

The Advocate's Gateway

**General principles from research, policy
and guidance: planning to question a
vulnerable person or someone with
communication needs**

Toolkit 2

2 September 2019

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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

The Advocate’s Gateway provides individual toolkits that outline guidance relating to the questioning of children and young people and those who have particular communication needs within the justice process. This toolkit contains general information about questioning a vulnerable person or somebody with communication needs and is primarily intended for use by advocates and judges, as well as police officers, social workers, solicitors and guardians. For more detailed guidance, please refer to the toolkit most appropriate for the person being questioned. *‘Every vulnerable witness is different and how the testimony unfolds in every cross-examination is different, and guidance needs to recognize and support this’* (Cooper et al, 2018)

This toolkit contains general guidance and is not a replacement for an intermediary assessment which will provide advice specific to the individual. Importantly, an intermediary can help highlight an individual’s communication needs. For further guidance on the work of intermediaries please refer to Toolkit 16 - Intermediaries: step by step. This toolkit summarises:

- general principles from research, policy and guidance;
- appropriate questioning styles and strategies;
- framing and structuring questions appropriately and effectively; and
- inappropriate and ineffective questioning: strategies to avoid.

1. GENERAL PRINCIPLES FROM RESEARCH, POLICY AND GUIDANCE

1.1 The most significant factor in effective communication with a vulnerable person or somebody with communication needs is the questioner's ability to adopt an appropriate manner and tailor questions to the needs and abilities of the individual (Agnew et al, 2006; Bull, 2010; Powell et al, 2013), enabling the person to understand questions and give answers that he or she believes to be correct.

1.2 No two people have the same profile of communication strengths and weaknesses. Obtaining a full picture of the individual's communication capabilities is essential and an intermediary can help with this, by requesting information, for example:

- about the person's education;
- whether (s)he has a carer; and
- whether (s)he uses signing/communication aids in daily life.

1.3 Always consider assessment of a vulnerable witness by an intermediary ([Youth Justice and Criminal Evidence Act 1999](#), section 29) if the person is unlikely to be able to recognise when they do not understand something, or tell you that they have not understood, or has some other communication difficulty, even if no intermediary was used at the investigative interview. The judiciary may use its inherent jurisdiction to appoint an intermediary for a vulnerable defendant.

1.4 Accuracy, coherence and completeness of testimony from a vulnerable person or somebody with communication needs can be significantly improved if the person's preferred communication strategies are adopted, including the use of communication aids (see Toolkit 14 - Using communication aids in the criminal justice system).

1.5 The 'rules' of communication should also be explained prior to questioning, for example:

- that the person 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 person 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 vulnerable person (Marchant, 2013).

2. APPROPRIATE QUESTIONING STYLES AND STRATEGIES

2.1 Introductions:

- Being introduced to the vulnerable person prior to them giving evidence is an important opportunity to become familiar with their communication abilities.
- This approach can also help to reduce stress and anxiety associated with vulnerability.
- Explanations to the witness or defendant about their role and the questioner's role are crucial.
- Some vulnerable people may be unaware that the person asking questions does not know the answers.

2.2 Ensure tone and body language are neutral and maintain attention:

- Do not nod, invite an affirmative response, or express disbelief through facial expression or body language.
- Look at the person and ensure that they know you are speaking to them.
- Eye contact is an important part of communication and should be achieved, unless there are cultural or other specific reasons to avoid it.
- On the live link, look straight at the camera, not at papers.

2.3 Use appropriate pace:

- This means appropriate to the individual. For example, some young children will lose attention or not connect the question with their previous answer if there are long pauses between questions.
- Some witnesses need a 'normal' pace of communication, others need you to speak more slowly or to allow extra thinking time where needed in order to process information before answering a question.
- Do not move on to another question too quickly.

- If there is no response, count to six in your head and then try repeating or rephrasing the question.

2.4 Consider non-verbal communication/use of visual communication aids:

- Communication aids can support and augment a person's communication;
- Asking a witness to demonstrate intimate touching on their own body is inappropriate. Use a body map or diagram.
- Using communication aids almost always requires intermediary involvement and should be explored prior to questioning.

2.5 Be alert for possible miscommunication:

- This includes monitoring non-verbal clues such as a puzzled or frustrated look, knitted eyebrows, downcast eyes and long pauses.
- An intermediary in the live link room often identifies signs of confusion before these are picked up by those in court.
- It is good practice to ask the witness to say so, put up a hand or to point to a 'cue' card if he or does not understand.
- Many vulnerable people will not recognise when difficulties occur or will be too embarrassed to admit this.
- Do not just say 'Do you understand?' If necessary, ask the person to explain what is meant in their own words.

2.6 Check that you and the witness mean the same thing:

- Clarify understanding of words crucial to the evidence.
- For example, the word 'touch' may be interpreted as relating solely to touching by hands.

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

A: 'No. [later] He licked me.'

- The question may not be understood if it implies that the witness was active in the event.

Q: *'Did you touch John?'*

A: *'No. [later] He put his willy in my hand and in my mouth.'*

2.7 Be alert to loss of concentration and take breaks from questioning.

- Breaks should be based on the person's concentration span. This will vary with time of day, stress levels and situation. An intermediary assessment may assist.
- Be mindful that a person's typical level of concentration is likely to be shorter than usual at court.
- Early signs may not be evident over the live link.
- Do not rely on someone to ask for a break, or to say they need one if asked. They may elect to keep going to 'get it over with'. The person may lack the ability to anticipate when they need a break and may quickly reach overload under cross-examination.
- When a break is requested, it may be needed immediately. This should be accommodated.

Draw the court's attention to improper or inappropriate cross-examination: both the prosecutor and defence advocates have this responsibility.

3. FRAMING AND STRUCTURING QUESTIONS APPROPRIATELY AND EFFECTIVELY

3.1 Writing out questions in advance will help to identify potential problems.

Advocates should always write out questions ahead of time, whether or not the judge has ordered it, as best practice preparation. The purpose of the exercise is to get used to thinking in terms of vocabulary/sentence structure which the witness can understand. The idea is not to create a fixed script; it should still be possible to be flexible in the course of cross-examination depending on how the witness answers, should something arise.

- Use clear and simple language.
- Use simple words with which the witness is familiar.
- Avoid redundant words and phrases (e.g. *'To your knowledge . . .'*; *'I put it to you . . .'*), jargon and complex vocabulary.
- Use the same words consistently in questions.
- Ensure there is a shared understanding of key concepts and phrases.
- Avoid metaphors and non-literal language. For example:

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

A: *'No.'*

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

A: *'Yes.'*

- Avoid figures of speech, e.g: *'I am going to run through a few things.'*
- Avoid use of present tense, e.g:

Q: *'Are you in school now?'*

A: *'No, I'm at court.'*

- Avoid figures of speech, which even if understood, may be interpreted literally. For example, *'Is that right?'* should be avoided because the word 'right' has two meanings in this context ('accurate' or 'morally right'). Better alternatives are *'Are you sure?'* or *'Is that true?'*

3.2 Use concrete words.

- Abstract, 'concept' words can be problematic, for example: numbers; measurements; before/after; in front of/below/behind; always /never; different/same; and more/less.
- Use of such words by a vulnerable person does not mean they are understood, for example, the ability to count does not mean that somebody can answer accurately 'How many times?' something happened.
- Tie questions about timing of what happened to events: *'What was on TV?'*
- An intermediary can assess the person's understanding of abstract, concept words, prior to questioning.

3.3 Follow a logical and chronological order.

- Avoid questions that jump around in time or appear to be unconnected, as these require constant re-orientation by the witness.
- Refer to one event per question. Referring to more than one event per question is confusing for the listener.

3.4 Signpost places, names and objects:

- **refer to places:** *'Carol, were you in the kitchen?'* not *'Were you there?'*
- **refer to names:** avoid pronouns, e.g. *'What did Max say?'* not *'What did he say?'*
- **refer to objects:** e.g. *'Was the money in the wallet?'* not *'Was it inside?'* Questions removing personal references to the witness and/or defendant are more difficult to understand and have a distancing effect, e.g. *'Did you tell the police about what is in that statement about the matter, about the touching of the boobs?'* (asked of an 11-

year-old). This can cause comprehension problems even for adults. Better options include: 'You said Jim touched your boobs. Did you tell the police?'

3.5 Refer to the subject in question and explain when it is about to be changed.

- This gives the person transition time to focus on the next subject.
- For example, '*Now we're going to talk about . . .*'. It can be helpful to schedule a break at a change of subject.

3.6 Keep questions short.

- Ask short, simple questions.
- Avoid 'front-loading', e.g. '*I suggest to you that . . .*'; '*I put it to you . . .*'; '*I believe you told us . . .*'
- Avoid phrases such as '*Do you follow?*' at the end of questions.
- Complex questions are likely to result in incorrect or '*I don't know*' responses, even though the person does know the answer and could respond if the question were phrased simply.
- In order to answer accurately, someone with a learning disability needs to be able to remember and process the whole question.
- Present one topic at a time. The person may have a limited working memory and may be unable to remember all of a multi-part question or decipher embedded clauses.
- Who/what/where questions are usually most easily understood.

4. INAPPROPRIATE AND INEFFECTIVE QUESTIONING: STRATEGIES TO AVOID

4.1 Vulnerable people and people with communication needs are more likely to misunderstand or comply with (i.e. reply 'yes' to):

- questions suggesting the answer (such as a tag or other form of leading question);
- questions requiring a yes/no response;
- questions in the form of statements (assertions);
- questions/assertions that are repeated by authority figures;
- forced choice (closed) questions;
- questions containing one or more negatives;
- questions suggesting the witness is lying or confused;
- 'Do you remember...?' questions.

4.2 Tag questions make a statement then add a short question inviting confirmation, for example, 'John didn't touch you, did he?' or 'John didn't touch you, right?'. They are powerfully suggestive and linguistically complex. Judicial guidance recommends that this form of question be avoided with children and that a direct question be put instead, e.g. 'Did John touch you?'; 'How did John touch you?'

4.3 Questions requiring a yes/no response: a series of propositions or leading questions inviting repetition of either 'yes' or 'no' answers is likely to affect accuracy. These questions carry a risk that an acquiescent person (i.e. someone with a tendency to answer 'yes', regardless of the question) will adopt a pattern of replies 'cued' by the questioner and will cease to respond to individual questions, leading to inaccurate replies. If only 'yes'/'no' questions are asked, it is difficult to determine if the person is having problems with the questions.

4.4 Questions in the form of statements (assertions), for example, 'You're not telling the truth, you wanted Jim out of your house', may not be understood as requiring a response. Better alternatives include: 'Did you want Jim out of your house?'

Questioning by making assertions is poor practice for any witness: *‘What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury’s perspective between evidence from the witness and inadmissible comment from the advocate.’* [R v Farooqi & Ors](#) [2013] EWCA Crim 1649, para 113.

- 4.5 Questions/assertions repeated by authority figures:** whether asked/stated consecutively or interspersed with others, these risk reducing the overall accuracy of a vulnerable person or someone with communication needs. For questions, this is because the person is likely to conclude that their first answer is wrong or unsatisfactory because somebody in authority is repeating the question. This may make the person ‘go along’ with the suggested answer, even if the person disagrees with it. If a question must be repeated (even with changed wording) for clarity, explain that you just want to check your understanding of what the person said, without implying the first answer was wrong: for example, *‘Thank you, but I want to be sure I understand. Tell me again.’* (followed by the question). For assertions, when someone in a position of authority formally suggests that something is a fact, it becomes extremely difficult for a person to disagree if necessary and to maintain verbally what they believe to be true. The person is likely to have a particular problem with an assertion in the form of a statement, viewing this as a comment and not appreciating that it requires a response.
- 4.6 Forced choice (closed) questions:** these questions (for example, *‘When you went to the flat, did John or Bill open the door?’*) create opportunities for error if the correct alternative may be missing. If asked open, free recall questions (e.g. *‘What happened?’*), vulnerable people or those with communication needs can provide accounts with accuracy rates broadly similar to the general population. In instances where forced choice questions are necessary, offer *‘I don’t know’* as a last alternative.
- 4.7 Questions containing one or more negatives:** these questions make it harder to decipher the underlying meaning. Negatives increase complexity and the risk of unreliable responses.
- 4.8 Questions suggesting the witness is lying or confused:** these questions are likely to have an adverse impact on concentration and accuracy of responses because of the

heightened anxiety often associated with vulnerable people. For an alternative approach in which such points are explained to the jury but not put to the witness, see Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court (section 3).

4.9 If such a challenge is developmentally appropriate, it should:

- be addressed separately, at the end of cross-examination;
- be put in simple, clear language;
- not require the person to identify past emotions or intentions – a question about past emotions or intentions may be developmentally inappropriate for a vulnerable person or someone with communication needs.

4.10 ‘Do you remember?’ questions: these require the ability to follow and recall the whole question and to identify what the questioner wants to know. This type of question requires complex processing, particularly when the person is asked, not about the event, but about what they said about it to someone else.

ACKNOWLEDGEMENTS AND REFERENCES

The development of this toolkit was funded by The Advocacy Training Council and the Legal Education Foundation. This toolkit was updated in 2019 by Professor Penny Cooper.

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