

Measuring up?

Evaluating implementation of Government commitments
to young witnesses in criminal proceedings

Joyce Plotnikoff and Richard Woolfson

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Good practice guidance in managing young
witness cases and questioning children

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Cruelty to children must stop. FULL STOP.™

The treatment of vulnerable and child witnesses must be sensitively and fairly handled. We welcome the good practice guidance as a timely reminder of important factors to bear in mind in these difficult cases.

Lord Justice Maurice Kay, chairman, Judicial Studies Board

Keir Starmer, QC, Director of Public Prosecutions

Peter Lodder, QC, chairman, Criminal Bar Association

Desmond Hudson, chief executive, The Law Society

The NSPCC

The NSPCC's purpose is to end cruelty to children. Our vision is of a society where all children are loved, valued and able to fulfil their potential. We run projects across the UK and the Channel Islands, including the NSPCC Helpline and ChildLine, the UK's confidential, free 24-hour helpline for children and young people who need to talk. We are the only charity to have been given statutory powers to carry out child abuse investigations.

The Nuffield Foundation

The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable object is "the advancement of social wellbeing". The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed are however those of the authors and not necessarily those of the Foundation.

Good practice messages

This good practice guidance is based on research carried out by the authors and discussed in their report *Measuring up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (Plotnikoff and Woolfson, 2009), which can be downloaded from www.nspcc.org.uk/measuringup.¹ The report brings together policies and guidance relating to young witnesses and compares these with interviews of 182 young prosecution witnesses.²

Advice concerning this guidance was provided by Her Honour Judge Cahill QC (liaison judge to HM Courts Service on victim and witness issues) and Her Honour Judge Tapping (responsible for Judicial Studies Board seminars on serious sexual offences). The messages were agreed by Michael Bowes QC, Criminal Bar Association, Nadine Tilbury, Crown Prosecution Service and Janet Arkinstall, Law Society (members of the research advisory group); and also by the Advocacy Training Council.

Before trial

List cases for an early fixed date and avoid adjournments

Enquire about children's level of understanding

The majority of young witnesses (across all ages) experience communication difficulties while giving evidence, often because questioning is developmentally or otherwise inappropriate, including too fast a pace. Before young people give evidence, ask for information about their communication abilities and concentration span. Where an intermediary is appointed, the judge or magistrates will discuss the intermediary's assessment report with advocates and the intermediary and give directions (the judiciary may set ground rules for questioning children even where no intermediary has been appointed). For guidance on questioning children, see Annex A.

¹ A disk of recordings made by young witnesses in the study *Giving young witnesses a voice: Experiences in criminal trials* (feedback for the judiciary, criminal justice system personnel and witness supporters, and advice for young witnesses waiting to go to court) can be requested from www.nspcc.org.uk/publications or 020 7825 7422.

² 170 were called to give evidence in England and Wales (of whom 160 testified) and 12 gave evidence in Northern Ireland. The sample included victims and bystander witnesses to a wide range of offences. Information was also received from parents, supporters and the organisations that referred children for interview (in England and Wales, primarily Witness Care Units).

Consider the full range of special measures in light of the child's wishes and needs

Ensure applications are made within time limits so that young witnesses can be informed of decisions before trial. There is no research evidence showing that special measures have an adverse effect on conviction rates.

Consider the potential benefits to recall and stress reduction if a young witness is accompanied by a known and trusted supporter

This person should be seated out of the witness's line of sight.

Timetable all stages of children's evidence to minimise time at court and give them a fresh start in the morning

The start of children's testimony should not be delayed by other matters on the court list. Take account of their concentration span, the length of any recording, the best time to view it and the need for breaks.

Agree admissions of as much of the child's evidence as possible in advance

This includes locations, times, and lay-outs.

Request that court familiarisation visits take place before the day of trial

This will enable children to express an informed view about special measures, so that a revised application can be made if necessary in advance of trial. A pre-trial visit to the court also avoids the need for them to attend early on the day of trial to see facilities.

Request that they see their statement for the purpose of memory-refreshing before trial

Most children find their first viewing difficult so it is preferable for this not to take place at trial.

Consider the witness's access to the building and suitability of waiting areas

Where it is difficult to segregate young witnesses from defendants within and around the building, consider standby arrangements or the use of remote live links. Depending on the child, the importance of a personal introduction to the judge may outweigh benefits of remote link use.

At trial

Prosecutors are expected to introduce themselves to young witnesses before trial and to answer their questions

Judges and magistrates may ask if the child would like to meet them, to help to establish rapport and reinforce advice.

Encourage young witnesses to let the court know if they have a problem

They may not understand a question or questions that are too fast, or they may need a break. Some courts provide coloured “signal” cards in the live link room for this purpose. However, many young people will not say they do not understand, even when told to do so. Professional vigilance is therefore always necessary to identify potential miscommunication (see Annex A for examples).

Explain that the judge or magistrates can always see the witness over the live link

Explain that this is the case even when the witness cannot see the judge or magistrates. Check that children also know that everyone in the courtroom, including the defendant, can see them on the live link.

Avoid asking young witnesses at trial to demonstrate intimate touching on their own body

This is likely to be experienced as abusive. They can be asked to point to a body outline diagram (see Annex B).

Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant

Do not wait until the young witness is in the live link room to run checks: delays and malfunctions are disruptive to the child. During children’s testimony, ensure that they see all of the questioner’s face over the live link.

Post-trial

Thank young people for being a witness

Where possible, also ensure that the person who called them as a witness informs them of the case outcome.

Seek routine feedback from young witnesses locally

This should include the time they waited, the support they received and their experiences of questioning. Without this, courts and practitioners cannot be confident about what works well or could be improved.

Key findings from the research

- Around half of the young people who gave evidence in this study did not understand some questions at court (consistent with previous young witness studies).³ A greater proportion in Crown Court had difficulty in understanding some questions.
- Sixty-five per cent experienced problems of comprehension, complexity, questions that were too fast or having their answers talked over. Young people in all age groups, including older teenagers, had such problems.
- More than half of those with a problem did not tell the court even though they had been advised they could do so.
- Young people also reported problems with questions that came too fast; were repetitive; jumped around in time; focused on details that appeared to be unrelated to the substance of the case or which placed unrealistic demands on their memory; and which attempted to “put words in their mouth”.
- Fifty-seven per cent said they were accused of lying, and most of them said this happened more than once.
- Almost half of the children (all were prosecution witnesses) described defence lawyers as “sarcastic”, “rude”, “aggressive” or “cross”.

³ *The Bercow Report: A Review of Services for Children and Young People (0-19) with Speech, Language and Communication Needs* (DCSF, 2008) reveals that communication problems are much more prevalent among children than previously realised.

- Eleven per cent of victims of sexual offences were asked to demonstrate intimate touching on their own body.
- Judges and magistrates intervened in response to inappropriate questioning less often than communication problems arose, according to young witnesses. They reported few such interventions by the prosecutor.
- All young people under 17 are eligible to be considered for the intermediary special measure. In areas where the intermediary special measure was available, 70 per cent of children (74 out of 106) had problems with questions or underlying conditions potentially affecting communication, which meant they may have benefited from assessment by an intermediary. Nevertheless, only one of these children was the subject of such an assessment.
- Young people appreciated personal introductions. While most were introduced to the prosecutor, few met the defence lawyer or the judge, district judge or magistrates.
- Sixty-six per cent giving evidence by live link were accompanied by someone they had not met before.
- Although young witness cases were dealt with more quickly than in previous studies, time from first court hearing to trial in study cases remained longer, on average, than published statistics for all criminal cases. Trials involving over one-third of children were adjourned at least once.
- Fifty-one per cent began their evidence in the morning of the first day of court attendance. The average actual waiting time to give evidence was 3.5 hours at magistrates' or youth court (91 young witnesses) and 5.8 hours at Crown Court (59 young witnesses).
- Only 5 per cent had the option of waiting away from the court on standby.
- Half of the young people had a familiarisation visit to the court before trial; most did not have the chance to practise speaking on the live link during this visit.
- Forty-five per cent who made a visually recorded statement saw it before the day of trial for the purpose of refreshing their memory. CPS policy⁴ suggests that the pre-trial court visit is a good time to view the recording. Our study concludes this is not desirable because of time pressures and the risk of overloading the child.

⁴ Crown Prosecution Service (2006) *Children and Young People: CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses*. London: Crown Prosecution Service (p 14).

- Of the 55 per cent of children who watched their statement for the first time at trial, nearly three-quarters described the viewing as “upsetting”, “funny” or “strange”, or said that it was hard to concentrate, confirming that it is desirable for young witnesses to see their statement before it is used in evidence at trial.
- Most were content with how they gave evidence, but 9 per cent of those who used the live link and 40 per cent of those who testified in the courtroom did not want to give evidence this way. Among those who used the live link, several were unhappy about the defendant seeing them: for a few, the defendant’s screen was turned off or covered.
- Forty per cent described problems caused by faulty live links, difficulties in playing visually recorded statements, or the lack of screens. Some gave evidence in court because the live link was not working.
- Twelve per cent of those who used a live link saw the defendant on their TV screen and some reported seeing only part of the face of the questioner.
- Leaving aside young witnesses who gave evidence in the youth court from which the public is excluded, 41 per cent of children who testified in sex offence cases or who had been intimidated appear to have been eligible for the section 25 special measure (to exclude the public from the courtroom). This measure was used for one child in the study.
- Forty-five per cent of those who attended court in person saw the defendant in the building, or while entering or leaving. Only 7 per cent of young witnesses in the study used a remote live link away from the trial court.
- In the pre-trial period, 79 per cent of children felt anxious about giving evidence, 52 per cent experienced stress symptoms, and 20 per cent described themselves as intimidated by the defendant. Of those in full-time education, 38 per cent said their studies or attendance were affected (8 per cent dropped out altogether and 2 per cent changed schools due to intimidation).
- While giving evidence, two-thirds described themselves as feeling upset, scared, shaky, sick, intimidated, annoyed, angry, tired, frustrated, under pressure or having fast heart beats.
- According to their parents, 23 per cent of children had conditions including epilepsy, hearing or sight problems, learning difficulties, autistic spectrum disorders, ADHD, a short attention span or poor levels of speech.
- Sixty-five per cent of children who gave evidence would be a witness again in future; 90 per cent of those willing to give evidence again had been thanked for being a witness.

Annex A

Research-based guidance: Good practice when questioning children at court⁵

The findings of *Measuring Up?*, on which this guidance is based, are consistent with two previous studies by Plotnikoff and Woolfson⁶ in which 50 per cent of young witnesses (of all ages) reported not understanding words or questions at court. It is likely that some other young witnesses could not identify whether they understood all questions asked.

This Annex draws on *Handbook On Questioning Children – A Linguistic Perspective*, by Anne Graffam Walker, Ph.D (1999), the American Bar Association Center on Children and the Law’s “most-acclaimed and most widely used book”, available from www.abanet.org. Walker, a forensic linguist, sets out general principles based on research, and emphasises the need to take account of the individual child’s communication abilities, particularly those who have a developmental disability, have been maltreated or who come from a different culture.

See also *Achieving Best Evidence in Criminal Proceedings* (Criminal Justice System, 2007), particularly the guidance on questioning (paras. 2.153–178) and on intermediaries (paras. 6.83–90).⁷ Bear in mind that a report from a registered intermediary assesses the child’s communication abilities and will advise whether use of an intermediary at interview or trial should be considered.

Use simple, common words and phrases

Witnesses as young as four have been asked questions that include “allegation”, “exaggerate”, “deny”, “insert”, “was that not true?”, or “I put it to you”.

Repeat names and places often

Examples: “What did *Jim* say?” not “What did he say?” “Were there a lot of people *in the kitchen*?” not “Were there a lot of people there?” Also, using the child’s own name frequently can help keep younger children focused.

⁵ This Annex updates guidance prepared for seminars held by the Criminal Bar Association and the NSPCC in 2008: *The Prosecution Case and Evidence* (16 January); *Witnesses: Demonstration of Best Practice* (23 January); and *The Defence Case and Evidence* (6 February).

⁶ *In their own words* (NSPCC, 2004); and *Evaluation of young witness support: examining the impact on young witnesses and the criminal justice system* (Office for Criminal Justice Reform, 2007) – see www.lexiconlimited.co.uk/PDF%20files/Young_Witness_Study_Report.pdf

⁷ Written guidance on judicial monitoring of questioning accompanied the NSPCC DVD, *A Case for Balance* (1997), demonstrating good practice when children are witnesses.

Ask one short question (one idea) at a time

Children must remember the whole question in order to process it. Avoid “front-loading” questions such as: “Do you recall talking to her on the Sunday after they found – discovered – something had happened to Doug and asking her, ‘Do you know Mark?’ and then saying, ‘That is who did it’? Do you remember telling her that?” (Question asked of a five-year-old at a murder trial.)

Follow a structured approach, signposting the subject

Signposting prepares children to respond by letting them know the subject of the question, for example “Now I’m going to ask you about X”. Tell young children clearly that the subject is about to be changed. Explaining why a question is repeated may help allay the child’s concern that the first answer to a repeated question was wrong.

Avoid negatives

Phrase questions positively whenever possible. Questions containing negatives (“Didn’t he hurt you?”) or negative forms (for example “*incorrect*”) are hard to process and therefore not reliable tools for getting accurate information from children. They are more likely to be misinterpreted and answers are far less likely to be accurate. Children’s strategies for processing negatives are still not in place at the age of nine.

Avoid “I suggest to you that...”, “I believe you told us...”, “Isn’t it a fact that...”

Such words are used to introduce a statement, using language that asserts its status as fact. These questions are wholly inappropriate for children. When an adult in a powerful position formally suggests that something is a fact, it becomes extremely difficult for children – even 11 and 12-year-olds – to know how to disagree if necessary, and to maintain verbally what they believe to be true.

Avoid “tag” questions

A tag question makes a statement then adds a short question that invites corroboration of its truth, for instance: “you stayed at home that day, didn’t you?” They are one of the most powerfully suggestive forms of speech. They are also linguistically complex, requiring seven stages of reasoning in order to answer correctly. Children often answer “Yes” to a tag question in which the tag is negative. “Yes” is a valued answer, as it indicates cooperation; it is often perceived to be the answer that the adult wants. Tag questions of all kinds should be avoided with children. (A four-year-old was asked at trial: “No man licked your nunny, did he?”)

Avoid “Do you remember...?” questions

Such questions require the ability to follow, process and recall all of the question; judge the questioner’s intention; and then to modify the question as necessary in order to reply truthfully. Even older school-age children are not good at this. Answers are often ambiguous.

Avoid restricted choice questions

These create opportunities for error, particularly for children under eight or nine. (“When he hit you, did you shout or cry?”) Where they are unavoidable, one approach is to give no more than three options, with the last one always open-ended, for example “Was it red, or was it blue – or was it some other colour?”

Speak slowly and give children enough time to answer

Children need more time to process questions than adults: for five- to seven-year-olds, almost twice as much. Pausing between phrases and sentences and after questions gives children the processing time they need.

Don’t rely on children (even adolescents) to say if they don’t understand

It is good practice to begin by asking children to say when they do not understand a question. However, they often try to answer questions they do not understand fully. Reasons why they may fail to say they do not understand include reluctance, because the questioner is an authority figure, and because they think that they understand the question when in fact they do not.

Check directly on the child’s understanding

Asking “Do you understand?” is not sufficient to avoid confusion. The most critical error that we make in questioning children is to assume that they use, process, and understand language in the same way as adults. (Q: “Who’s Tim?” A: “My advocate.” Q: “What’s an advocate?” A: “Someone who prays and has sex with you.”) Children often use words before they really understand them. Problem words include before/after; in front of/below/ahead of/behind; always/never; different/same; and more/less. Ways to clarify meaning and reduce inconsistencies include: “Tell me more about that” and “What do you mean when you say...”

Be aware that concept words are particularly problematic

Their use does not mean they are understood, for example, the ability to count does not mean the child understands numbers. “How many times” questions are inappropriate for young children: the response may change each time the question is asked. Unbelievable responses can be a metaphor for “lots and lots of times”, or a recognition that a question with a number slot needs a number to fill it. However, even very young children can tie what happened to events such as holidays and familiar knowledge such as what was on TV.

Be alert to literal interpretation by younger children and those with autistic spectrum disorders

Literal interpretation may be true even for some older children. Examples include:

Q: “Did you go to the man’s house?” A: “No.” Q: “Did you go to his flat?” A: “Yes.”
Q: “Did you have your clothes on?” A: “No.” Q: “Did you have your pyjamas on?” A: “Yes.”
Q: “Did he touch you?” A: “No. He washed me on my private, everywhere.” (“Touch” may well be understood only in a narrow sense).

Avoid idioms, for example: “Can you shed light on this?” An autistic child aged 12 was asked a question at court that began “I’m trying to paint a picture of what happened to you...”

Finally

- Inconsistency in children’s statements is a normal part of the language acquisition process.
- Many teenagers (particularly the under-educated/-parented, unattached and developmentally delayed) remain stuck in the seven to 10-year-old stage. Teenagers are at greater risk of miscommunication because of adults’ higher expectation of their ability to understand court language.
- Children who are upset or stressed may function at a lower level.
- Seven per cent of children have significant speech or language difficulties.
- About 50 per cent of young people in some socio-economically disadvantaged populations have lower communication skills than others of the same age.
- Ten per cent of children aged five to 16 have a clinically recognisable mental disorder.

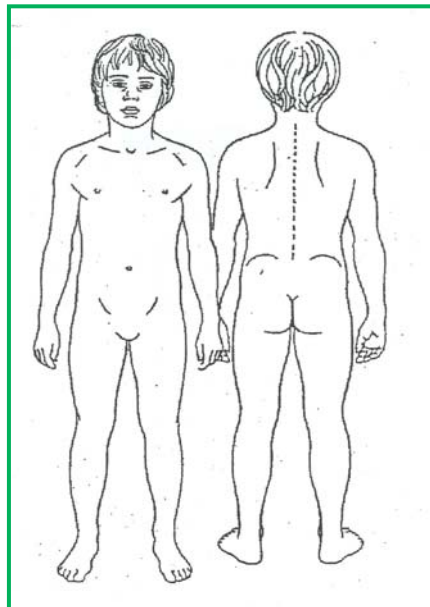
Annex B

Questions concerning intimate touching

CPS policy states that: “It is almost always inappropriate and unnecessary to have the child point to parts of their own bodies. Consider using diagrams or body maps.” (*Safeguarding Children*, CPS, 2007, para. 11). An example is provided below.⁸

It is important that any such drawing be used:

- where intimate touching has already been reported
- along with open questions only, for example: “You said he touched you. Can you show me on the drawing where he touched you?”
- that any touch reported by the witness using the drawing is then clarified (that is, an elaborative account is also elicited) using open questioning, for example: “Do you have a name for that place? Tell me about it/Tell me what happened.”



Note

Research studies relating to the investigation stage warn against use of body outlines to elicit reports of touching that have not previously been reported spontaneously. No studies have compared the use of different types of drawings (that is, clothed versus gender-neutral versus anatomically detailed) but clothed drawings are likely to be too ambiguous.

⁸ The authors are grateful to Deirdre Brown, Lancaster University, for providing this example. It was first used in J. Aldridge et al (2004) *Using a human figure drawing to elicit information from alleged victims of child sexual abuse*. *Journal of Consulting and Clinical Psychology* 72, 304-316.

The full report and executive summary
of *Measuring up?* are available from:
www.nspcc.org.uk/measuringup

You may also find these other
research reports of interest:

Your shout too! A survey of the views of children
and young people involved in court proceedings
when their parents divorce or separate
Judith E. Timms, Sue Bailey and June Thoburn, 2007

Your shout! A survey of the views of 706
children and young people in public care
Judith E. Timms and June Thoburn, 2003

I think it's about trust: The views of
young people on information sharing
By Zoe Hilton and Chris Mills for the Office of
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