think that the questioner has an ‘angry’ facial expression and this may affect their responses.

Similarly, a statement that is accompanied by a particular facial expression (e.g. a surprised expression with *‘but you still let him in into your room’*) will not necessarily be interpreted as the examiner questioning the witness’s actions.

3.6.1 At trial, do:

- **be aware of your own facial expressions** – more ‘neutral’ facial expressions may be difficult to interpret;
- **consider explicitly providing information about your own emotional state**, for example, saying *‘I’m not angry with you’* before continuing.

3.7 Reading ability

A person with autism may initially appear to be able to read well, however, be aware that some people with autism can superficially read text without fully understanding what it means (this is referred to as ‘hyperlexia’).

3.7.1 At trial, do:

- **ask questions that check what they have understood from written information** – for example, ask them to explain what it means, or use more specific questioning depending on the content of the text (e.g. *‘What do you need to do now?’*).

3.8 Question content

There are certain questions that may be challenging for a person with autism because of the content of the question rather than the question’s structure. They may be able to understand the structure of the question and be able to verbalise a clear answer, but have difficulties answering it accurately because of the cognitive processes that the question relies upon. For example, questions that ask:

- ‘when’ an event occurred, or differentiating details between episodes, can be challenging because autism impacts on memory retrieval;
- ‘how long’ specific events lasted can also be problematic because autism may also impact upon a person’s perception of time;
- about the intentions, emotional states or behaviour of others, for example *‘Why did he do that?’*, because autism affects a person’s ability to see things from another person’s perspective. This is often referred to as a ‘theory of mind’ or ‘mentalising’ difficulty. This can be highly significant in the legal arena (for example, in alleged offences of dishonesty: Cooper and Alley 2016).

These issues, with suggested solutions, are comprehensively dealt within [Toolkit 15 - Witnesses and defendants with autism: memory and sensory issues](#). Cross-examination must enable the autistic person to give answers that they believe to be correct, so they will need to be questioned in a way that allows them to provide detail about their own perception and recall of a set of events. It is beyond the remit of an intermediary to comment on the accuracy of an individual’s recall of facts or perception of events. Expert witness opinion may be required if these issues are critical to a case.

4. PUTTING YOUR CASE

- 4.1** People with autism (unless they also have accompanying intellectual impairment) are not more suggestible than their non-autistic peers (McCrary et al 2007; North et al 2008; Maras and Bowler 2011; 2012). They are no more likely than individuals without autism to accept messages that are communicated to them during questioning or hold them as true reflections of their own memory. However, they may, under certain circumstances, be more compliant (agreeing with the questioner's suggestions or to statements that are untrue) and may not understand the consequences of this action. This is clearly a risk when an advocate wants to put their client's case.
- 4.2** The Criminal Procedure Rules 2015 give the court the power to make an order dispensing with an advocate putting their case to a witness ([CPR 3.9\(7\)\(b\)\(i\)](#)). However, if the case is to be put to the witness or defendant, it should be put in a manner that the witness can understand and respond to (Cooper and Allely 2016). 'The gravamen of it is fairness.' (Lord Hughes in *Director of Public Prosecutions v Nelson (Antigua and Barbuda)* [2015] UKPC 7, paras 23 and 24).
- 4.3** Methods of putting the case will be dependent on the individual and the circumstances of the trial. This should be discussed at a ground rules hearing and with advice sought from an intermediary, if there is one ([CPR 3.9\(7\)](#)).
- 4.4** Given that people with autism often have relative strengths in following clear 'rules' and guidance about what is expected, it is feasible that many individuals with autism would be able to refute inaccurate suggestions made to them, if they are given clear instructions how to do this and there are a range of agreed safeguards put in place, for example:
- the use of visual rules that remind them to 'say if someone gets something wrong' (and having ideally practised this skill during the pre-trial visit on a neutral topic);
 - strategies in place to ensure that their attention is sustained;
 - one 'idea' to be posed at a time;
 - short, simply phrased and unambiguous language;

- tag questions (for example, *'You wanted this to happen, didn't you?'*) have traditionally been used to put a case, however, it may still be possible to put your case without using these, for instance by using questions along the lines of –
 - *'You said John did X. John said he didn't do X. Did John do X?'* or
 - *'I am going to tell you some things. I want you to tell me if these are true or not true, or whether you don't know ...'*

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