

The Advocate's Gateway

**Planning to question someone with a
learning disability**

Toolkit 4

30 November 2015

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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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CONTENTS

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

- 1. INTRODUCTION AND SUMMARY 4
- 2. GENERAL PRINCIPLES 5
- 3. DEFINITIONS AND CHARACTERISTICS OF LEARNING DISABILITY 6
- 4. HOW LEARNING DISABILITY CAN AFFECT COMMUNICATION 10
- 5. FOUNDATIONS OR ‘SETTING CONDITIONS’ 12
- 6. EXPRESSIVE COMMUNICATION: MAKING SURE YOU ARE UNDERSTOOD: 23
- 7. RECEPTIVE COMMUNICATION: MAKING SURE YOU UNDERSTAND 34
- ACKNOWLEDGEMENTS AND REFERENCES..... 37

1. INTRODUCTION AND SUMMARY

The guidance in this toolkit is not intended to be a replacement for a communication assessment that would provide advice specific to the individual person. 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 brings together policy, research and guidance relating to:

General principles

- Definitions and characteristics of learning disability
- How learning disability can affect communication

Summary

- No two people with a learning disability will have exactly the same profile of strengths and weaknesses.
- An assessment by an intermediary will provide advice specific to the individual.
- Courts are expected to make reasonable adjustments to remove barriers for people with disabilities.
- Cross-examination must enable the person to give answers that he or she believes to be correct.
- Some question types carry a high risk of being misunderstood or producing unreliable answers.
- Advocates are expected to tailor their questions appropriately.
- Even witnesses with severe learning disability and no speech have given evidence effectively with intermediary assistance.

2. GENERAL PRINCIPLES

- 2.1 Tailor your approach to the individual person and be flexible *because no two people have the same profile of communication strengths and weaknesses.***

Advocates must adapt to the witness, not the other way round. ([R v Lubemba; R v JP](#) [2014] EWCA Crim 2064)

- 2.2** 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 he or she has additional support at home, school, college or work; and whether he or she uses signing/communication aids in daily life.
- 2.3** Always work with the person's familiar or preferred communication strategies because 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.
- 2.4 Always consider assessment of a vulnerable person by an intermediary** because communication difficulties can be subtle and not immediately obvious. Section 29 of the [Youth Justice and Criminal Evidence Act 1999](#) says that an intermediary assessment should be considered 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.

3. DEFINITIONS AND CHARACTERISTICS OF LEARNING DISABILITY

What is learning disability?

3.1 Learning disability is considered to be the most common developmental disorder. For many individuals, the cause remains unknown but, in some cases, learning disability can be caused by genetic factors, infections and brain damage (which can occur before, at, or after birth). It is a condition that starts before adulthood, with lasting effect.

3.2 Learning disability typically affects:

- learning and understanding new information or skills;
- communication skills and abilities;
- management of personal needs and everyday tasks;
- ability to live and cope independently;
- social skills and abilities.

3.3 **People with a learning disability, regardless of age, are considered to be vulnerable** ([Youth Justice and Criminal Evidence Act 1999](#)). This Act covers those whose quality of evidence is likely to be diminished because they have a significant impairment of intelligence and social functioning (section 16(2)(a)(ii)). When determining whether quality of evidence is likely to be diminished, the court must consider its likely completeness, coherence and accuracy (section 16(5)).

Types of learning disability

3.4 Psychometric tests of intellectual functioning (e.g. IQ testing) are used to assess the presence and degree of learning disability. However, these tests form only a small part of the assessment process. IQ measurements alone do not capture personal strengths and abilities; they may not be precisely accurate; IQ can vary during a person's development and is only useful in combination with assessment of social functioning, adaptation and communication.

3.5 In the UK, the average IQ score is 100. An IQ score below 70 is often used to indicate that a person has a learning disability. Although each person's abilities and limitations vary and there are no clear distinctions between groups, IQ scores generally 'categorise' learning disability in the following ways:

- IQ around 70: borderline learning disability;
- 50–70: mild learning disability;
- 35–50: moderate learning disability;
- 20–35: severe learning disability;
- IQ below 20: profound learning disability.

3.6 People with borderline learning disability . . .

- may not have been formally diagnosed and may be difficult to identify.
- are often independent in caring for themselves and conducting everyday tasks.
- may have comprehension difficulties that are not obvious and may be disguised by coping strategies and efforts to hide areas that the person is struggling with.
- may repeat language without fully understanding it.
- may have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.
- usually have skills in reading and writing.
- are able to engage in conversation and communicate experiences, needs, wishes and feelings.

3.7 People with mild learning disability . . .

- may not have been formally diagnosed.
- are often independent in caring for themselves and conducting everyday tasks.
- may have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.

- usually have basic skills in reading and writing.
- usually are able to engage in conversation and communicate experiences, needs, wishes and feelings.

3.8 People with moderate learning disability . . .

- are likely to have been diagnosed.
- may need support in caring for themselves and conducting everyday tasks.
- are likely to have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.
- are likely to have some language skills in order to communicate experiences, needs, wishes and feelings.

3.9 People with severe learning disability . . .

- are likely to have been diagnosed.
- may need a high level of support in caring for themselves and conducting everyday tasks.
- may have additional medical needs and need support with mobility.
- are likely to have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organization, and planning and sequencing ideas.
- are likely to have some basic language skills or able to use gestures and other alternative forms of communication (see Toolkit 14 - Using communication aids in the criminal justice system) in order to communicate experiences, needs, wishes and feelings.

3.10 People with profound learning disability . . .

- will almost definitely have been diagnosed.
- often need extensive and the highest level of care.
- may have other disabilities or medical needs.

- may have very limited or no understanding of abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.
- are Likely to have significant difficulty communicating and severe difficulty communicating verbally, and may use alternative and augmentative communication (AAC) (See Toolkit 14 - Using communication aids in the criminal justice system).

Other key terms

3.11 The term 'learning disability' is generally used in health and social care settings. In the field of education, special educational needs (SEN) codes of 'moderate learning difficulty', 'severe learning difficulty' and 'profound multiple learning difficulty' all refer to generalised learning difficulty of varying severity. Taken together they are considered to be interchangeable with 'learning disability'. The criminal justice system sometimes uses the term 'mental disorder'. 'Intellectual disability' is also used.

Learning disability and associated conditions

3.12 Learning disability is distinguished from specific learning difficulties such as language impairment and dyslexia, which occur independently of intelligence (see Toolkit 5 - Planning to question someone with 'hidden' disabilities).

3.13 Co-existing conditions, such as those affecting mental health (see Toolkit 12 - General principles when questioning witnesses and defendants with mental disorder) and autism spectrum conditions (Toolkit 3 - Planning to question someone with an autism spectrum disorder including Asperger syndrome) are more common in people with learning disabilities than in the general population. One condition may hide another, leaving the person's needs not fully recognised. There may also be problems with vision and hearing.

4. HOW LEARNING DISABILITY CAN AFFECT COMMUNICATION

4.1 No two people with a learning disability will have exactly the same profile of strengths and weaknesses and each person's capabilities will differ (this should be assessed by an intermediary). Typically, however, a person with a learning disability is likely to:

- have weak listening and processing skills;
- experience difficulty and delay between hearing something, understanding it, and in working out how to respond.
- have a limited concentration span;
- be prone to suggestion and compliance (a nod or answering 'yes' does not necessarily indicate full understanding);
- have limited insight and ability to identify emotions or intentions behind their own or someone else's speech or actions, or see someone else's point of view;
- experience heightened frustration, stress and anxiety.

4.2 Within criminal justice settings, frustration, anxiety and stress commonly occur as a result of:

- poor communication by those interacting with the person who has learning disability (especially in an unfamiliar context, outside of everyday routine and experience);
- the person who has learning disability not knowing what is going to happen;
- people and surroundings being perceived as intimidating by the person who has learning disability;
- delays in investigative and court proceedings.

4.3 Responses to frustration, anxiety and stress may include:

- feelings of panic and mental overload, leading to total shutdown;
- outbursts of aggressive or frustrated behaviour;
- the urge to provide any answer, simply to bring questioning to an end.

- monitoring frustration, anxiety and stress can be achieved with the use of a visual cue – see Figures 1 and 2.

Figure 1. Emotions thermometer

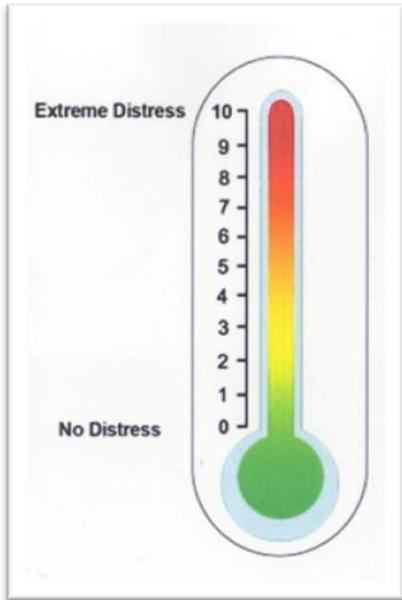


Figure 2. Text format anxiety scale

3	I need to stop for a break now so you need to stop for a little while.
2	It's getting hard to think and concentrate. Please slow down.
1	I'm OK and can carry on.

5. FOUNDATIONS OR ‘SETTING CONDITIONS’

- 5.1** These basic foundations for effective communication will enable the best evidence of a vulnerable young child or person with learning disability.
- 5.2** **Adjust the environment if needed** because the person may have heightened sensitivity to noise and visual stimuli, especially when under stress.
- The person may have impaired ability to screen out background noise or movement. Where this impairment is significant, environmental adaptations will need to be made, for example: ensuring the listed courtroom is away from potential external noise; repetition if there are other sounds during a question; and the use of screens throughout questioning to reduce visual stimuli.
 - Live link rooms allow more control of the immediate environment than is possible in the courtroom but there can be other complications. Some people 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 and creative adaptations, such as:
 - screening the defendant’s view of the live link screen where a person is very fearful of being seen by the defendant;
 - using a remote link from another court or non-court site where a 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)
- 5.3** **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.
- 5.4** Editing should take place before memory refreshing and before the planning of cross-examination questions. This makes memory refreshing quicker and also saves court time.

GOOD PRACTICE EXAMPLE

A statement was produced to condense a lengthy DVD interview. The intermediary and police officer agreed that the intermediary would review the statement for vocabulary, grammar and phrasing and suggest any amendments. Then the officer, witness and intermediary read through the statement together. This made memory refreshing quicker and also saved court time.

- 5.5** Ensure interview transcripts include important non-verbal communication, especially where a person 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, for example, by 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 techniques to revise the transcript to include a written record of use of signs and communication aids.

- 5.6** 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.
- 5.7** **Keep key people in the person's life informed about what is happening** because parents and caregivers will have to answer the person'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. Both of these factors will improve the person's ability to provide a comprehensive account during questioning. The intermediary and the Witness Service can offer

guidance on this information, e.g. who needs to be informed and what types of information the caregiver and child will need to know.

- 5.8** Young and vulnerable children and other persons with learning disability should be kept informed as far as is possible as to any changes to the schedule of the hearing. Each stage of the trial should be explained to them in appropriate language and they should be informed of what will be happening next and their understanding of this should be checked. If an intermediary has been appointed, they will take responsibility for arranging this. Any steps that can reasonably be taken to reduce the anxiety of a witness or defendant should be taken as this will be likely to increase the quality of the person's communication throughout the trial.

GOOD PRACTICE EXAMPLE

A person with learning disability was sent a series of 'photo letters' to be shared with him by his carer, preparing him for each step pre-trial and at trial.

- 5.9** **Facilitate a pre-trial visit, including a practice with live link and/or screens**, because people 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). During the visit people 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/support person and their caregiver will be whilst they are providing testimony (Ministry of Justice, 2011, [*Achieving Best Evidence*](#)). A trained person can also help children understand their witness role, the trained person might be an intermediary or an individual from the Witness Service.
- 5.10** If the person's carer/supporter is not going to be with them when they give evidence, helping a person with learning disability to separate from their accompanying carer/support worker at the pre-trial visit can help to reduce stress and anxiety. The person needs to know ahead of time:

- where their accompanying carer/support worker will wait;
- that the person can go to the carer/support worker if they need to, and should practise doing so;
- that the person can stop the questioning as and when needed and come back when ready.

GOOD PRACTICE EXAMPLES

These include giving the person with learning disability the option to practise using the court facilities – the live link and/or screens – by asking questions about something unconnected with the facts of the case.

5.11 Most people 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.

5.12 If an intermediary is not used then a neutral supporter trusted by the person should always be considered as a special measure because of potential benefits to recall and stress reduction. The court must take the person'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 a witness, has no detailed knowledge of evidence and is trusted by the vulnerable young child or person; ideally, it should be the person preparing the vulnerable young child or person for court. Others may be appropriate (Ministry of Justice, 2011, [Achieving Best Evidence](#), 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](#)).

5.13 Plan memory refreshing carefully including when how and where because . . .

- The child or person with learning disability is entitled to refresh their memory in advance of the trial if appropriate. Memory refreshing should take place in a neutral

environment (not home or residential setting) in the presence of an appropriately trained person able to provide clear guidance and act as a witness if the child extends, clarifies or contradicts their account (CPD 2015 Evidence 18C: Visually Recorded Interviews: Memory refreshing and watching at a different time from the jury).

- Memory refreshment should generally not occur at the same time as the jury watches the DVD (Judicial College, *Bench Checklist: Young witness cases* (2012). Earlier viewing allows the person to take breaks as necessary. In certain circumstances, the person need not watch the DVD at all if there is a better way to refresh their testimony.
- There is no legal requirement that the witness should watch their DVD evidence at the same time as the jury. Provided they were able to concentrate on it at memory refreshing, the witness may not wish to view it again with the jury and it may be detrimental to their anxiety and concentration levels if they do so.
- Some people with learning disability may prefer to read a transcript of their DVD evidence or listen to, but not watch, the DVD.

GOOD PRACTICE EXAMPLE

A witness with moderate learning disability was allowed to take breaks during the viewing of their DVD evidence.

5.14 Introduce yourself to establish rapport before questioning starts because people with learning disability often feel intimidated by the court environment. This may induce further anxiety and have a negative impact on the accuracy of the information provided.

5.15 Many people with learning disability may not understand why they should answer questions from someone on a TV screen that they have not met. Introducing yourself to the person before questioning begins can address this issue. Further, this will help you to build an understanding of the person's communication skills before you begin

questioning. For some people with learning disability this can be a very brief introductory session, for others it may take longer.

- 5.16** Some people prefer that wigs and gowns be removed, but others prefer that they are worn. It is a good idea to take the opportunity to explore the issue of wigs and gowns prior to questioning, showing how you look with and without them.
- 5.17** 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))

- 5.18 Explain the ‘rules’ of communication prior to questioning** because the rules of court communication are very different to the rules of everyday conversation. People 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, a witness service volunteer or an advocate can help the person understand what is expected of their communication in court and often this is covered in pre-trial preparation.
- 5.19** It can help to explicitly teach the ‘rules’, for example: that the person does not need to agree with suggestions put to them when questioned unless they are true; and 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). Rules may include:
- ‘Tell the truth’ – explaining in language familiar to the person, 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'.*

5.20 Be aware of the impact of stress on communication because many people with learning disability have low confidence and self-esteem, rendering them prone to stress reactions where their coping strategies break down and their impairments become even more pronounced. Frustration and stress are heightened by poor communication, not knowing what is going to happen, and delays. Responses may include feelings of panic and mental overload, leading to total shutdown or the urge to provide any answer at all in order to bring questioning to an end.

5.21 People with learning disability who are experiencing stress may function at a lower level: making it harder for them to remember accurately and think clearly. Causes of anxiety include: delay before or during trial; fear of seeing the defendant or his or her supporters; feelings of shame or guilt; fear of retribution; and anxiety about giving the wrong answer, not being believed or being overwhelmed by emotion in the presence of strangers. 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 behaviours, e.g. tapping arms or legs, pulling at clothes or hair, inappropriate laughter.

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

5.23 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.

5.24 Be aware of the impact of live link on communication because, although live link can improve the detail and accuracy of testimony and reduce suggestibility, live link can also disrupt communication in different ways (e.g. Doherty-Sneddon and McAuley, 2000; Marchant, 2010; 2013). Most people want to use the live link and many would refuse to give evidence any other way. However, the following points should be born in mind.

- Some people 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 person’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 person’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 people are much more effective communicating face to face.
- Early signs of the person’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.

5.25 Adjust your pace to the person’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 people with learning disability need a ‘normal’ pace of communication; some people 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 person’s responses.

5.26 A person with learning disability is likely to need extra time to process the question and to formulate a response.

- Speak slowly and count silently to six before rephrasing or asking another question.
- Some people may need almost twice as much time to process questions but may not be good at waiting in between questions.
- Receptive language delays are common in people with learning disability, especially in the high-pressure environment of the court. Repeating too quickly or rephrasing can disrupt the person's thinking and they may need to start processing the question again from the beginning, causing stress and delays. Be prepared to pause during questioning if the person 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.

5.27 **Be alert to loss of concentration and take breaks from questioning** because some people with learning disability have specific difficulties with attention.

- 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.
- A person'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.
- 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. These can be brief, non-adjourned breaks where the court waits for the person to be ready to resume.
- When tired, a person with learning disability 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 (find out what the person wants to be called) can help them to focus and attend.

5.28 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.

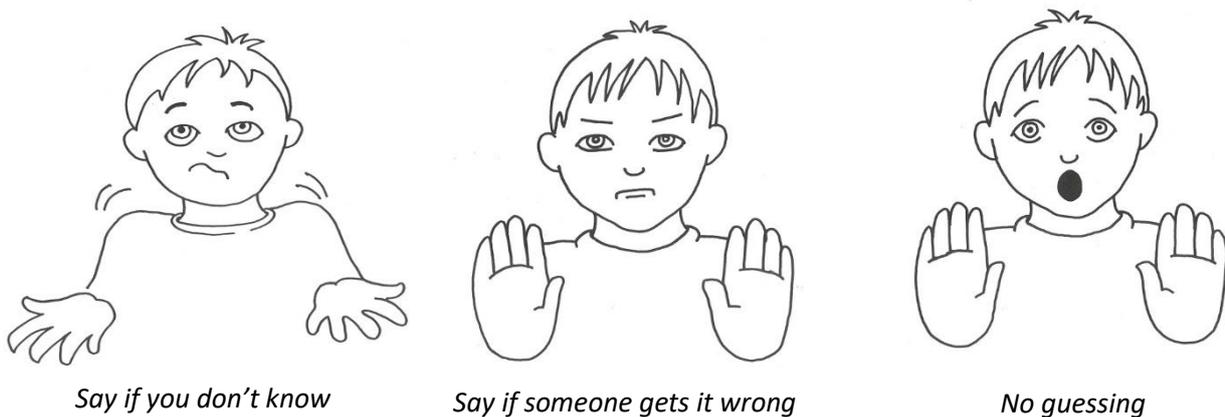
- An intermediary in the live link room often identifies signs of confusion before these are picked up by those in court.
- Many vulnerable people will not recognise when difficulties occur or will be too embarrassed to admit this.
- Do not just say ‘*Do you understand?*’. If necessary, ask the person to explain what is meant in their own words. It can sometimes help to ask the witness to, say, put up a hand or to point to a ‘cue’ card if they do not understand.
- Monitor non-verbal clues such as a puzzled or frustrated looks, knitted eyebrows, downcast eyes and long pauses.
- The person may try to answer a question even if they do not understand it or when they have no knowledge about the subject matter.
- Some people with a specific learning difficulty will have difficulty recognising when they do not understand something but, even if they do, are likely to be reluctant to say so.
- Remind the person to say if he or she does not know or does not understand.
- Attend to their facial expressions and time taken to answer questions and ask if you are not sure he or she has understood.
- Instead of ‘*I asked if he behaved aggressively towards you. Do you understand the question?*’ try ‘*Tell me what “aggressive” means?*’
- Be alert to non-verbal clues of misunderstanding as described above, e.g. puzzled looks, knitted eyebrows, downcast eyes and long pauses. The intermediary can help with this by practising ‘ground rules’ with the person prior to questioning. The intermediary can provide visual cues to help the child with this. The intermediary will also monitor the person’s verbal and non-verbal communication and can

highlight when they think the young child or person might not have understood.

GOOD PRACTICE EXAMPLE

Before trial, a person with learning disability was introduced to simple communication rules, with symbols. At trial she had them in front of her to help her remember the 'rules'.

5.29 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.



5.30 See [R v Lubemba; R v JP](#) **Figure 3. Rule cards with symbols (Triangle)**

[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.'*

6. EXPRESSIVE COMMUNICATION: MAKING SURE YOU ARE UNDERSTOOD:

- 6.1** The most significant factor in effective communication with a vulnerable person or somebody with communication needs is the questioner's ability to adapt and respond to the person. The aim is to enable the person 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 (Agnew et al, 2006; Bull, 2010; Powell et al, 2013).
- 6.2** Adapting questions requires considerable skill and questioning a person with learning disability in court is very different to questioning a person 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 person'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).
- 6.3** **Plan questions in topics and be clear about changes of topic** because this helps the person make sense of the process and allows 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.
 - 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.
 - Signpost the subject and explain when the subject is about to be changed;
 - This will help to identify potential problems in advance. 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.'

GOOD PRACTICE EXAMPLE

The defence advocate prepared questions for a witness with learning disability. These were divided into specific topics. The intermediary prepared a card for each topic which was turned over as that topic began.

6.4 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 person's overall accuracy.

- This is the case whether asked consecutively or interspersed with others. People's experience is often that, if somebody repeats a question, it means that their first answer was wrong or unsatisfactory.
- Anxiety, combined with the desire to please someone in a position of authority, can cause somebody with a learning disability to change their first answers, regardless of initial accuracy. If a question needs to be repeated for clarity (even with changed wording), explain that you want to check your understanding of what the person said, e.g. *'Thank you, but I want to be really sure I understand. Tell me again . . .'* (followed by the question).

6.5 Ensure tone and body language are neutral and maintain attention because the person needs to know that you are speaking to them and listening to them.

- 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.
- Regularly using the person's preferred first name and looking at the camera (if using live link) can help to maintain attention when questioning.

- Eye contact is an important part of communication but can be disrupted by live link. Generally, direct eye contact is helpful, so when asking questions look directly at the person or, if using live link, look straight at the camera, not at papers. However, there may also be cultural or other specific reasons to avoid direct eye gaze. Calming, quiet things to fiddle with can help some people with learning disability to avert their gaze while thinking (for others, they may be distracting).



Figure 4: Calming objects: (clockwise from top left) koosh ball, magnetic ball, magnets, tangle toy, squishy mess ball and stress ball

- 6.6** It is important to explain when you need time to read or think so that the person understands the delay.
- 6.7 Use simple, everyday words, because** these are much more likely to be understood.
- People with learning disability may not be familiar with complex language that does not form part of their everyday vocabulary – use simple words with which the person is familiar.
 - Jargon or complex vocabulary may not be understood.

- It is easier for a person 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?'*; instead of *'Have you ever actually observed your father physically assaulting your mother?'*, try *'Have you seen your Dad hit your Mum?'* and then check *'Did you see that with your own eyes?'*

6.8 Use concrete words and say what you mean because some words have more than one meaning and this can create significant confusion.

- Metaphors, non-literal language and figures of speech may be interpreted literally.
- Many people with learning disability are unable to infer meaning and deciphering underlying meanings can be problematic.
- Use of abstract words by a vulnerable person does not mean the person understands them. For example, the ability to count does not mean that somebody can answer accurately *'How many times?'* something happened.
- Instead of *'Is that right?'*, try *'Is that true?'*
- Instead of *'I'm going to jog your memory'*, try *'I'm going to ask about when . . .'*
- Instead of *'Let's get down to the facts'*, try *'Now I'm going to ask you about something important.'*
- Instead of *'Did you see eye to eye with Jane?'*, try *'Did you and Jane agree about things?'*
- Instead of *'Were you and Jane close?'*, try *'Did you like Jane?'*
- Instead of *'Do you remember falling out with your boyfriend?'*, try *'Were you and David cross with each other?'*
- Instead of *'I want to take you back'*, say *'I want to ask you about . . .'*
- *'Are you sure?'* or *'Is that true?'* are better alternatives than *'Is that right?'*, which has two meanings in this context ('accurate' or 'morally right').

6.9 Check understanding of crucial evidential words because these provide the foundation for clear communication about essential evidence. For example:

- some people may have learnt new language for private body parts since their interview;
- learning disabled adults may use the word 'sex' to mean very different things;
- they may interpret 'touch' quite narrowly, relating it only to hands, e.g:

Q: *'Did he touch you?'*

A: *'No. He washed me on my private, everywhere.'*

Q: *'Did he touch you?'*

A: *'No.'* (later) *'He kissed me.'*

6.10 Take care with questions that suggest the witness 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. A person with learning disability should not be asked 'Do you tell lies?' unless there are grounds to think that the witness is a habitual liar. It is not enough that the witness's evidence contradicts that of the defendant (Ministry of Justice, 2011, [Achieving Best Evidence](#)).

6.11 *R v Pipe* [2014] EWCA Crim 2570 notes that it was put to the complainant a number of times that she was lying and there was 'extensive cross-examination about her mental illness', 'more than enough material' on which to judge her credibility.

- Instead of *'*** didn't really happen, did it?'*, try *'You said *** happened. X says *** didn't happen. Did *** really happen?'*
- Instead of *'You saw her at the cinema?'*, try *'Did you see her at the cinema?'*
- Instead of *'And he would sometimes come to your house, is that fair?'*, try *'Did X sometimes come to your house?'*
- Instead of *'It was sunny in the day, wasn't it?'*, try *'Was it sunny in the day?'* or *'Was it sunny or rainy that day?'*

- Instead of *'Now you had a bruise, did you not?'*, try *'Did you have a bruise?'*

6.12 Carefully plan questions about intimate touching or sexual acts, because it is inappropriate to ask someone 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](#) (NSPCC, 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](#).

GOOD PRACTICE EXAMPLE

A person with learning disability was reluctant to name the place on his body where he alleged he was touched. The intermediary provided a body outline of an undressable boy and the witness was able to point clearly to indicate the place.

6.13 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.
- Instead of *'Were you there?'*, try *'Marsha, were you in the kitchen?'*
- Instead of *'When did he do that?'*, try *'When did Robert break the window?'*
- Instead of *'What did he say?'*, try *'What did Tyrese say?'*
- Instead of *'Was it inside?'*, try *'Was the money in the wallet?'*

6.14 This will help the person keep track of the information you are referring to. Using the person's preferred name can also help keep them focused. Identify the police officer (and other relevant people) by the name by which they are known to the person. Identify names and places.

6.15 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 and may not have been acquired at all by some people.

- Some people with learning disability may 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 person may not connect 'category' and 'subcategory' words and may interpret them literally, e.g:

Q: 'Did you go to Jim's home?'

A: 'No. 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. People learn that 'how many' questions seek a number response even if they cannot reliably estimate or count. Unbelievable responses (e.g. 'It happened 1000 times') can simply mean 'lots of times'.
- Some people 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: *'How old were you when x?'; 'Was it light or dark or don't you know?; or 'You said that you played football that day, was that before or after you saw Robert?'*
- Consider the use of a visual timeline or similar device if the person is likely to have difficulty in responding to questions about times, dates or separate events or locations.
- If the alleged offence involved several incidents in different locations, the intermediary (if appointed) can prepare prompt cards, with a photo and symbol to represent each location.

6.16 Make sure the structure of questions is developmentally appropriate.

6.17 Keep questions short and the structure simple because in order to answer accurately, the person needs to be able to remember and process the whole question.

- The person may have difficulty remembering all of a multi-part question and may have a poor short-term memory for facts, events, times and dates;
- The person may have weak listening skills and a limited attention span
- ‘Front-loaded’ questions are more difficult to process, e.g. *‘I suggest to you that . . .’*; *‘I put it to you . . .’*
- Phrases such as *‘Do you follow?’* at the end of questions make it harder for the person to retain the key information they need in order to respond to the question.
- 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?’*).
- Complex questions are likely to result in incorrect or *‘I don’t know’* responses, even though the person knows the answer and could respond accurately if the question is phrased simply.
- A question with multiple topics can cause confusion as the person may have a limited working memory and may be unable to remember all of a multi-part question or decipher embedded clauses.
 - Instead of *‘When was the last time you say he did this to you before the time on that day in the summer that we have been speaking of?’*, try *‘You said that Michael touched you one day in the summer. Did he touch you on any other days?’*
 - Instead of *‘Is it correct that Susan put you up to making these allegations, because Mr and Mrs Hobbs have refused to allow Susan to live with them?’*, try *‘Did Susan want to live with your Dad and Step Mum?’ ‘Did your Dad and Step Mum say no to Susan living with them?’*

6.18 Ask all questions about past events in the past tense because the use of the present tense is likely to cause confusion or distress; 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?’*

6.19 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 people to understand, e.g. *'That is not a lie?' or 'It was not dark yet?'*
- Double negatives are even more problematic, e.g. *'Doesn't Mr Smith not only allow one child in his car at a time?' or 'Didn't you dislike that?'*
- Questions in the passive form are unnecessarily complex and difficult to understand. For example, e.g. *'Were you to have been taken to school that day?'*
- Questions which remove personal references and objectify the action are also harder to process, e.g. *'Did you tell the police about what is in that statement about the matter, about the touching of the boobs?'* Better options include: *'Did you tell the police that Tony touched your boobs?'*

6.20 Be careful about questions in the form of statements because these may not be understood as requiring a response. For example, *'You wanted Jim out of your house.'* A better alternative is *'Did you want Jim out of your house?'*

6.21 When an adult in a position of authority formally suggests that something is a fact, it becomes extremely difficult for people with a learning disability to disagree and to maintain verbally what they believe to be true. The more vulnerable the person, the riskier 'assertion' questions become. The previous Lord Chief Justice described the use of assertions with witnesses as 'particularly damaging' ('Half a century of change: the evidence of child victims' Toulmin lecture, 20 March 2013, King's College London). People with learning disability 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 person may interpret statements as comments, not as questions that require responses.

6.22 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 in favour of a direct question:

- 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?'*
- instead of *'You saw her at the cinema, didn't you?'*, try *'Did you see her at the cinema?'*
- Instead of *'And he would sometimes come to your house, is that fair?'*, try *'Did X sometimes come to your house?'*
- Instead of *'It was sunny that day, wasn't it?'*, try *'Was it sunny that day?'* or *'What was the weather like that day?'* or *'Was it sunny or rainy that day, or don't you know?'*
- Instead of *'Now you had a bruise, did you not?'*, try *'Did you have a bruise?'*

See Judicial College (2012b) [Fairness in Courts and Tribunals](#), section 5.1, and (2012a) Judicial College, [Bench Checklist: Young witness cases](#).

6.23 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 an acquiescent or vulnerable person 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.
- 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 young child or person to stay focused on the topic. This will also help the intermediary monitor his or her understanding.
- 6.24** If yes/no questions are the only option (because a person 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, 1993).
- 6.25 Be careful when asking forced choice (closed) questions because** these create significant opportunities for error as the correct alternative may be missing. The person may assume that one of the alternatives must be correct, e.g. *'When you went to the flat, did John or Bill open the door?'*
- 6.26** If asked open, free recall questions (e.g. *'What happened?'*), people with learning disabilities 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'* 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?'*
- 6.27 Be careful with 'Do you remember?' questions because** these require complex processing. People are likely to be confused when they are not asked about the event but are asked about what they told someone else. Use of quotes aggravates the problem, e.g. *'Do you remember when you were being asked by the sergeant what was said, you said that your father said, "He loved me" that's all he really said. Do you remember?'*
- 6.28** Answers may also be ambiguous, especially with 'Do you remember' questions that are also tagged, e.g. *'Now you had a bruise, did you not, near one of your breasts? Do you remember that?'* If the person answers 'no', this could mean *'No, I don't remember'* or *'No, I didn't have a bruise there'* or *'Yes, I remember but no I didn't have a bruise there.'*

7. RECEPTIVE COMMUNICATION: MAKING SURE YOU UNDERSTAND

- 7.1 Make sure you and the jury can see and hear the child or young person clearly** because many children and young people 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.
- 7.2 Attend to gestures and actions as well as words** because, as with children, some people with learning disability may be more competent to demonstrate what happened, rather than just explaining in words (Ministry of Justice, 2011, *Achieving Best Evidence*, section 3.107). Showing and telling can be an important part of communication. If the person realises 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.'*
- 7.3 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.
- 7.4** Some people'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 impaired. Again, an intermediary can be asked to help clarify what has been said; they will have assessed the person and be more familiar with their communication style.
- 7.5** Listen to what the person says and try to understand what they mean. A person with learning disability often uses words before fully understanding them.
- 7.6 Ask the young child or person to repeat what they said if you didn't hear properly, but say why because** witnesses may change their answer if asked to repeat something without knowing the reason. Some people may speak very quietly, especially when feeling anxious or fearful, or providing information that they are embarrassed about. Microphones can be relocated closer or higher, or the young child or person seated

lower. However, if you do not hear what the person has said, 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 person has said.

- 7.7 If you need to check back on what was said, use the child or young person’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 or young person that may not be accurate. This may affect the accuracy of their subsequent account of events.
- 7.8 Gain some familiarity with the person’s communication aids because** this will enable two-way communication during questioning. You do not need to know the person’s system in detail, but it helps to know how they use it and how it works.
- 7.9** Triangle produces an accessible summary giving details of 20 of the most common communication options used with children and young persons in the UK (e.g. BSL, Makaton, PECs), giving brief descriptions and guidance plus links for further information.
- 7.10** Many people with little or no speech can communicate effectively using signing, communication aids, symbols, pictures, photos, or written answers, with the assistance of an interpreter or intermediary. Refer to Toolkit 14 - Using communication aids in the criminal justice system. Communication aids can support and augment a person’s communication.
- 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).
 - Using formal communication aids almost always requires intermediary involvement and should be explored prior to questioning.
 - Aids may allow people to both show and tell (see Toolkit 14 - Using communication aids in the criminal justice system). The intermediary can help with the selection of appropriate communication aids (See ‘How It Is: An image vocabulary for children’ (2002) Triangle).

- There are risks and pitfalls as well as advantages (Ministry of Justice, 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).

7.11 The Intermediary can assist in identifying appropriate safe aids and help the child create aids to augment their communication. Examples have included:

- **the person’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** as long as the person is able to use a body map correctly for demonstrative purposes.

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