



Benchmark

best practice - best evidence with vulnerable people

Guideline Summary: Questioning children

Facilitating children's evidence

Even young children can accurately recall and report past events, provided they are questioned appropriately. This guideline summary identifies some of the communication issues that can make it difficult for children to testify effectively and what you can do to facilitate their best evidence. Children are defined as young people aged up to 18; "child witness" refers to both complainants and witnesses.

For more detailed information refer to the full guideline [[link](#)].

What's the problem?

1. Linguistic diversity

- Aotearoa New Zealand is a highly linguistically and culturally diverse context. Many who enter the courts do not necessarily share the same cultural knowledge and practices and may not share the same first language. Establishing reliable information about the first language and known languages for a child is essential.

2. Legal professionals often use language which is too complicated for children

- Children's acquisition of their first language goes on much longer than is often realised: People in their late teens and early 20s may still not have a typical adult understanding.
- This means that children understand fewer words and grammatical structures than adults; they may not understand common legal terms like *allegation*, *defendant*, *evidence*; they may not recognise ambiguity and irony or know the same idioms as you; they may be unable to express themselves as well as adults.
- If children are stressed during questioning, this can diminish their ability to process and respond to your questions even further.
- Studies show that Aotearoa New Zealand lawyers typically do not simplify their language enough when questioning children.
- Lawyers and judges may not realise just how complex their language actually is (complexity is typical of highly literate people's speech), making it especially difficult for them to adjust their language to match children's competencies.
- Long experience in examining children or in communicating with your own children/grandchildren does not guarantee that you are competent at adjusting your language to match all child witnesses' and defendants' competencies.
- Just because a child does well in an EVI does not mean s/he will do equally well at trial unaided. The context/atmosphere and

questioning style of the typical EVI differs vastly from that of the typical courtroom examination.

3. Some of the children you question will have language and other impairments

- Child maltreatment is associated with impoverished language competencies.
- Youthful offenders have disproportionately high rates of language and other intellectual impairment, mental health and substance abuse issues, and traumatic brain injuries.
- These impairments may not have been formally diagnosed.

4. You can't rely on children to tell you when they don't understand you

- Children rarely tell the court when they don't understand a question but may try to answer anyway - children may not even realise they haven't understood.
- Giving a seemingly sensible answer is not proof that the child understood the question. Furthermore, children may use words and expressions before they have a full (or any) understanding of them - just because a child uses formal words like *allegation* does not mean their understanding of the word matches yours.

5. Some concepts and words are particularly difficult for younger children

- Difficult concepts include time (timing of events, duration, frequency) and describing clothing placement. Children may be unable to accurately tell the time on a clock until after age 9.
- Children can have idiosyncratic understandings of common words (*touch, remember, forget*) which can cause miscommunication; children up to 10 can misinterpret seemingly simple words like *ask* and *tell*; clauses beginning with *before* and *after* can confuse children up to 7 (e.g., *Did you go home after you went to the mall?*).

6. Children's role in legal examinations differs from their role in typical adult-child interactions

- The younger the child, the less experience they have in constructing a coherent and complete account of what has happened - they may not realise what details they need to include to convey what has happened to someone who was not present.

- Children may not be used to being in the role of "expert" when talking to adults. They may expect adults to know the answers about the events in question, and so accept adult suggestions or "corrections" more readily. They may be unaccustomed to correcting adults.
- Children can be reluctant to answer questions due to the potentially sensitive, highly personal or embarrassing nature of the events under discussion and/or fear of consequences (for themselves or others).

What can you do?

7. Establish rapport

- Establishing rapport with children may go some way to minimising possible anxiety or apprehension that children may feel about participating in a trial.
- When the child is **your own witness**:
 - Spend some time prior to the trial talking with them about neutral or positive events, using an open-ended style of questions. Let children know that it is acceptable to respond, "I don't know", to correct you if you make a mistake, and to let you know if they do not understand your questions.
 - Supportive statements (e.g. "I can see that this is hard for you") and encouraging behaviours that are not contingent on the content of what children say (e.g. nods, smiles) may create a supportive context and increase children's accuracy and responding.
 - Spend some time if possible immediately prior to the child taking the stand re-establishing rapport.
- When the child is **NOT** your own witness:
 - Opposing counsel may also find value in establishing rapport immediately prior to substantive questioning, by asking simple questions about the child and what they like to do, to settle the child and allay any anxiety that might negatively impact on responding. Reminding the child of the examination rules may also be useful (e.g. to indicate to the child that they need to say if they do not understand a question, do not know the answer, or need a break).

8. Plan your examination in advance

- Draft as many of the questions as possible before trial to identify language that might be too difficult, unnecessary questions, and poor sequencing.

- Organise questions into topics, then arrange those topics into chronological order. During the examination, tell the child when you've finished with one topic and orient them to the next topic (*I've finished my questions about the day you visited grandma. Now let's talk about the day you visited Uncle Tom*).
- Always consider engaging a communication assistant under s 80 of the Evidence Act if the child is under 12, has (or may have) a language or other impairment, or if you have any other concerns about the child's ability to give evidence (see [Communication Assistance Guideline](#)).

9. Explain the "rules" of the examination

- Tell children to say if they don't understand a question. Stress that they should answer the question if they know the answer, but that it's ok to say *I don't remember* or *I don't know*. Remind them there is 'no guessing' in court. Remind children of the rules throughout the examination - it may be useful to display visual aids (e.g., posters) that remind children of the examination rules.
- If the child is **your own witness**, you can practise applying the rules with the child during a pre-trial briefing using neutral questions and giving feedback on their application of the rules.
- Although this doesn't guarantee children will apply the rules, it may prompt some to do so.

10. Adjust your speaking speed

- Slow down your speaking speed, use pauses, and give children plenty of time to respond. Wait as long as 6 seconds for an answer before concluding the child is not going to give one. Children can take far longer to process and respond to questions than adults.

11. Use children's terms

- Use the same terms the child uses - e.g., for relevant body parts, members of their whānau/family, places, and so on. These terms may be clear from the EVI, but you should *also* check your understanding of those terms with the child (e.g., *You said you talked with Grandma. Do you know Grandma's name? or You said he touched you on your "flower". Is there another name for the place where he touched you?*).

12. Adopt these two rules of thumb to help simplify your language

- **Use short, simple questions** - the younger the witness, the shorter the question.
- **Imagine the question coming out of the witness'/defendant's mouth:** if it sounds strange, precocious, or like a parody of legal-speak, rephrase your question.

13. Avoid these words/features in your questions:

- Legalese and legal terminology such as *I put it to you; I suggest to you; is it your evidence that; defendant; cross-examination; witness; allegation; interview; evidence; Your Honour.*
- Formal vocabulary and expressions such as *on that occasion, incident, sibling, residence, at that address, assert, concede, confirm, conclude, assume, nevertheless, moreover, furthermore.*
- Figurative (non-literal) expressions, such as irony, metaphors and idioms like *kick the bucket, talk shop, hammer the point.*
- The passive voice, such as *you were interviewed by Jan; you were asked some questions; Bob was hit by Bill.*
- Sentences with lots of clauses; ones beginning with *although, unless,* and hypothetical *if* can be particularly difficult.
- Multiple questions, which ask for more than one piece of information, such as *Was Dad wearing shorts and a t-shirt?* **HINT:** if you hear yourself saying *and* in the middle of a question, you may be about to ask a multiple question.

14. Wherever possible, avoid these features in your questions:

- Third-person pronouns (*he, she, it, they*) and other words whose meaning depends on the context (*here, then, there, at that time, on that day*) - it may not be clear what or whom you are referring to. Use full names or descriptions instead.
- Negatives - even single negatives - such as *not, never, nor, no* and negative affixes like *un(happy), (use)-less, dis-(approve)*. Negative words like *unless, scarcely, hardly, rarely, anything but* can be particularly difficult.
- Asking young children to estimate the timing, duration, or frequency of events (see the full [Questioning Children Guideline](#) for specific guidance). For example, children may be able to accurately indicate whether something happened once or more than once but be unable to accurately indicate how many times a repeated event occurred.

15. Avoid repeating questions

- Repeating questions can diminish the accuracy of children's responses; needlessly repetitive questions should be disallowed under s 80 Evidence Act 2006.
- If you *must* repeat a question, explain why you are asking again (e.g., to check you understand) and use a non-suggestive, open question rather than one which is answered by *yes* or *no*. Limit the number of times you ask for the same information.

16. Choose your question types carefully

- When children are asked to recall past events, their responses to non-suggestive, open-ended, free recall questions (*Tell me everything you saw*) are more likely to be accurate than responses to other question types; closed yes/no questions can sometimes be risky (*Were you wearing pyjamas?*); closed leading questions are riskiest of all (*So you were wearing pyjamas?*).
- Use open questions wherever possible (*Tell me everything you saw. What were you wearing? Who was in the house?*), including to elicit descriptions of clothing placement (*Where were your clothes? Tell me more about where your clothes were*).
- **Never** ask tagged questions (i.e., never use questions like *You saw the fight, didn't you? You were wearing pyjamas, weren't you? Bob was not shouting, was he?*).
- Be wary of forced-choice questions such as *Were you happy or sad? Were the curtains open or closed?* The options must be mutually exclusive and cover all possibilities to avoid error - if you must use one, asking *Were you happy, sad, or something else?* is safer than asking *Were you happy or sad?* (the child might have been neither).
- Avoid accusing the child of lying, even indirectly or using "soft" words (*fibs, porkies*). Allegations of lying may cause severe distress, preventing the child answering further or concentrating on their answers. See [Pre-trial Case Management Guideline](#) on seeking directions to limit your duty to put the case.

17. Be aware that *children's* responses can be ambiguous or cause confusion

- Indirect questions involve two questions: [*Do you know*]_{Q1} [*What time Dad arrived?*]_{Q2}. Respondents are expected to answer the second question (if they know the answer). However, children sometimes answer the first instead: Q: *Do you know what time dad arrived?* A: *Yes*. If both questions are closed (*Do you know*_{Q1} *whether Dad was home?*_{Q2}) a bare *yes* or *no* can be ambiguous: *Yes* could mean *Yes, I do know* or *Yes, he was at home*. If this happens, clarify the answer. **HINT:** Indirect questions often begin with *do you know, do you remember, can you tell me, etc;* if

the next word is *if* or *whether*, you may be about to ask a question made up of two closed questions and a bare *yes* or *no* response will be ambiguous.

- Children may not have mastered the tricky rules for answering **negative yes/no questions** (*Didn't you see Bob?*) and **negative tagged questions** (*You didn't see Bob, did you?*), so a bare *yes* or *no* response can be ambiguous. E.g. If a child says just *No* to either of these questions, you cannot be sure whether the child is saying *No, I didn't see Bob* or *No, you're wrong, I did see Bob*. Similarly with **negative declarative questions**: In response to *You didn't see Bob?*, a bare *yes* could mean *Yes, I did see Bob* or *Yes, you're right, I didn't see Bob*. Avoid these question types; if you do use one, and get a bare *yes* or *no* response, clarify the response.
- Inconsistencies in a child's testimony can arise because of their idiosyncratic understanding of words. For example, for some children, *touch* only refers to bodily contact involving a hand, but not to biting, kissing, kicking. Similarly, words like *forget* and *remember* are conceptually complex. They involve knowing something in the past, then being able (*remember*) or unable (*forget*) to subsequently recall it. Avoid these words if possible, particularly with younger children.
- Children up to around 10 can sometimes confuse *ask* and *tell*. If you do use these words, follow up with a question to clarify (e.g., Q: *Did you ask Mum what to do?* A: *Yes*. Q: *What did you say?* A: *I said she had to go to the police*).

18. Make use of all legislative and other procedural supports available for children

- See the [Pre-Trial Case Management Guideline](#), especially on pre-trial directions on language.
- See the [Communication Assistance Guideline](#).
- You can request specific accommodations for children, e.g., allowing the child a comfort toy, mini-breaks, cards the child can use to point at to indicate non-comprehension or the need for a break, and so on. The courts are increasingly willing to adjust processes to accommodate children.

For more detailed information refer to the full guideline [[link](#)].