



Mental health, autism and learning disabilities in the criminal courts

Information for magistrates, district judges and court staff

Second Edition, revised and updated by the Prison Reform Trust

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The Prison Reform Trust

The Prison Reform Trust works to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing parliament, government and officials towards reform.

The Prison Reform Trust's advice and information service responds to over 6,000 prisoners and their families each year.



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Rethink Mental Illness is a charity that believes a better life is possible for millions of people affected by mental illness. For more than 40 years we have brought people together to support each other. We run services and support groups that change people's lives and challenge attitudes about mental illness.

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“It just felt like it wasn’t real, like it was all going on around you. It just went over my head, all the legal terminology... you feel like they’re deciding your life but it doesn’t involve you.” Service user, Revolving Doors Service User Forum

“It was scary because I just see this man and two women sitting on a great big bench and I was in a glass box and there were all these others looking. A man then came over and said he was my solicitor but he was different from the one the night before. I thought to myself, ‘What is going on?’” An offender with learning disabilities talking about her experience in court

“This resource will prove very helpful to magistrates’ courts judiciary and staff. It will aid a greater awareness and understanding of mental health and learning disabilities, and how the court can respond effectively to the challenges these matters can present.”

John Fassenfelt, chair, Magistrates’ Association (2011 – 2013).



Foreword

Many people who come into contact with criminal justice services have multiple and complex needs, and high numbers have mental health and learning disabilities. I was invited by the government to undertake an independent review of people with mental health problems or learning disabilities in the criminal justice system.

What began as a six month review of the organisation and effectiveness of court liaison and diversion schemes was extended to over 12 months. This extension was to ensure comprehensive consideration of vulnerable individuals at each stage of the criminal justice process. My report (Department of Health, 2009) contained 82 recommendations and most of these are being taken forward.

One of my recommendations was that members of the judiciary – and criminal justice staff – should undertake mental health and learning disability awareness training. I am especially pleased that the Judicial College, Justices' Clerks' Society and the Magistrates' Association have joined with the Prison Reform Trust and Rethink Mental Illness to produce this valuable resource. While it is not the role of the judiciary and court staff to 'diagnose' mental health or learning disability, it is important that they are able to recognise certain behaviours that warrant further investigation. Members of the judiciary should also be aware of support measures they can call upon to ensure an individual's participation in court proceedings, and disposal options appropriate to the care and support needs of individual offenders.

Another of my key recommendations that should further help members of the judiciary concerns liaison and diversion services. Members of the judiciary need access to timely information concerning the particular support needs of individual defendants and offenders. For example, what help is needed to ensure effective participation in court proceedings, when certain disposal options might be appropriate, such as the mental health treatment requirement, and how disposal options might need to be adapted for offenders with a learning disability. I am pleased, therefore, that the government has made a commitment for every police custody suite and criminal court in England to have access to liaison and diversion services; similar services exist

in Wales. These services should help members of the judiciary to identify when an individual might have mental health or learning disabilities, how best they might be supported through the criminal justice process or, where necessary, be diverted away from criminal justice and into treatment and care.

Five years on, an independent review, by the Centre for Mental Health (2014), of progress to date and priorities for further development was published. From this review, there was evidence of good progress made and important further developments for liaison and diversion services.

This excellent resource, which is available on-line and in hard copy, will help members of the judiciary and court staff to recognise when further information about an individual defendant might be necessary, how to get that information, and how to use it to inform their decision making.

A handwritten signature in black ink that reads "Keith Bradley". The signature is written in a cursive, flowing style with a long horizontal line underneath the name.

The Rt Hon Lord Bradley

Section 1:

Welcome and introduction

High numbers of people with mental health conditions, learning disabilities, autism or other needs come into contact with the criminal justice system as perpetrators and victims. It can be difficult to recognise when someone has a mental health condition, learning disability or autism.

In his review into people with mental health problems or learning disabilities in the criminal justice system, Lord Bradley highlighted the importance of mental health and learning disability awareness training for criminal justice staff including members of the judiciary. The Magistrates' Association supports this need for information and training.

This resource has been produced primarily for magistrates. It is also useful for district judges, legal advisers and ushers, and health and justice professionals and practitioners. It provides information about some of the common characteristics of mental health conditions, learning disabilities, autism and communication difficulties, and highlights how members of the judiciary and court staff might deal with adult defendants with these conditions. Members of the judiciary and court staff are not expected to diagnose conditions or disabilities, neither is it their role to provide welfare services to defendants. They do, however, have a responsibility to raise concerns about defendants who they think might be vulnerable.

This resource provides an overview of the signs to be aware of that may indicate that someone has a mental health condition, learning disability, autism or communication difficulty. Having a feeling that 'something isn't quite right', or thinking that a defendant is behaving oddly, is enough justification to ask for more information about that defendant. Asking for more information about a defendant can happen at any point during court proceedings.

All defendants have the right to a fair trial. There are some defendants who are vulnerable and might need additional support. This could be due to their age or developmental immaturity or to particular conditions such as learning disabilities, mental health conditions, or autism.

Criminal Practice Directions (CPD 1 General Matters, 3D: 2015) Vulnerable people in the courts notes that:

...‘vulnerable’ includes those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.

People with mental health conditions, learning disabilities, autism or communication difficulties are not homogenous groups with identical experiences and needs. They are individuals with a wide range of different life experiences, strengths, weaknesses and support needs. Many, however, will share some common characteristics, which might make them especially vulnerable in court. People can experience mild to severe conditions and this will affect the level of support they might need.

This resource draws on prevalence data from different research studies, all of which produced statistically significant results. Nonetheless, they show some differences, largely due to different research methodologies. Despite these variations, it is clear that high numbers of people with vulnerabilities routinely appear in the criminal courts.

The primary focus of this resource is vulnerable adult defendants. However, much of what is covered will apply also to child defendants and vulnerable witnesses in the criminal court.

“The Magistrates’ Association, together with the Justices’ Clerks’ Society and Judicial College, has been pleased to be involved in the production of this resource. As magistrates, we have all seen defendants who we believe should not be in court; this is something we can’t change. But we can affect how they are dealt with. This resource will be invaluable in helping us to respond more appropriately towards these individuals. Not only should it be required reading, but its content should be embedded into our practices. The criminal justice system may rightly be focussed on the victim, but unless we deal appropriately with the offender, nothing will change. As the incoming chair of the Magistrates’ Association, I will encourage its use and application in the criminal courts.”

Richard Monkhouse, chair, Magistrates’ Association (2013 – 2015)



Section 2:

How to use this information

This resource has been designed so that it can be used in a number of different ways. One of the most useful ways is when it is combined with information from local services such as liaison and diversion and probation. The resource is available online (www.mhldcc.org.uk) and hard copies are available to download for free. Being online means that updates can be made in response to feedback, and new topics can be added.

In this revised and updated edition, two new sections on autism and women in the criminal justice system have been added, and information on communication difficulties has been enhanced.

Film clips are used throughout the online version to help illuminate points made. The Film clips are not a standalone resource. 'Hyperlinks' are used throughout the online version to help you manipulate the resource and to direct you to further reading.

Primarily, the resource is intended for personal use. It can also be used:

- to inform training events
- as part of ongoing training during bench or other meetings
- as reference material.

The Prison Reform Trust can help with providing speakers for training events and suggesting how events might be organised.

We welcome your feedback on this resource. You can give your views and comments by contacting us on the email address below. Please also contact us if you notice any errors or if you would like further information:

- jenny.talbot@prisonreformtrust.org.uk

“This awareness training in mental health and learning disabilities is a must for all involved in the criminal courts. The resource is informative and sensitively put together. It is useful to be able to dip in and out to get the information you need. I found the film clips thought provoking; the personal life experiences portrayed took courage to share.” Janet Whitby, magistrate

Section 3: Mental health

a. What is a mental health condition?

Mental health conditions are very common. One in four people will experience a mental health condition in their lifetime.

Mental health conditions are also commonly known as 'mental health problems' or 'mental illnesses', and these terms can be used interchangeably. Mental health conditions can affect someone's thinking, feeling and behaviour. This can have a detrimental effect on their relationships, work and life generally.

Some people need support with daily living, such as with personal care, shopping and paying bills. This support can come from friends, relatives, voluntary agencies or statutory services.

Some people with mental health conditions live independently, others may live with a carer and some may live in supported accommodation. If a person's mental illness is severe, they may need to spend some time in hospital for treatment under the Mental Health Act 1983 or as a voluntary patient. Further information on the Mental Health Act can be found in Section 16: Mental Health Act.

Some people may have a mental health condition for a short amount of time and make a full recovery. Others may have a long-term condition. For some people, their condition can come and go.

A mental health condition is considered a disability if it has a long term and adverse effect on someone's day to day activities. In this case, their condition would be covered by the Equality Act 2010. The Equality Act 2010 protects disabled people from being discriminated against. It protects people from discrimination at work, when applying for jobs or when they use services, which includes HM Courts and Tribunals Service (you can get more information about discrimination and the Equality Act 2010 from Rethink Mental Illness at www.rethink.org).

b. What are the main mental health conditions?

Some mental health conditions are more common than others. Conditions such as depression and anxiety are much more common than psychotic conditions such as schizophrenia and bipolar disorder (manic depression). There are also conditions that relate to someone's personality which are known as personality disorders. Mental health conditions are defined by the Mental Health Act. Further information on the Mental Health Act can be found in Section 16: Mental Health Act.

Someone can have a mild, moderate or severe mental health condition with a range of symptoms. Someone may have a severe mental health condition but experience good mental health. This could be because they are managing their condition well with medication and therapy. In contrast, someone could have no diagnosed mental health condition but have poor mental health. For example, they might be experiencing a particularly difficult time due to life events such as a bereavement, relationship problems or difficulties at work.

Symptoms often overlap across several conditions and everyone will experience things differently.

i. Depression and anxiety disorders

Depression and anxiety disorders are the most common conditions. It is normal to experience low mood and anxious feelings from time to time. Someone can develop a mental health condition when these feelings become more severe and affect everyday activities.

Common symptoms of depression:

- experiencing low mood and self esteem
- lack of energy
- feeling hopeless and worthless
- difficulties in concentrating and making decisions
- poor memory.

Common symptoms of anxiety:

- feeling irritable
- excessive worrying
- difficulties in sleeping and concentrating
- fear and panic
- physical symptoms such as sweating, heart palpitations, breathlessness and pain.

Post traumatic stress disorder (PTSD) is a type of anxiety disorder. Someone can develop PTSD if they experience a traumatic or frightening event, such as being a victim of a violent crime, being involved in military combat or witnessing a violent attack or death. PTSD causes feelings of intense fear, helplessness and horror. Someone can have panic attacks, nightmares and flashbacks (seeing images or visions of a past event in their mind).

There is the misconception that PTSD most commonly affects veterans. Around 1 in 25 veterans of the Iraq and Afghanistan wars are likely to develop PTSD, similar to that in the general public. However, while the rate of occurrence is similar, the complexity of the disorder tends to be much greater. Furthermore, it often occurs alongside other medical problems such as pain, disability and substance misuse, particularly alcohol misuse (Combat Stress, 2015).

ii. Psychosis

Psychosis is less common. About 1 in 100 people have psychosis (Royal College of Psychiatrists, 2011). It is classed as a 'severe mental illness'. The most common psychotic conditions are schizophrenia and bipolar disorder (manic depression).

The main symptoms of psychosis are hallucinations and delusions.

Hallucinations are experiencing something that isn't really there. This can affect all the senses – sight, smell, taste, touch and sound. Hearing voices is the most common hallucination in schizophrenia. These voices may tell the person to do something, or be critical of the person. This can be very distressing.

Delusions are false beliefs. For example, someone with schizophrenia may think that someone is trying to harm them, or that they are an actor playing out a part in a film. Due to these beliefs, the person may act strangely.

Common symptoms of schizophrenia:

- difficulties in determining what is real or not
- muddled thinking and speech
- difficulty in relating to others
- little motivation
- self neglect and poor hygiene.

Common symptoms of bipolar disorder (manic depression):

- extreme changes in mood, from severe lows (depression) to highs (mania) with regular moods in-between
- symptoms of mania include increased self esteem, talking quickly, racing thoughts, delusions, hallucinations, acting irrationally.

iii. Personality disorder

Between 10 and 13% of the general population have some form of personality disorder (Girolamo and Dotto, 2000). This includes borderline personality disorder and anti-social personality disorder.

We all have individual characteristics called personality traits. These affect the way we think, feel and behave. Someone may be described as having a personality disorder if these characteristics cause regular and long term problems in the way they cope with life, interact with others or how they respond emotionally.

Each type of personality disorder includes specific symptoms. Some typical symptoms are:

- not trusting other people, feeling threatened
- lack of emotion
- extreme fear of rejection, becoming dependent on others
- appearing not to care about other's opinions of them
- reckless and impulsive behaviour
- being overly dramatic and like to be the centre of attention
- perfectionism
- not seeing the bigger picture.

Personality disorder is probably the most misunderstood diagnosis in mental health. Personality disorder was included in the definition of mental

disorder in the 2007 amendments to the Mental Health Act. But there is still controversy over its inclusion.

In 2003 the National Institute for Mental Health produced guidance, 'Personality Disorder: No longer a diagnosis of exclusion', making it clear that people with personality disorders should receive appropriate care and should not be excluded from services because of their diagnosis.

c. How many people who offend have a mental health condition?

FILM CLIP



MENTAL HEALTH: 05:04 minutes

Three people talk about their experiences of having a mental health condition and how they came into contact with the criminal justice system. Steve has a diagnosis of depression, Leroy has a diagnosis of personality disorder and severe depression and a woman speaks about her experience of dual diagnosis (a mental health condition and drug addiction).

Mental health conditions are more common amongst people who offend than in the general population. Mental health conditions can contribute towards someone committing an offence.

Research in prisons has shown that adult prisoners experience a much higher rate of mental health conditions than the general population. For example:

- 66% of prisoners have a personality disorder compared to 5% of the general population.
- 45% of prisoners have a mood disorder such as depression or anxiety compared to 14% of the general population (Centre for Mental Health, 2009).
- In 2013, 25% of women and 15% of men in prison reported symptoms indicative of psychosis (Ministry of Justice, 2013). The rate of psychosis in the general population is around 4% (Wiles et al, 2006).

Some groups of prisoners are particularly vulnerable to mental health conditions. Rates amongst women prisoners are higher than for men. For example:

- 33% of women prisoners reported having suicidal thoughts in the four weeks prior to custody, compared to 14% of male prisoners
- 29% report ever having self-harmed, compared to 13% of male prisoners
- 49% of women prisoners were assessed as suffering from anxiety and depression, compared to 23% of male prisoners
- 25% of women prisoners report symptoms indicative of psychosis, compared to 15% of male prisoners (Ministry of Justice, 2013).

Rates of mental health conditions amongst children who offend are around three times higher than within the general children's population (Hagell, 2002; Chitsabesan et al 2006). Research shows that 43% of children on community orders have emotional and health needs. The rates amongst children in custody are even higher (Healthcare Commission, 2009).

Someone with a mental health condition may use drugs or alcohol to make the symptoms of mental illness and side effects of medication easier to manage; this is sometimes referred to as self-medication. In some cases, using drugs or alcohol can increase someone's risk of experiencing mental health conditions. If someone has a mental health condition and abuses drugs or alcohol this is known as dual diagnosis.

The number of incidents of self-harm (when a person hurts themselves deliberately) and self inflicted deaths in prison has risen dramatically. For example:

- Rates of self-harm are at the highest level ever recorded. There were 36,440 self-harm incidents in the year to June 2016 – a 52% rise in just two years (Ministry of Justice, 2016)
- Women accounted for 21% of all incidents of self-harm in this 12 month period despite representing just 5% of the total prison population (Ministry of Justice, 2016)
- The Prisons and Probation Ombudsman (PPO) has reported a 34% increase in self inflicted deaths in 2015-16
- The suicide rate for men in prison is five times greater than that for men in the community (Prison Reform Trust Factfile, 2014).

Snapshot of offenders under supervision in one probation area:

- 39% had a current mental health condition (personality disorder was the most common condition, followed by anxiety disorders)
- 49% had a past or lifetime mental illness (mood disorders e.g. depression were the most common)
- 72% had both a substance misuse problem and a current mental illness. Alcohol misuse was more common than drug abuse (Brooker et al, 2011).

d. How to recognise when a defendant might have a mental health condition?

FILM CLIP



MENTAL HEALTH AND THE CRIMINAL COURTS: 05:59 minutes

Three people with mental health conditions talk about their experiences of going to court. They describe what they found particularly difficult, how they felt their mental health wasn't always taken into consideration, and what might have helped.

Most people find going to court a stressful experience. Factors such as a night in a police cell prior to a court appearance can add to levels of stress and agitation. For some individuals, this can lead to the development of mental health conditions such as depression and anxiety, especially if they have poor personal coping strategies or few family members or friends able to provide support. Women, who are frequently the primary carers of children, can be left especially anxious when separated from their children, and fear that they may be taken into care.

Stress can exacerbate an existing mental health condition, and symptoms and associated behaviours may get worse and become more prominent.

It can be very difficult to know when a defendant might have a mental health condition or is simply experiencing a degree of stress and discomfort due to their appearance in court. Unlike some physical health conditions, you cannot see a mental illness. A mental health condition is often referred to as a hidden disability because of this.

There is a lot of stigma associated with having a mental health condition. Individuals with a mental health condition might not want to tell anyone about it, even when asked. They may fear being ridiculed or worry that others will view them negatively. There are some signs you can look out for.

A defendant with a mental health condition might:

- avoid eye contact
- lack in energy and appear very slow, almost 'switched off' and empty
- be very restless, fidgety, breathe heavily and be sweating
- be very emotional and crying
- talk very negatively about themselves
- appear flamboyant and speak very highly of themselves
- find it difficult to answer questions quickly or succinctly with yes/no answers
- speak very quickly and jump into conversations when they haven't been asked a question
- not make sense when they talk, they may have muddled or disordered speech
- look around the room, appear as though they're not listening
- forget what's just been said, or what they were saying
- talk to themselves or appear distracted
- turn up in court dressed inappropriately or be unkempt in their appearance.

There may be a number of reasons why someone might act like this. It may look as if someone is being disrespectful, difficult or untruthful. If someone has a mental health condition, they may not be able to control their behaviour. The stress of being at court may make this behaviour more likely. Alcohol and drug use could make this behaviour worse or make people more likely to behave in these ways.



Mental health summary:

- Mental health conditions are very common and they can affect a person's thinking, feeling and behaviour. Some people with mental health problems may need additional support with daily living.
- A mental health condition is a disability if it has a long term and adverse effect on a person's day to day activities. In this case, a person's condition may be considered a disability under the Equality Act 2010.
- Mental health conditions may be short term or long term; and a person's condition can fluctuate.
- Mental health conditions are more common in the offending population than the general population.
- Stress can make an existing mental health condition and symptoms worse.
- It can be very difficult to know if someone has a mental health condition, but there are some signs to look out for.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *A common sense approach to working with defendants and offenders with mental health problems*, Together for Mental Wellbeing (2010): www.together-uk.org.uk
- *A common sense approach to working with women with health and wellbeing needs in the criminal justice system*, Together for Mental Wellbeing (2013): www.together-uk.org.uk
- *Equal Treatment Bench Book* Judicial College (2013). Chapter 7: Mental disabilities, learning difficulties and mental capacity: www.judiciary.gov.uk
- Rethink Mental Illness produce information factsheets on mental health conditions, how to access treatment and other topics. These can be accessed from www.rethink.org
- Combat Stress is the UK's leading veterans mental health charity and can provide further information on veterans mental health: www.combatstress.org.uk
- *Mental health and the courts* Mind (2010): www.mind.org.uk



Section 4: Learning disability

a. What is a learning disability?

A learning disability is a condition that combines:

- a low IQ of less than 70 (described as impaired intelligence) with
- a reduced ability to cope independently and to adapt to the daily demands of a normal social environment (described as impaired social functioning).

A learning disability:

- is a lifelong condition and not an illness. A learning disability cannot be 'cured'
- is often described as a hidden disability as it is not immediately obvious when someone has a learning disability.

Someone can have mild, moderate or severe learning disabilities. People with mild to moderate learning disabilities are the most likely to come into contact with the criminal justice system.

Having a 'borderline' learning disability or a low IQ (between 70 and 80) is not the same as having a learning disability. There are, however, many shared characteristics and support needs.

Most people with learning disabilities have greater health needs than the general population. They are more likely to experience mental health conditions and are more prone to chronic health problems, such as epilepsy and physical and sensory disabilities. People with learning disabilities can also be on the autistic spectrum.

A learning disability is not the same as a learning difficulty. The terms are mistakenly used interchangeably, which can be confusing. Learning difficulties includes a range of conditions such as dyslexia, attention deficit disorder and attention deficit hyperactive disorder. People with learning difficulties can have a range of IQ levels from below average to above average. Further information about specific learning difficulties can be found in Section 7: Other disabilities and impairments.

Learning disability is a protected characteristic under the Equality Act 2010. The Equality Act 2010 protects disabled people from being discriminated against. It protects people from discrimination at work, when applying for jobs or when they use services, which includes HM Courts and Tribunals Service (you can get more information about discrimination and the Equality Act 2010 from Rethink Mental Illness at www.rethink.org).

b. What does it mean to have a learning disability?

People with learning disabilities are likely to:

- have limited language ability, comprehension and communication skills, which might mean they have difficulty understanding and responding to questions
- have difficulty recalling and processing information
- be acquiescent and suggestible. When under pressure they may try to appease people. For example, if asked the same question more than once, they might change their answer thinking they had got their first answer 'wrong'
- have difficulties reading and writing
- have difficulties filling in forms
- have difficulties telling the time
- have difficulties following instructions
- be unable to concentrate for long periods of time
- have difficulties understanding social norms, such as reading body language and taking turns
- find new situations, such as appearing in court, especially stressful.

People with learning disabilities might need support with daily living, for example, with personal care, cooking and ensuring bills are paid on time. Support can come from various sources including social or health services, family members and friends, and voluntary organisations. Access to statutory support for people with a learning disability can be limited and hard to get. Some adults with learning disabilities live independently in the community. Others may live in care homes, in supported accommodation, or with parents or other family members.

People with learning disabilities often don't have the same friendship and social networks as other people and their lives can often be lonely and solitary. In looking for friendship, they might form inappropriate relationships with people who might take advantage of them or with people who are much younger than they are.

Not everyone with a learning disability will be known to social services, and not everyone with a learning disability will be aware of their condition. Evidence shows that only around a fifth of people with a learning disability are known to learning disability services (Emerson et al, 2011).

With appropriate support, people with learning disabilities can lead full and productive lives.

c. How many people who offend have a learning disability?

FILM CLIP



LEARNING DISABILITIES: 06:07 minutes

Three people talk about their learning disability, how they came into contact with criminal justice, and their experiences of the criminal justice system.

It is generally acknowledged that between 5 and 10% of adults who offend have learning disabilities, compared to slightly more than 2% of the general population (Department of Health, 2001).

Around a quarter of children (under 18 years) who offend have very low IQs of less than 70 (Harrington and Bailey et al, 2005). This does not mean that around a quarter of children who offend have learning disabilities, but they will have support needs similar to those of people with learning disabilities.

d. How to recognise when a defendant might have a learning disability

A learning disability can be a hidden disability, which means there are often no visual clues. Many people with learning disabilities will try to hide their condition for fear of ridicule or embarrassment. They may try to appear the same as everyone else. It is possible for someone with learning disabilities to appear in court without anyone having recognised his or her condition or particular support needs.

“As a relatively new magistrate with over 20 years working in the learning disability field, I have been surprised by how many people with a learning disability appear before the bench. I have seen at least two people a day with an undisclosed learning disability.”

Wayne Crocker, magistrate, Director, Mencap Cymru

There are some signs that you can look out for that might suggest that a defendant has a learning disability. A defendant with learning disabilities might:

- respond inappropriately to questions or instructions
- use words inappropriately
- not understand common criminal justice and court terminology, for example, words such as remand, custody and bail
- respond inappropriately to their situation as a defendant in court. For example falling asleep, gazing around the court room or not paying attention to what is happening
- take longer to answer a question or follow an instruction
- appear unduly anxious, distressed, angry or frustrated
- appear withdrawn and say little in response to questions.

The Prison Reform Trust interviewed people with learning disabilities to find out about their experiences of being a defendant in court, and this is what they said:

- The judges don't speak English, they say these long words I have never heard of in my life.
- I didn't know what 'remanded' meant. I thought it meant I could come back later.
- I couldn't really hear. I couldn't understand but I said 'yes, whatever' to anything because if I say, 'I don't know' they look at me as if I'm thick. Sometimes they tell you two things at once.
- I was upset; I didn't know why I was there. I really didn't think I had done anything wrong.
- I didn't know what was going on and there's no one there to explain things to you. They tell you to read things and in court you can't just ask for help. The judge thinks you can read and write just because you can speak English.

[Note: interviewees referred to magistrates as judges.]

FILM CLIP



LEARNING DISABILITIES AND THE CRIMINAL COURTS: 05:42 minutes

Four people with learning disabilities talk about their experiences of going to court, what might have helped and how their learning disabilities could have been raised in court. Certain terminology, names and organisations are referred to and these are described below:

- **Working for Justice Group:** this is a group of individuals with learning disabilities who have been in contact with the criminal justice system as suspects, defendants, offenders and prisoners. The Group is supported by KeyRing Living Support Network and the Prison Reform Trust.
- **KeyRing Living Support Network** is a voluntary organisation that provides support for people with learning disabilities to live independently in the community.
- Some interviewees say they have learning difficulties. Some people with learning disabilities use the term learning difficulty because it seems less stigmatising than learning disability. The terms are often used interchangeably, which can be confusing.
- One interviewee has learning disabilities and autism.



Learning disabilities summary:

- Around 2% of the population has a learning disability; with appropriate support many can live productive and fulfilling lives.
- It is estimated that between 5 and 10% of adults who offend have learning disabilities.
- A learning disability is a lifelong condition; people with a learning disability frequently have greater health needs than the general population, including mental health conditions, and some might have autism.
- A learning disability is different to a learning difficulty, although the terms are sometimes used interchangeably.
- Learning disabilities are more common in the offending population than the general population.
- A learning disability is considered a disability under the Equality Act 2010.
- There are often no visual clues that a person has a learning disability and some people may try to hide their condition for fear of ridicule, and to appear the same as everybody else. There are, however, some signs to look out for.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *A common sense approach to working with defendants and offenders with mental health problems*, Together for Mental Wellbeing (2010); pages 19-21: **www.together-uk.org**
- *Access to Justice: a guidebook supporting the responsive and appropriate management of adults with a learning disability in the criminal justice system in Wales*, Public Health Wales (2013): **www.wales.nhs.uk**
- *Prisoners' Voices: experiences of the criminal justice system by prisoners with learning disabilities and difficulties*, Talbot (2008); pages 21-25: **www.prisonreformtrust.org.uk**
- *Positive Practice Positive Outcomes: a handbook for professionals in the criminal justice system working with offenders with learning disabilities*, Department of Health (2011); pages 5-36 and 41-45: **www.gov.uk**
- *The Advocate's Gateway Toolkit 4, Planning to question someone with a learning disability*: **www.theadvocatesgateway.org**
- *A joint inspection of the treatment of offenders with learning disabilities within the criminal justice system – phase 1 from arrest to sentence* HMI Probation (2014): **www.justiceinspectors.gov.uk/cjji/**



Section 5: Autism



Thanks to The National Autistic Society for writing this section on autism.

a. What is autism?

Autism is a lifelong, developmental disability that affects how a person communicates with and relates to other people, and how they experience the world around them. Around 700,000 people in the UK have autism. Together with their families they make up over 2.8 million people whose lives are touched by autism every day. Autism is a spectrum condition, which means that, while all people with autism share certain difficulties, their condition will affect them in different ways. Some people with autism are able to live relatively independent lives, while others may need a lifetime of specialist support.

Autism is not a learning disability or a mental health condition; however some people with autism may have accompanying learning disabilities or mental health conditions. People with autism may also experience over or under sensitivity to sounds, touch, tastes, smells, light or colours. This can have a profound impact on their life. For example, public buildings such as courts can be noisy and brightly lit, which can make a person with autism especially anxious.

There are different terms which are used to describe people on the autism spectrum. Asperger syndrome is part of the autism spectrum. Other terms used include: autistic spectrum disorder, autism spectrum disorder, autism spectrum condition, high functioning autism, pervasive development disorder (PDD), classic autism, and Kanner autism.

b. The Autism Act 2009

The Autism Act was the first disability specific law in England, and placed two main duties on Government: to produce a strategy for adults with autism, and statutory guidance for local councils and local health bodies on implementing the strategy. The first strategy and statutory guidance were published in 2010, with a commitment to review three years later. The new strategy, Think Autism, was published in April 2014, the new statutory guidance in March 2015, and a Progress Report was published in January 2016.

The Progress Report notes an 'increased focus' on criminal justice, and included as 'new actions' is the need to achieve better awareness of autism within the criminal justice system. Amongst other achievements, the Progress Report cites an autism guide [sic] for prosecutors (see Further reading box, below); liaison and diversion services, which provide early interventions for suspects and defendants identified as having a range of vulnerabilities, including autism (see Section 13); and Autism Accreditation Standards for prisons.

Developed by the National Autistic Society, working with HMYOI Feltham, the accreditation standards for prisons include training for staff, prison processes and environment, and arrangements for release from prison. The National Autistic Society is now working to develop accreditation standards for the National Probation service and Community Rehabilitation Companies, and with three police forces.

c. What might be the impact of autism on an individual?

The way that autism affects an individual will vary from person to person. It will also vary depending on their level of intellectual ability and gender. However, most people with autism will have difficulties in the following areas:

Social communication and social interaction:

- people with autism have difficulties interacting with others, but to varying degrees
- some people with autism will struggle to make and maintain friendships and relationships. They may want to have relationships, but struggle to know how to interact with others, or interact in ways that can be perceived as odd or even inappropriate
- people with autism may have difficulty in recognising and understanding the feelings and emotions of others. This may mean that others think people with autism are insensitive or even callous
- people with autism can struggle to understand verbal and non-verbal communication, such as facial expressions and body language. They may have a very literal interpretation of language and take what people say at face value. For example, asking a person with autism to 'Tell me what happened on the 31st March 2014' may result in the person telling you absolutely everything that happened on that day
- jokes, banter and sarcasm can be difficult for people with autism to understand. This literal understanding and the desire to have friendships and relationships can lead some people with autism to get into trouble
- some people with autism have come into contact with the criminal justice system because they have been asked to do something by others who have claimed that they are their friends. They haven't questioned what they are being asked to do, either because they have taken the instruction literally or because the other person/people have said things like, you would do this if you were really my friend.

Social imagination:

- linked with difficulties in social interaction, some people with autism struggle to understand the feelings and emotions of others, and to predict what those feelings may be in certain situations
- they may struggle to identify their own emotions
- they may struggle to understand a sequence of events and what might happen next
- many people with autism like to have structure and routine in their lives because they find it hard to predict what might happen in the future, and their own routines are important in that they provide an element of structure and security in what they may perceive to be an uncertain environment.

People with autism have deficits of 'Theory of Mind'. Theory of Mind refers to our ability to perceive the intentions of others, how others may think and feel and how that relates to us – essentially, our ability to put ourselves in someone else's shoes, to see things from their perspective. Theory of mind deficits are independent of intelligence, making people with autism and Asperger syndrome socially vulnerable.

People with autism who have an average to above average IQ are sometimes referred to as having high functioning autism or Asperger syndrome. While these individuals may come across as highly articulate and intelligent, they are still likely to experience difficulties interacting and communicating with others, as well as with social imagination, such as in understanding the feelings and emotions of others.

d. How do you recognise when a defendant may have autism?

Autism is a hidden disability, which means there are few – if any – visual clues that a person has autism. Autism affects each individual differently. Previous experience of an individual with autism won't necessarily give you any indicators for how to recognise or interact with the next person that you meet with autism due to the spectrum being so wide. There are, however, some signs that you can look out for that might suggest a defendant has autism.

A defendant with autism might:

- struggle to understand what is being said or misinterpret what is said
- seem over-compliant
- be honest to the point of bluntness or rudeness
- seem overly anxious or agitated
- avoid eye contact or give too much eye contact to the point of making others feel uncomfortable
- provide far more detail than is required or seem unable or unwilling to move on from a certain aspect of that detail
- interpret what is said very literally
- not appear to understand the consequences of their actions or the emotional impact on others.



Autism summary:

- Autism is a lifelong developmental disability.
- Most people with autism will have difficulties in the areas of communication, interaction and imagination, despite their level of intelligence.
- Around 2% of the general population have autism. The prevalence of people with autism who offend isn't known and more work needs to be done in this area.
- Many people with autism who come into contact with the criminal justice system will not have a diagnosis of autism.
- Autism is not a learning disability or a mental health condition. Some people with autism may have a learning disability and/or a mental health condition; this is sometimes referred to as co-morbidity.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *Autism: Guide for criminal justice professionals* (2011): www.autism.org.uk
- *Criminal Justice pages* on The National Autistic Society's website: www.autism.org.uk
- *Advocates Gateway Toolkit 3, Planning to question someone with an autism spectrum disorder including Asperger syndrome*: www.theadvocatesgateway.org
- *CPS Autism – Guide for Prosecutors* (2015): www.cps.gov.uk



Section 6:

Communication difficulties



Thanks to the Royal College of Speech and Language Therapists for writing this section.

a. What are communication difficulties?

Communication difficulties are sometimes referred to as speech, language and communication needs or communication disabilities. These terms describe people who have difficulty with one or more aspects of communication. There are a wide range of difficulties and corresponding needs that may be short-term or may remain with the person throughout their childhood and adult life.

Speech, language and communication needs can occur from childhood as primary difficulties, such as specific language impairment or a stammer; or as secondary difficulties due to conditions such as learning disability, autism, hearing impairment and certain mental health conditions. Speech, language and communication needs can also be acquired due, for example, to stroke and dementia.

Some people with psychosis have particular communication difficulties. This is often because of 'disordered thinking'. People with disordered thinking find it hard to keep a logical order to their ideas. Their thoughts and speech may be jumbled and disconnected. The person may appear to talk nonsense, make up words or replace words with sounds or rhymes.

Some medications for psychosis can cause problems with communication. Antipsychotics can cause persistent abnormal movement of the jaw, lips and tongue and can cause slurred speech.

b. How many people who offend have a communication difficulty?

Research shows that 60% of children in the justice system have communication difficulties. Around half of this group has poor or very poor communication skills (Bryan, Freer and Furlong, 2007). Children with communication difficulties are over-represented within the justice system.

There has been less attention paid to adults in the justice system however research shows levels of speech, language and communication needs to be higher than in the general population. For example, a project based in Pontypridd Probation Service showed that offenders had below average speech, language and communication ability and specific problems with comprehension and expression (Iredale, Parow and Pierpoint, 2011).

Research involving adult prisoners with learning disabilities and difficulties showed that around two-thirds experienced problems with verbal comprehension skills, including understanding certain words and in expressing themselves (Talbot, 2008).

FILM CLIP



COMMUNICATION DIFFICULTIES:
02:20 minutes

Two speech and language therapists talk about communication and communication difficulties.

c. What does it mean to have speech, language and communication needs?

People with speech, language and communication needs may experience a number of difficulties. For example, they may find it hard to:

- express themselves through speaking, writing or non-verbal communication
- understand spoken or written words
- understand body language, facial expressions and other ordinary social cues
- listen to what is being said directly to them or around them
- remember information they have been given
- express their feelings and emotions in an appropriate way
- interact with others in socially acceptable ways
- sequence events
- think clearly.

d. Communication in court

Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood; otherwise the legal process will be impeded or derailed (Equal Treatment Bench Book, Judicial College, 2013).

Courts are verbally mediated, which means that effective communication between all parties is essential. The language used in court, however, is often complex with a vocabulary not generally encountered outside of the court environment. The use of jargon – specialised language concerned with a particular subject, culture or profession – can be especially problematic (Crew and Ellis, 2008).

Many defendants with speech, language and communication needs, including people with autism, learning disabilities or mental health problems, will experience difficulties with communication and comprehension. For example, they may find it hard to give a clear narrative account of what has happened or to properly sequence events; and they may behave inappropriately during proceedings, such as smiling or laughing when asked a question or given instructions. Magistrates and district judges are expected to deal with such difficulties ‘as part and parcel of the ordinary control of the judicial process.’

Being able to understand what is happening in court and to communicate effectively is fundamental to a defendant’s participation in proceedings. Conversely, a lack of understanding on the part of the defendant and an inability to participate effectively may lead to feelings of frustration, anger or passive acceptance – each of which can impede court proceedings and risk an unfair outcome.

e. How to recognise when a defendant might have speech, language or communication needs?

Communication difficulties are frequently described as a hidden disability because they are not visible and are often not obvious. Some people can become adept at hiding the true nature of their difficulties, for fear of ridicule or because they feel embarrassed, while others – especially children and young adults – may not be aware that they have speech, language and communication needs. People with communication difficulties can present as articulate, with good surface language skills, which can make it harder to recognise that they might need support.

There are, however, some signs that you can look out for that might suggest that a defendant is struggling to understand and to communicate effectively in court proceedings.

For example, a defendant with speech, language or communication needs might:

- not understand common criminal justice and court terminology, for example, words such as remand, custody and bail
- take longer to answer a question or follow an instruction
- respond inappropriately to questions or instructions
- have difficulty engaging
- say they understand when, on seeking further assurance of their understanding, they clearly don’t understand
- use words inappropriately
- respond inappropriately to their situation as a defendant in court. For example gazing around the court room, smiling, laughing, or not paying attention to what is happening
- appear unduly anxious, distressed, angry or frustrated

- use aggression to deflect hard conversations or to avoid having to admit that they don't understand
- be disruptive
- be quiet and seemingly compliant
- appear withdrawn and say little in response to questions.

For many defendants some straight forward communication 'rules' can help, see Box 1, below. Where liaison and diversion services exist (see Section 13, Liaison and diversion services (England) and criminal justice liaison services (Wales), staff may be asked to include an assessment of a

defendant's speech, language and communication needs in their report, a copy of which should be made available to members of the judiciary.

However, there will be occasions in court when, despite your best efforts, specialist communication support is necessary to ensure the defendant is able to participate effectively in proceedings. If you remain concerned that a defendant is unable to understand or to communicate effectively in court, specialist help should be sought, and this can be provided by an intermediary (see Section 11e (i) Specialist communication support – intermediaries).

Box 1: Supporting communication and comprehension in court

- Use the defendant's name and ensure you have their attention before you begin speaking to him or her.
- Explain in simple language and short sentences what is going to happen at each stage of court proceedings. As a general rule give one piece of information per sentence.
- Don't ask, 'do you understand?' A 'yes' response or a nod does not necessarily mean the individual does understand. Instead, ask the defendant to tell you what they have understood.
- Avoid using jargon and technical or legal terminology. If such language cannot be avoided, explain what it means and check understanding.
- Allow extra thinking time so that the defendant can process information and consider their response before replying.
- Offer support with reading and understanding documents in court. Being able to read a document doesn't mean the defendant understands the content. This may still need explaining.
- If the defendant is unable to write very well, he or she might need help in making notes of proceedings. For example, a defendant might be able to follow proceedings or take notes but not do both at the same time.
- Allow a defendant to sit next to their advocate, carer or a family member. This can help to reduce the stress of appearing in court and enhance defendants' participation in proceedings.
- Ensure court documents are accessible, for example, written in Easy Read. Further information about Easy Read can be found in Section 11, Supporting vulnerable defendants in court, Box 3: Easy Read.
- Ensure the defendant can hear proceedings clearly.
- Ensure glass security screens do not impede the defendant's ability to hear.
- Defendants with communication and comprehension difficulties might need breaks for 'explanation time', which should be in addition to breaks to help counter fatigue.
- Defendants with communication and comprehension difficulties might tire more easily and need extra breaks. Such breaks should not be used as 'explanation time'.



Communication difficulties summary:

- Communication difficulties are sometimes referred to as speech, language and communication needs or communication disabilities. These terms describe people who have difficulty with one or more aspects of communication, and there are a wide range of difficulties and corresponding needs.
- Communication difficulties can be primary, such as specific language impairment or a stammer; or secondary due to conditions such as learning disability, autism, hearing impairment and certain mental health conditions.
- Although limited research has been undertaken amongst adult offenders, high numbers are thought to have speech, language and communication needs; research demonstrates that around two-thirds of adult prisoners with learning disabilities and difficulties experience problems with verbal comprehension skills, including understanding certain words and in expressing themselves.
- It can be hard to recognise when a defendant has speech, language and communication needs and, where they exist, liaison and diversion services can help.
- There are a number of straight forward communication rules that can help a defendant to participate in proceedings; however, there will be occasions when more specialist help is needed and this can be provided by an intermediary (see Section 11e (i), Specialist communication support – intermediaries).



Further reading:

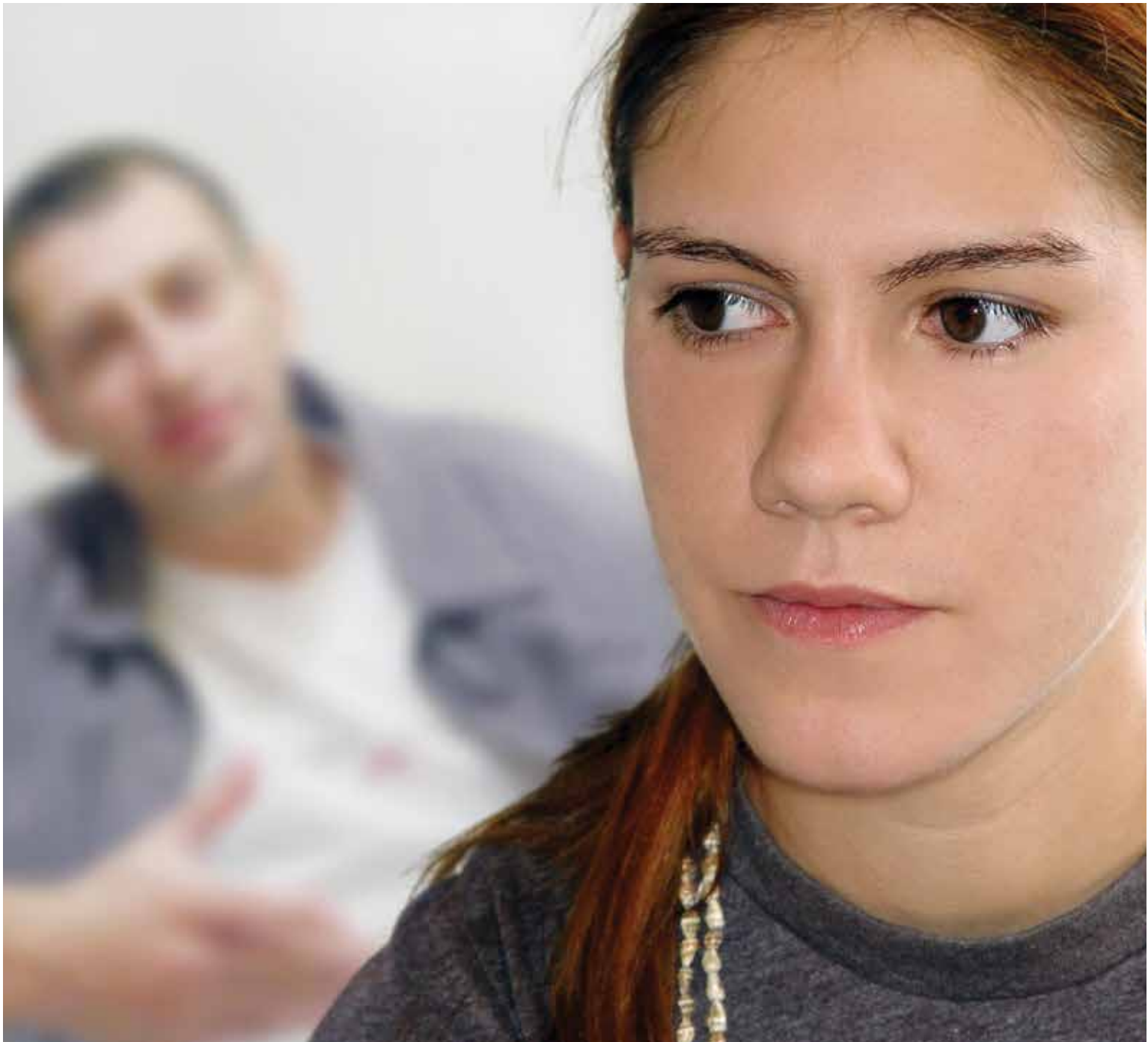
Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *Youth Justice Board: Practice Advice on speech, language and communication needs*: www.gov.uk
- *Royal College of Speech and Language Therapists: Speech, Language and Communication Needs in the Criminal Justice System and Best Practice responses to these, Dossier of evidence*: www.rcslt.org
- *Sentence Trouble; The Communication Trust*: www.sentencetrouble.info
- *The Advocates Gateway Toolkit 2: General principles from research: planning to question a child or adult with communication needs – summary* (This two page summary may be laminated for ease of reference): www.theadvocatesgateway.org
- *Equal Treatment Bench Book* (2013): Chapter 2, Judgecraft, paragraphs 7-18; Chapter 3, Social exclusion and poverty, paragraphs 39-40; Chapter 5, Children and vulnerable adults; Section 7, Mental disabilities, specific learning difficulties and mental capacity, paragraphs 2, 23, 30, 53, 56 and 60: www.judiciary.gov.uk



Some questions you might want to consider:

- If your court has access to liaison and diversion services, are speech, language and communication needs of defendants addressed in their reports?
- What procedures are in place in your court if you are concerned about a defendant's ability to understand or to participate in court proceedings?
- How will you ensure that vulnerable offenders understand their sentence requirement(s), including implications for non-compliance?



Section 7:

Specific learning difficulties and literacy

a. Specific learning difficulties

Specific learning difficulties covers a range of impairments including dyslexia, which is the most common, dyspraxia, dyscalculia, attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD).

Specific learning difficulties that are not identified or dealt with at an early age can cause significant life problems, particularly when the family is already socially disadvantaged.

Dyslexia is a specific learning difficulty which has its main impact on reading and spelling, but can also affect activities where memory for word sounds and sequences is important. Dyslexia may occur on its own or alongside other kinds of learning difficulties and is unrelated to intelligence.

People with dyslexia may have difficulties:

- reading certain words, which can make understanding difficult
- spelling and writing, including problems filling in forms
- sequencing, for example, getting dates, times and events in the correct order
- with personal organisation and time management.

With support, people with dyslexia can learn to manage their condition, but they may continue to have difficulties especially when under time pressure or stress.

People can be mildly, moderately or severely affected by dyslexia. Around 10% of the general population has dyslexia, with around 4% experiencing severe difficulties. Dyslexia is three to four times more common amongst prisoners than in the general population (Rack, 2005).

Dyslexia was recognised under the Disability Discrimination Act in 1995 and is specifically mentioned in the Equality Act 2010. This means that public services may have a duty to make reasonable adjustments to ensure that people affected by dyslexia are not disadvantaged compared to their peers.

Attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) refers to a range of behaviours associated with poor attention span. These may include impulsiveness and hyperactivity. This can prevent children from learning and socialising, which can continue into adulthood.

Characteristics associated with ADD include:

- being unable to pay close attention to detail
- being unable to finish tasks
- being unable to sustain attention in activities
- appearing not to listen to what is said
- not following through instructions
- being disorganised about tasks and activities
- being easily distracted
- being forgetful.

Characteristics associated with impulsivity and hyperactivity include:

- fidgeting with hands or feet
- blurting out answers before questions have been completed
- inability to wait in-line, queue jumping
- not taking turns in group situations
- interrupting when people are speaking and butting into conversations
- talking excessively, without an appropriate response to social restraint.

About 1.7% of the UK population have ADD or ADHD. A review of international research literature showed that 15% of 10-19 year olds in custody had a diagnosis of ADHD (Fazel et al, 2008), although some youth justice staff believe figures to be higher (Talbot, 2010).

b. Literacy

Literacy rates in prison are low. 48% of prisoners are at or below Level 1 in reading, and 82% are at or below Level 1 in writing (Office for National Statistics, 2003). Level 1 is the same as a GCSE grade D to G which is roughly the same as that expected of a 14 year old.

Problems with literacy can be caused by difficulties understanding, processing and retaining information. Knowing whether an individual can read and write will help you to understand, and to further explore, what support needs individual defendants might have. For

example, defendants might be unable to read their police interview, the oath or court orders. They might be able to read some but not all of the documents they are presented with. They might also have difficulties understanding certain words.

Finding out if a defendant has literacy problems needs to be handled sensitively. For example, you could begin by saying that criminal justice/court documents often use complex legal language that makes them hard to understand; you could then ask if the defendant would like more time to read documents or if they would like any help with understanding the language used.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- Dyslexia Action: www.dyslexiaaction.org.uk
- *Equal Treatment Bench Book*, 2013: Chapter 7, Mental disabilities, specific learning difficulties and mental capacity: www.judiciary.gov.uk
- British Dyslexia Association: www.bdadyslexia.org.uk
- *The Advocate's Gateway Toolkit 5, Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and attention deficit disorder*: www.theadvocatesgateway.org

“One of the problems I had was I didn’t notice I was unwell. The hallucinations and everything else gives you a positive vibe, I was hallucinating good things.”

Leroy Simpson, Revolving Doors Service User Forum



Section 8:

Co-morbidity and dual diagnosis

a. Co-morbidity

Co-morbidity is the term used to describe people who experience more than one condition. This is extremely common amongst people who offend. For example, someone might have learning disabilities and mental health conditions. Many people with mental health conditions or learning disabilities also have communication difficulties. The most comprehensive study, which dates back to 1998, says that 'more than 70% of the prison population has two or more mental health disorders' (Office for National Statistics, 1998).

b. Dual diagnosis

Dual diagnosis is the term used to describe people with mental health and substance abuse problems.

The most recent survey of mental illness and substance misuse amongst prisoners, and also the most comprehensive, was reported in a 1997 survey carried out by the Office for National Statistics. The survey found that 72% of adult male and 71% of female prisoners may have two or more mental disorders (including personality disorder, psychosis, neurosis, alcohol misuse and drug dependence), while 20% have four or more co-morbidities (Department of Health, 2008). More recent studies have demonstrated similar findings, with between a quarter and half of prisoners likely to suffer from mental illness, with the proportion rising to between 70 and 90 per cent if substance misuse issues are included (private correspondence with the National Offender Management Service, 9 March 2016).

Many people with mental health conditions use drugs or alcohol to help them to deal with their symptoms.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- Rethink Mental Illness produce a factsheet on '*Drugs, alcohol and mental health*'. This can be accessed from www.rethink.org
- Turning Point is an organisation that works with people affected by drug and alcohol misuse, mental health problems and learning disabilities: www.turning-point.co.uk
- National Consortium of Consultant Nurses in Dual Diagnosis and Substance Use has further information on dual diagnosis and a search facility for local services and professionals: www.dualdiagnosis.co.uk
- National Offender Management Service (2015) – *Drug Testing and Drug Appointment Licence and Post-Release Supervision Conditions, Guidance on Supporting Integrated Delivery*: www.gov.uk

Section 9:

Right to a fair trial and fitness to plead

a. Introduction

Although most cases that come before the magistrates' courts are unlikely to go to trial, it is important to highlight the principles underpinning both the right to a fair trial and fitness to plead. This is particularly important when considering support for vulnerable defendants.

b. Right to a fair trial

The right to a fair trial is enshrined in the criminal courts of England and Wales. It is protected by the common law and Article 6 of the European Convention on Human Rights, which was incorporated into British law by the Human Rights Act 1998. It states that everyone charged with a criminal offence should be presumed innocent until proven guilty by law, and establishes five minimum rights for the defendant.

These are:

- to be informed properly, in a language which the defendant understands and in detail, of the nature and cause of the accusation against them
- to have adequate time and facilities for the preparation of their defence
- to defend themselves in person or through legal assistance of their own choosing or, if the defendant has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require
- to examine or to have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them
- to have the free assistance of an interpreter if the defendant cannot understand or speak the language used in court.

Subsequent case law has strengthened these minimum rights. In *SC v UK* (2004) the European Court of Human Rights ruled that the applicant's right to a fair trial had been breached because he had not had 'effective participation' in the trial. The court went on:

...effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court.

The defendant should be able to follow what is said by the prosecution witness and, if represented, to explain to his own lawyers his version of events, point out any statement with which he disagrees and make them aware of any facts which should be put forward in his defence (*SC v UK*, 2004).

c. Fitness to plead

Individuals who stand trial are required to be '*capable of contributing to the whole process of his or her trial, starting with entering a plea*' (British Psychological Society, 2006:68).

The main criteria used in determining fitness to plead date from the 1836 case of *R v Pritchard*, and these are:

- capacity to plead with understanding
- ability to follow the proceedings
- knowing that a juror can be challenged
- ability to question the evidence
- ability to instruct counsel.

Concerns, however, have been raised about the broad and subjective criteria for fitness to plead. In 2008 the Law Commission launched a review of the current test, noting that the legal principles date back to 1836 when *‘the science of psychiatry was in its infancy’* and that *‘the application of these antiquated rules is becoming increasingly difficult and artificial’* (Law Commission, 2008).

The review was followed, in 2010, by a consultation paper ‘Unfitness to Plead’ in which the Law Commission noted that the ‘Pritchard’ criteria are:

... at best... not comprehensive and place a disproportionate emphasis on low intellectual ability [and] at worst... set too high a threshold for finding an accused to be unfit to plead and are inconsistent with the modern day trial process (Law Commission, consultation paper 197, 2010).

Following a further extensive period of consultation and review, the Law Commission published *Unfitness to Plead* (Law Com 364, 2016), which considers in detail how defendants who lack sufficient ability to participate meaningfully in a trial should be dealt with in the criminal courts.

The Report notes that defendants may be unfit to plead for a variety of reasons, including difficulties resulting from mental illness (longstanding or temporary), learning disability, communication impairment or other cause or combination of causes.

At the heart of the Report’s recommendations for reform is the belief that the normal criminal trial is the optimum process for a defendant, and that a full trial is best for the defendant, for victims and for society. Removing any defendant from the full trial process should, the Report says, only be undertaken as a last resort; and the decision to adopt alternative procedures made with great caution. Every effort should be made to provide the reasonable adjustments necessary for the defendant to participate in the criminal process, and to maintain capacity throughout. The report acknowledges, however, that ‘a very small number’ of defendants will never have capacity to participate effectively in a trial.

The report addresses a range of concerns and makes key recommendations for reform; a draft Bill has been published, and a response from Government awaited.

It will be of interest to note that while there is no specific procedure by which unfitness to plead can be determined in the magistrates’ court, a key recommendation for reform made by the Report is to introduce ‘into the magistrates’ (including youth) courts procedures to address capacity to participate effectively in trial’ (see chapter 7: Effective participation in the magistrates’ and youth courts).

If you are concerned about a defendant’s fitness to plead you should seek advice from the legal adviser.

“I understand that I have done something wrong, but I’m still unsure as to what that is. You also feel small when you are in court.”

An offender with learning disabilities talking about his experience in court



Right to a fair trial summary:

- The right to a fair trial for everyone charged with a criminal offence is enshrined in the criminal courts of England and Wales. Defendants have a number of minimum rights which have been further strengthened through case law.
- Defendants should be supported, as necessary, to understand what is happening in court, and to participate in proceedings; and guidance exists.
- Vulnerability, disability or communication difficulties do not mean that an individual is unable to participate effectively in proceedings or to enter a plea. Reasonable adjustments should be made to enhance decision-making capacity.
- The Mental Capacity Act states that an individual's mental capacity should be assumed unless it is demonstrated that they lack capacity. Mental capacity can be affected for a number of reasons; for example, because of a mental illness, brain injury, stroke or due to alcohol or drugs. In these situations, mental capacity may be slightly reduced or severely reduced, and may be reduced for a short period of time or be longer lasting. The mental capacity of people with a learning disability is unlikely to change very much unless they are also affected for other reasons – including those shown above. For most people, their mental capacity can be enhanced though the use of reasonable adjustments; and this is a requirement of the Equality Act.
- If you are concerned about a defendant's ability to participate in proceedings or about their fitness to plead, you should ask your legal adviser for advice.

“If you give people the opportunity to present their evidence and themselves in a way that is most advantageous to them, then you are actually speeding up the process of justice and you're giving justice, in the broadest sense, the best opportunity to be done, and to be seen to be done, which is what we all want.”

Robert Gill, magistrate

Section 10: Vulnerable defendants in court

a. Introduction

Many defendants and witnesses in the criminal courts have mental health conditions, learning disabilities or other support needs. Some courts have a coordinated approach to recognising when defendants might have particular support needs but this is not always the case. The development of liaison and diversion services should begin to change this. Further information on liaison and diversion services can be found in Section 13: Liaison and diversion services (England) and criminal justice liaison services (Wales).

Recognising and meeting a defendant's support needs are important in ensuring they are not unfairly disadvantaged or discriminated against during court proceedings.

The Equal Treatment Bench Book (ETBB) notes:

... there are many potential sources of discrimination and not being heard or being misunderstood by the judge is as discriminatory as an inability to access a court or tribunal building (Judicial College, 2013).

b. Difficulties recognising when a defendant might be vulnerable

It is not unusual for defendants to appear in court without any indication that they might have mental health conditions, learning disabilities or other conditions that require support. There are a number of reasons for this including the defendant themselves being unaware that they have a particular condition or because their condition has not been diagnosed. Many people with mental health conditions, autism or learning disabilities are uncomfortable about disclosing their condition and will try to hide their support needs. This is often due to the stigma associated with such conditions, or fear of ridicule, or that more punitive sanctions may be imposed.

If you are concerned that a defendant does not appear to understand what is happening in court, or appears unduly anxious or distressed, then you should raise your concerns with the legal adviser at the earliest opportunity.

You can – and should not hesitate to – request further information if you are concerned about a defendant's behaviour or think they might have particular needs. Finding out more about the individual defendant will help to ensure that necessary support is put in place during court proceedings and that the most appropriate disposal option is considered, so giving the best chance of reducing reoffending.

FILM CLIP



DIFFICULTIES FOR MAGISTRATES IN SPOTTING VULNERABLE DEFENDANTS: 04:14 minutes

Magistrates speak about some of the difficulties they have in identifying defendants who may be vulnerable in court due to mental health conditions or learning disabilities. They suggest what can be done to address such concerns, including speaking to other professionals and obtaining information. The benefits to the court process and to the defendant are also discussed.

c. How you can obtain further information about a defendant's support needs

It is important to identify and meet a defendant's support needs at the earliest possible stage in court proceedings. There are a number of ways that you can get more information during the various stages of court proceedings.

These include:

- i. At the pre-court briefing
- ii. The defendant's advocate
- iii. The defendant
- iv. Community mental health services
- v. Liaison and diversion services
- vi. Medical reports
- vii. Case management

i. At the pre-court briefing

Information about a defendant's support needs may or may not be available at the pre-court briefing. The Police and Criminal Evidence Act (PACE) Code C provides particular safeguards for 'mentally disordered' suspects held in police custody. This includes requiring an Appropriate Adult to be present during interviews with the police, and might involve the individual seeing a healthcare professional.

If an Appropriate Adult has been present during an interview with the police, this could be a useful indicator that a defendant might be vulnerable and in need of particular support during court proceedings; whenever possible, you should ask if this information is available. However, it should be noted that not all vulnerable people are recognised by the police as being in need of support.

ii. The defendant's advocate

If the defendant has legal representation you can ask the advocate for information about any support needs they may be aware of in respect of their client. You can also ask the representative whether an Appropriate Adult was requested by the police.

However, it should be borne in mind that defence lawyers do not routinely receive awareness training in mental health, learning disabilities or autism and may not be aware themselves that their client might have particular difficulties.

iii. The defendant

Although many people with mental health conditions, learning disabilities or other conditions are reluctant to say they need support, some will readily volunteer information about what would help them to understand and to participate in court proceedings. Any questioning of the defendant should be done quietly and sensitively, and not in open court.

iv. Community mental health services

All courts should have some form of routine access to community mental health services to assist with information about individual defendants. Some courts will have dedicated on-site services, however not all courts will have routine access to learning disability services.

v. Liaison and diversion services

Increasingly courts will have access to liaison and diversion services (in England) and criminal justice liaison services (in Wales), see Section 13. Services in England will reflect a common service specification, set by NHS England, which includes children and adults, and a wide range of mental health, disability, substance misuse and social vulnerabilities.

Liaison and diversion and criminal justice liaison services will cover police custody and court settings. Liaison and diversion and criminal justice liaison services will be staffed by qualified healthcare professionals, with access to mental health, learning disability and other expertise.

An integral part of the role of liaison and diversion services is to provide information to members of the judiciary and court staff concerning the particular needs of individual defendants, and ways in which they can be supported during court proceedings.

vi. Medical reports

You can request a medical report at a defendant's first appearance in court and at any point during court proceedings, under various provisions. The legal adviser will be able to advise which is most appropriate.

The provisions include:

1. Section 11 of the Powers of the Criminal Courts (Sentencing) Act 2000 enables you to adjourn/remand for medical reports for a defendant, who has not been convicted, but who you are satisfied did the act or made the omission charged and that you are of the opinion that an inquiry ought to be made into his/her physical or mental condition.
2. Section 11 (3) requires the court to impose a condition of bail requiring the accused to:
 - undergo medical examination by a registered medical practitioner or, where the inquiry is into his mental condition and the court so directs, two such practitioners; and
 - for that purpose attend such an institution or place, or on such practitioner, as the court directs and, where the inquiry is into his or her mental condition, comply with any other directions which may be given to him for that purpose by any person specified by the court or by a person of any class so specified.
3. Section 35 of the Mental Health Act 1983 enables a magistrates' court to remand a defendant to a specified hospital (with agreement of the hospital) to enable a report to be prepared on his/her mental condition. The remand to hospital under this provision may take place only if the following conditions are met:
 - the offence in issue is punishable on summary conviction with imprisonment
 - the court is satisfied, on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the defendant is suffering from mental disorder.

vii. Case management

For cases that go to trial, plea and directions hearings should address potential problems that individual defendants might have in engaging with trial proceedings and help to inform the use of 'special measures' and 'reasonable adjustments'. Such arrangements should be made in advance of the trial. New Criminal Procedure Rules which came into effect on 6 October 2014 requires the court, in preparation for the trial, to take 'every reasonable step' to facilitate the preparation of any person, including the defendant. (See Section 11: Supporting vulnerable defendants in court.)

The aims of pre-trial directions are threefold:

- to identify difficulties that are likely to arise in court hearings and procedures
- to clarify the individual's needs
- to arrive at a proportionate response.

d. Unrepresented defendants

There are various reasons why people either choose or have to represent themselves, rather than instructing a lawyer. For many, it is because they do not qualify for Legal Aid Agency funding, which is becoming increasingly difficult to secure.

While most unrepresented parties are likely to be anxious, vulnerable defendants are likely to be especially so – or conversely, might believe they are in full control of the situation. Most may be unaware of basic legal principles and court procedures, and are likely to be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage.

Magistrates' courts operate 'duty solicitor schemes' which provide advice and representation to defendants facing criminal proceedings. It is not uncommon for a court usher to refer an unrepresented defendant to the duty solicitor.

“Having read the resource, I am much more aware of my responsibility to provide for the fair delivery of justice to defendants with mental health conditions or learning disability.” Verna Nosworthy, magistrate

The court duty solicitor can only provide advice to a defendant who:

- is in custody, or
- is charged with an offence which carries imprisonment, or
- appears for non-payment of a fine and is at risk of receiving a custodial term for default in payment.

Part of the role of the duty solicitor is to give advice on the general availability of legal advice and assistance. If it is appropriate, the duty solicitor can assist the defendant in completing an application for a Representation Order (commonly referred to as 'Legal Aid').

Publicly funded representation can only be granted if the defendant can show that one or more of the statutory reasons for granting a Representation Order apply in the case. One of the reasons is that the accused person 'may be unable to understand the proceedings or to state his own case, which may apply to defendants with learning disabilities, mental health problems or autism.

Duty solicitor schemes are under increased pressure with cuts to Legal Aid Agency funding. It is now even more important to be aware of potential vulnerability and communicate effectively with defendants and refer to liaison and diversion services when needed. Some defendants will still refuse representation, but it is your role to ensure they have had a fair chance to justice.

Box 2: Good Practice Example

Magistrates' Association Mental Health and Learning Disability Champions

The initiative for a network of champions arose from an action of the Mental Health and Learning Disability Working Group, which is part of the formal committee structure of the Magistrates' Association. The champion role was launched in 2014. There are now champions in three quarters of the 58 branches of the Magistrates' Association, and the aim is to have full coverage in all branches.

The overarching role of champions is to act as a local facilitator or point of contact in their local area. The champions are a useful link for magistrates and court staff to enable an increase in awareness, information and understanding of the local criminal justice environment. To be effective, champions have established positive working relationships with Branch executives, local Bench committees and Justices' Clerks as well as local Liaison and Diversion Teams.

Within this framework the role of the champion is to:

- Seek, promote and encourage all opportunities to raise awareness of magistrates, court staff and others of issues in relation to mental health, learning disability and other vulnerabilities
- Encourage opportunities for training, newsletters and other local initiatives
- Facilitate engagement with local Liaison and Diversion Teams and other professionals
- Gain a greater understanding around what local services are available to deliver the community sentences.

Many champions have used this resource to help develop and deliver awareness training for magistrates, and representatives from the Prison Reform Trust and members of the Working for Justice Group (people with a learning disability) are often invited to speak at events aimed towards raising local awareness.

For more information, contact the Magistrates' Association.



Vulnerable defendants in court summary:

- People with mental health conditions, learning disabilities, autism and other support needs frequently appear before the criminal courts, however, their condition is not always recognised in advance of their appearance in court.
- Recognising and meeting a defendant's support needs are important in ensuring they are not unfairly disadvantaged or discriminated against during court proceedings.
- It can be difficult to spot when a defendant might be vulnerable in court.
- If you are in any doubt about a defendant's ability to understand or to participate effectively in court proceedings you should seek further information and advice.
- There are a number of ways in which you can obtain further information about a defendant's particular support needs.
- Increasingly, courts will have access to liaison and diversion services (or, in Wales, criminal justice liaison services) that will help ensure that defendants with mental health conditions, autism or learning disabilities are identified in advance of their first appearance in court so that the necessary support and adjustments can be put in place.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *The Advocate's Gateway Toolkit 10: Identifying vulnerability in witnesses and defendants:* www.theadvocatesgateway.org

Section 11: Supporting vulnerable defendants in court

a. Introduction

According to the Criminal Practice Directions 2015:

...the court is required to take 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (CrimPR 3.9(3)(a) and (b)). This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends (CPD 1 General Matters 3D Vulnerable people in the courts).

Where mental health conditions, learning disabilities or other conditions are known about, or suspected, the court administration and magistrates or district judges should act on this information. Special arrangements for vulnerable defendants should, wherever possible, be made in advance of an individual's first appearance in court..

b. Guidance and practice directions

Guidance documents and practice directions are available to assist you in making special arrangements, and these include the Equal Treatment Bench Book 2013 and Criminal Practice Directions 2015.

The Equal Treatment Bench Book (ETBB) notes that that people with disabilities:

- are likely to need more time – so a longer time estimate may be required for a trial
- may not be able to hear, read or be understood or fully comprehend what is taking place
- will be using up much of their energy to cope with the disability and therefore tire more easily, and that
- the stress of coming to court may exacerbate symptoms.

The ETBB further notes that guidance provides 'only broad indications owing to the need to treat each person as an individual'. In other words, although guidance is given, it remains necessary to find out what the particular needs of each individual defendant might be.

Relevant ETBB chapters include:

- Chapter 5, children and vulnerable adults
- Chapter 6, physical disability overview
- Chapter 7, mental disabilities, specific learning difficulties and mental capacity.

The Criminal Practice Directions outline a range of measures that should be adopted, where necessary, to enable the defendant to understand and engage fully in proceedings, and to give their best evidence. These include:

- arranging for the defendant to visit the court room before a court hearing or trial (CPD 1 General matters 3G)
- using 'simple questions', 'short sentences' and 'short periods of evidence, followed by breaks' (CPD 1 General matters 3F)
- holding a ground rules hearing, preferably before the day of the trial (CPD 1 General matters 3E)
- if the defendant's use of a live link is being considered, providing him or her with the opportunity to have a practice session (CPD 1 General matters 3G)
- restricting attendance by media representatives, and enlisting the assistance of the police to ensure the defendant is not 'exposed to intimidation, vilification or abuse' when attending court (CPD 1 General matters 3G).

Concerning defendants with communication difficulties, the Criminal Practice Directions note that:

The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial (CPD 1 General Matters 3F:13; see also 3F11-23).

Relevant Criminal Practice Directions include:

- CPD 1 General matters 3D: Vulnerable people in the courts
- CPD 1 General matters 3E: Ground rules hearings to plan the questioning of a vulnerable witness or defendant
- CPD 1 General matters 3F: Intermediaries
- CPD 1 General matters 3G: Vulnerable defendants
- CPD V Evidence 18A: Measures to assist a witness or defendant to give evidence.

c. Reasonable adjustments

The Equality Act 2010 requires public authorities, including courts, to seek to ensure that discrimination against disabled people does not occur. This could be by making ‘reasonable adjustments’ to existing provision and ensuring that future provision is accessible to people with disabilities. Courts are expected to make any reasonable adjustments necessary for people with disabilities to enable them to participate effectively in court proceedings.

Although reasonable adjustments are ‘personal’ to the individual there are a number of common adjustments, concerned with communication and comprehension, that can help defendants with mental health conditions or learning disabilities. One example of a reasonable adjustment is communicating in

a different way, see Section 11e: Communication in court. Another example is Easy Read, which is described in Box 3, below.

d. Special measures

While statutory protection and support exists for vulnerable witnesses, most notably provided for by the Youth Justice and Criminal Evidence Act 1999, there is little statutory provision for vulnerable defendants. The Police and Justice Act 2006 allows children and vulnerable adult defendants to give evidence via a live television link if certain conditions are met. If you wish to consider this option you should seek advice from the legal adviser.

A further special measures provision is included in the Coroners and Justice Act 2009, which made provision for vulnerable defendants to give their oral evidence in court with the assistance of an intermediary. However, this provision has not yet been implemented. Further information about the role of intermediaries, including how an intermediary for a defendant can be appointed by the court, can be found in Section 11e: i) Specialist communication support – intermediaries.

The lack of parity between support for vulnerable witnesses and vulnerable defendants has been raised as unjust by a number of organisations, including the Royal College of Psychiatrists and the Prison Reform Trust (PRT); see PRT briefing paper, Fair Access to

Box 3: Easy Read

- Easy Read documents present information using simple words and pictures making it easier to understand. The use of Easy Read is common in health and social care organisations, and is increasingly being used in other areas including criminal justice.
- Easy Read can help people with reading comprehension difficulties, including those with learning disabilities, learning difficulties and also people for whom English is not their first language.
- Easy Read is a ‘reasonable adjustment’ that helps to ensure equal access to information for people with reading and comprehension problems.
- An Easy Read leaflet, *A guide on how and where to pay your fine* (form MC102), can be downloaded from HM Courts and Tribunals Service website:
<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/mc102-eng.pdf>
- Examples of Easy Read can be found at KeyRing **<http://www.keyring.org/cjs-easyread>**
- See also: *Am I making myself clear?* Mencap’s guidelines for accessible writing:
<https://www.mencap.org.uk/node/6040>

Justice (Talbot, J., 2012). The Lord Chief Justice and the Director of Public Prosecutions, amongst others, have noted this lack of parity as a matter of concern; and in their report on *Unfitness to Plead*, the Law Commission recommend that, subject to restrictions, 'a statutory entitlement be created for intermediary assistance to be extended to a defendant during or in connection with the proceedings' (Law Com 364, 2016:319).

e. Communication in court

Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood; otherwise the legal process will be impeded or derailed (Chapter 2: Judgecraft, Equal Treatment Bench Book 2013).

Many vulnerable defendants will experience difficulties with communication and comprehension. Magistrates and district judges are expected to deal with such difficulties 'as part and parcel of the ordinary control of the judicial process.' Being able to communicate in court and understand what is happening is fundamental to an individual being able to participate effectively in court proceedings. Conversely, a lack of understanding on the part of the defendant and an inability to participate effectively in court can lead to feelings of frustration and anger, which can impede court proceedings.

For many vulnerable defendants some simple communication 'rules' can help, see Box 4, below. However, if you remain concerned that a defendant is unable to understand or to communicate

Box 4: Supporting communication and comprehension in court

- Use the defendant's name and ensure you have their attention before you begin speaking to him or her.
- Explain in simple language and short sentences what is going to happen at each stage of court proceedings. As a general rule give one piece of information per sentence.
- Don't ask, 'do you understand?' A 'yes' response or a nod does not necessarily mean the individual does understand. Instead, ask the defendant to tell you what they have understood.
- Avoid using jargon and technical or legal terminology. If such language cannot be avoided, explain what it means and check understanding.
- Allow extra thinking time so that the defendant can process information and consider their response before replying.
- Offer support with reading and understanding documents in court. Being able to read a document doesn't mean the defendant understands the content. This may still need explaining.
- If the defendant is unable to write very well, he or she might need help in making notes of proceedings. For example, a defendant might be able to follow proceedings or take notes but not do both at the same time.
- Allow a defendant to sit next to their advocate, carer or a family member. This can help to reduce the stress of appearing in court and enhance defendants' participation in proceedings.
- Ensure court documents are accessible, for example, written in Easy Read. Further information about Easy Read can be found in Box 3: Easy Read.
- Ensure the defendant can hear proceedings clearly. Ensure glass security screens do not impede the defendant's ability to hear.
- Defendants with communication and comprehension difficulties might tire more easily and need extra breaks. Such breaks should not be used as 'explanation time'.

effectively in court, specialist help should be sought; see Section 11e: i. Specialist communication support – intermediaries.

FILM CLIP



COMMUNICATION DIFFICULTIES AND THE CRIMINAL COURTS: 06:07 minutes

Two speech and language therapists and two people with learning disabilities talk about some of the difficulties experienced in court by people with poor communication skills. Some suggestions about what you can do to help are made.

i. Specialist communication support – intermediaries

FILM CLIP



USE OF INTERMEDIARIES: 02:00 minutes

A speech and language therapist talks about her role as an intermediary.

There will be occasions in court when, despite your best efforts, specialist communication support is necessary to ensure the defendant is able to participate effectively in proceedings. Such support can be provided by an intermediary.

The role of an intermediary is to facilitate two-way communication between the vulnerable individual and other participants in the legal process, and to ensure that their communication is as complete, accurate and coherent as possible. Intermediaries can assist the courts to meet their obligations to ensure that a vulnerable defendant is able to participate in court proceedings in a number of ways.

They can:

- assess the defendant's communication skills
- help a defendant to follow court proceedings, the course of a trial and the case against him or her
- assist prosecutors and defence solicitors or barristers rephrase questions that the defendant does not understand, and help to communicate their answers to the court.

The court has inherent powers to take such steps as are necessary to ensure that any defendant has a fair trial. The judgement in *R (on the application of C) v Sevenoaks Youth Court [2009] EWHC 3008* makes it clear that the court can appoint an intermediary to support a defendant to follow proceedings and to give evidence if, without such assistance, they would not be able to have a fair trial.

Courts can appoint intermediaries to support children and vulnerable adult defendants who require specialist help to assist their communication and comprehension during court proceedings. You should consider using an intermediary, as early as possible, where difficulties become apparent. It can take time to secure an intermediary who is appropriately matched to deal with the defendant's particular communication needs. The need for an intermediary should therefore be addressed well in advance of trial proceedings.

The Advocates Gateway Toolkit 16 *Intermediaries: step by step* addresses how to appoint an intermediary. HM Courts and Tribunals Service guidance is available on the use of intermediaries for defendants and guidance should be sought from the legal adviser. See Section 11b: Guidance and practice directions.



Some questions you might want to consider:

- What arrangements are in place in your court to ensure that defendants with mental health conditions, learning disabilities and other support needs are identified in advance of their first appearance in court?
- What procedures are in place in your court if you are concerned about a defendant's ability to understand or to participate in court proceedings?
- Does your court have routine and timely access to liaison and diversion services? Do services include access to learning disability and speech and language expertise?
- How often are special measures and reasonable adjustments used for vulnerable defendants in your court?
- Is routine information in court available in Easy Read?



Supporting vulnerable defendants summary:

- You should ensure that all possible steps are taken to assist a vulnerable defendant to understand and to participate in court proceedings. Support for vulnerable defendants will vary from person to person.
- If you are in any doubt about a defendant's ability to understand or to participate effectively in court proceedings, you should ask for further information and seek advice from your legal adviser.
- Under equality law, reasonable adjustments should be made to assist defendants with disabilities, as necessary.
- However, to date, there has been a lack of parity between support for vulnerable witnesses and vulnerable defendants.
- There are a number of practical steps that can be put in place to help ensure a defendant's understanding of, and effective participation in, court proceedings and useful guidance is available.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *Criminal Practice Directions 2015*: www.judiciary.gov.uk
 - ◆ CPD 1 General matters 3D: Vulnerable people in the courts
 - ◆ CPD 1 General matters 3E: Ground rules hearings to plan the questioning of a vulnerable witness or defendant
 - ◆ CPD 1 General matters 3F: Intermediaries
 - ◆ CPD 1 General matters 3G: Vulnerable defendants
 - ◆ CPD V Evidence 18A: Measures to assist a witness or defendant to give evidence.

- *Equal Treatment Bench Book 2013*: www.judiciary.gov.uk
 - ◆ Chapter 5, children and vulnerable adults
 - ◆ Chapter 6, physical disability overview
 - ◆ Chapter 7, mental disabilities, specific learning difficulties and mental capacity.

- *The Advocates Gateway*: www.theadvocatesgateway.org
 - ◆ Toolkit 1: Ground rules hearings and the fair treatment of vulnerable people in court
 - ◆ Toolkit 3: Planning to question someone with an autism spectrum disorder including Asperger syndrome
 - ◆ Toolkit 4: Planning to question someone with a learning disability
 - ◆ Toolkit 5: Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and ADD/ADHD
 - ◆ Toolkit 8: Effective participation of young defendants
 - ◆ Toolkit 10: Identifying vulnerability in witnesses and defendants
 - ◆ Toolkit 12: General principles when questioning witnesses and defendants with mental disorder
 - ◆ Toolkit 14: Using communication aids in the criminal justice system
 - ◆ Toolkit 15: Witnesses and defendants with autism: memory and sensory issues
 - ◆ Toolkit 16: Intermediaries: step by step.

Section 12:

Bail and remand decisions

When a defendant appears in court for the first time following charge, you must decide whether to remand on bail or in custody, unless the case is dealt with at the first hearing or is discontinued.

The major exceptions to the use of bail are where there are substantial grounds for believing that the defendant, if released on bail, would:

- fail to attend trial
- commit an offence while on bail
- interfere with witnesses
- otherwise obstruct the course of justice.

The Legal Aid, Sentencing and Punishment of Offenders Act (2012) introduced significant changes to the remand framework for adults and children under 18 years of age. Under the new 'no real prospect' test, most people will be released on bail if they would be unlikely to receive a custodial sentence.

Vulnerable defendants have the same right to bail as anyone else. However, Lord Bradley noted that magistrates may be inclined to view prison as 'a speedy and reliable "place of safety" for vulnerable individuals presenting at court' (Department of Health, 2009). Research has shown that due to the difficulties courts face in obtaining full and accurate information about defendants' needs, there is significant overuse of custodial remand for the purpose of facilitating psychiatric assessments (Rickford and Edgar, 2005).

Liaison and diversion services should increasingly be able to assist in obtaining timely information about defendants' support needs. This can include referrals for support while defendants await subsequent court appearances. This should reduce the perceived need for custodial remand for vulnerable defendants.

When a defendant is granted bail, there may be conditions attached, such as residence at 'approved premises'. Approved premises may be suitable for vulnerable defendants who might otherwise be remanded in custody. However you will want to reassure yourself that local approved premises are suitable for individual defendants as there is evidence that the provision of appropriate support is inadequate (Department of Health, 2009).

The Mental Health Act 1983 includes provisions for remanding a mentally disordered defendant in hospital as an alternative to custody. This can be so that either a report on his or her mental condition is prepared (section 35), or for treatment pending trial or sentence (section 36; only the Crown court can remand for treatment). In practice the limited availability of hospital places has resulted in mentally disordered defendants being inappropriately remanded to custody, because '*prisons are one of the few institutions that cannot turn their service-users away when resources are stretched*' (Player, 2007).

Prison can exacerbate mental health conditions, as there is often limited access to treatment for short stay prisoners. Similarly, prison is ill-equipped to deal with prisoners with learning disabilities (Talbot, 2008).

FILM CLIP



CASE STUDY, REACHING AN INFORMED DECISION TO BAIL: 01:45 minutes

A magistrate talks about his experience of sitting in a Saturday court and being faced with a difficult decision regarding a defendant with a mental health condition.



Bail and remand decisions summary:

- Vulnerable defendants have the same right to bail as defendants who are not vulnerable.
- There is an overuse of remand into custody for vulnerable defendants, which may be viewed, wrongly, as a place of safety.
- Prison can exacerbate mental health conditions for which there is limited access to treatment, especially for short stay prisoners; prison has been shown to be ill-equipped to deal with prisoners with learning disabilities.
- Information about community services for vulnerable defendants could reduce the perceived need for custodial remand, and should be available. Liaison and diversion services have an important role to play in this regard.



Section 13: Liaison and diversion services (England) and criminal justice liaison services (Wales)

Lord Bradley's report on people with mental health problems and learning disabilities in the criminal justice system (The Bradley Report, 2009), recommended that all police custody suites and criminal courts should have access to liaison and diversion services.

This recommendation has been supported by successive governments and, in March 2016, liaison and diversion services provided around 53% population coverage across England. A further investment of £12 million was announced in July 2016, which will result in 75% population coverage by 2018. Subject to full business case approval by HM Treasury, 100% roll out is expected by 2020. Similar services exist in Wales and these are known as criminal justice liaison services.

Liaison and diversion is a process whereby people of all ages with mental health or substance misuse problems, learning disabilities, autism, and other needs are identified and assessed by appropriately qualified staff as early as possible as they enter the criminal justice system.

Liaison and diversion services seek to improve health outcomes and reduce re-offending by providing early intervention for vulnerable people as they first come to the attention of the criminal justice system. Information from liaison and diversion assessments is shared appropriately and proportionately with members of the judiciary and court staff to help inform criminal justice decision making and reasonable adjustments to court proceedings, where necessary. Where appropriate, information should also be used to inform pre-sentence reports.

A 2015 survey undertaken by the Magistrates' Association found that where liaison and diversion services exist, magistrates say they receive information from assessments concerning defendants' at an earlier stage, are more confident that they are getting the information they need, and are more confident in asking further questions about the defendant – each of which impacts their decision making.

Police custody and court staff may recognise when an individual has a particular vulnerability and can make a referral to their local liaison and diversion service. Individuals who have been seen by liaison and diversion and criminal justice liaison services will either continue through the criminal justice system, with the necessary support, or be diverted away from criminal justice and into healthcare for treatment and care.

FILM CLIP



LIAISON & DIVERSION SERVICES: 05:33 minutes

Lord Bradley talks about his review of people with mental health problems and learning disabilities in the criminal justice system and, in particular, his recommendation for liaison and diversion services.

Magistrates, a liaison and diversion practitioner and an individual with a mental health condition discuss the need for, and benefits of, liaison and diversion services to help ensure effective participation in court proceedings and when considering sentencing options.

Please note: the national roll out for liaison and diversion services has been extended.



Some questions you might want to consider:

- Is the information you receive from liaison and diversion services useful? If not, what additional information would help?
- Do you receive information from liaison and diversion services before a defendant first appears in court?
- What access to liaison and diversion services does your court have? For example, what times and days of the week do liaison and diversion staff work in your court?
- Who is the main contact for liaison and diversion services in your court? How often do you meet to discuss issues of mutual concern?



Liaison and diversion summary:

- Liaison and diversion, and criminal justice liaison services help to identify individuals with mental health conditions, autism, learning disability, communication difficulties, substance misuse problems, and other needs when they first come into contact with the criminal justice system.
- Members of the judiciary and court staff should receive relevant information about individual defendants from liaison and diversion services in a timely way, and can request additional information should they consider it necessary.
- Information from liaison and diversion services should be used to inform pre-sentence reports, prepared by the National Probation Services.
- By 2018 there should be 75% population coverage of liaison and diversion services operating in police custody suites and the criminal courts, which should rise to full coverage by 2020.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *The Bradley Report* (Department of Health 2009): www.prisonreformtrust.org.uk
- *The Bradley Report Five Years On* (2014), Centre for Mental Health: www.centreformentalhealth.org.uk
- NHS England Liaison and Diversion: www.england.nhs.uk
- Welsh Government Criminal justice liaison services in Wales: www.gov.wales/?lang=en



Section 14: Sentencing

a. Introduction

Magistrates and district judges need to consider a number of factors when imposing a sentence to ensure the sentence is one of punishment, rehabilitation, reparation and public protection.

The Sentencing Guidelines Council states that mental illness or disability can be a mitigating factor, and therefore, sentencing requirements should take into consideration the abilities and support needs of individual offenders. For example, if you decide to issue a fine, certain offenders, such as people with learning disabilities, are likely to need help in budgeting and managing their finances in order to pay the fine.

Section 166 Criminal Justice Act 2003 makes provision for a sentencer to take account of any matters that *'in the opinion of the court, are relevant in mitigation of sentence'* in relation to dealing appropriately with offenders who have a mental disorder within the meaning of the Mental Health Act. This includes conditions such as schizophrenia, depression, bipolar disorder, anxiety disorder, obsessive-compulsive disorder, eating disorders, personality disorders, autistic-spectrum disorders, organic disorders such as dementia, behavioural changes due to brain injury, mental disorders due to drug use, and learning disability.

Taking into consideration the needs of the offender will help to avoid unreasonable or unrealistic expectations being imposed. For example, offending behaviour programmes might need adapting for offenders with learning disabilities. Offenders with mental health conditions might need help to address their condition before they are able to respond positively to other sentencing requirements.

FILM CLIP



APPROPRIATE SENTENCING: 04:23 minutes

Magistrates discuss the importance of addressing the individual needs of offenders when imposing a sentence. People with mental health conditions and learning disabilities talk about their experiences of sentencing.

b. Information you can ask for to inform sentencing decisions

Where you know or suspect that an offender has a mental health condition, learning disability or other support needs, you should seek further information to inform your sentencing decision. Sentencing that takes into account the particular support needs of an individual offender is most likely to help to reduce reoffending.

Section 10 of the Magistrates' Court Act 1980 enables a magistrates' court to adjourn a case after conviction so that enquiries can be made or to determine the most suitable method of dealing with the offender. This could involve obtaining a pre-sentence report, letters from employers and any other information that may be relevant. Section 10 is also the provision which enables an adjournment for medical reports to be obtained.

FILM CLIP



INFORMING SENTENCING DECISIONS: 02:49 minutes

Magistrates speak about information that helps to make informed sentencing decisions, including the importance of pre-sentence reports and medical information. Salma Ali, Learning Disabilities Court Diversion Practitioner, discusses her role and the benefits of liaison and diversion services.

i. Pre-sentence reports

The purpose of a pre-sentence report (PSR), as defined by s158 of the Criminal Justice Act 2003, is to assist the court ‘...in determining the most suitable method of dealing with an offender’.

In January 2016 a new Probation Instruction was issued, *Determining Pre Sentence Reports – Sentencing within the new framework* (PI 04/2016; NOMS, 2016), which sets out a framework for determining the most appropriate format for providing information to courts, and builds on best practice achieved between the probation service and courts. The National Probation Service (NPS) is responsible for the delivery of PSRs, and most reports are delivered on the day of sentence or within five working days. Initiatives such as Transforming Summary Justice and Better Case Management have introduced the ability to present reports orally to the court, and sentencing at first appearance, so reducing the need for adjournments and delays to sentence. Whether delivered orally or in writing, reports should be delivered to a national template or common format and, according to the Probation Instruction, ‘... the assessment and analysis undertaken [should be] sufficient and of good quality to provide appropriate sentencing proposals.’

The PSR should include, but is not limited to:

- an analysis of the offence and pattern of offending, beyond a restating of the facts of the case
- relevant offender circumstances with links to offending behaviour highlighted; relevant circumstances may, for example, be related to an offenders mental health or disability
- the outcome of pre-sentence checks with other agencies
- sentence proposals that address the offenders assessed risk and needs, and
- for offenders aged 18-24, a consideration of their maturity must be included.

In addition, the PSR should address ‘any indications provided by the court’, which – in the context of this resource – might relate to an offenders mental health or disability, or any suspicion that an offender might have mental health problems or a disability that need further investigation. For example, the report writer could discuss your concerns with the offender, liaise with local healthcare professionals and, where

services exist, arrange for the offender to be seen by your local liaison and diversion service. The liaison and diversion service could be asked to prepare a report to inform, or be included with, the PSR.

If, having received an oral or written report on the day of sentence, you think a more detailed report is needed, or you want to give a preliminary indication of purpose of sentence, you can adjourn so that a more detailed report is prepared. According to the Probation Instruction, ‘... where the court provides an indication of a specific sentence... the report must include an assessment of the specific requirement as requested by the court.’ In the context of this resource, a specific sentence might be Community Payback or Alcohol Treatment Requirement adapted to the particular needs of an offender with autism, learning disabilities or mental health problems, or a Mental Health Treatment Requirement.

Where a custodial sentence is being considered, a PSR should, ideally, include how custody may affect the offender, especially if they are vulnerable. For example, the use of custody for people with mental health conditions can heighten vulnerability and increase the risk of self harm and suicide (Department of Health, 2009), while very few prisons are able to adequately accommodate people with learning disabilities (Talbot, 2008).

It is important that you have confidence in the PSR you receive. A good PSR can provide you with background information about the offender, the offence and risk factors, which will enable you to make a decision on an appropriate sentence. If you think that the PSR does not give you sufficient information, or that relevant information has not been included or is inaccurate, you should ask to speak to the NPS Court Officer to request that your concerns are put right. For example, if the report has failed to answer a specific question or request to your satisfaction, the NPS Court Officer may be able to deal with the situation by interviewing the offender and providing a verbal update to the court, avoiding the need for an adjournment. If, in your view, the report is not fit for purpose, you can request an adjournment for the report to be reviewed or rewritten.

ii. Information from liaison and diversion services, other health professionals in court, and medical reports

Where they exist, liaison and diversion services

should provide the court with relevant information about the offender to help inform sentencing decisions. The same information will be used to inform the pre-sentence report. Where liaison and diversion services do not yet exist, similar information may be provided by other health professionals in court. See section 10c: How you can obtain further information about a defendant's support needs.

Section 157 of the Criminal Justice Act 2003 requires the court to obtain and consider a medical report before passing a custodial sentence on any person who is or appears to be mentally disordered, unless the court finds that it is unnecessary to do so. The court must address the need for a medical report and it is a separate consideration to the determination of whether to proceed with a pre-sentence report.

There are a limited set of situations in which consideration of a report will not be necessary.

These are:

- Magistrates or district judges might have received adequate up to date information about the offender from their current mental health professional(s) during proceedings, and therefore do not require another medical report prior to sentencing.
- The offender may have already spent as much time in custody on remand as would be served under sentence, and so will be released immediately.
- The sentence is fixed by law, namely mandatory life imprisonment for murder. However, when considering the circumstances of mentally disordered offenders, a medical report might still be necessary prior to administering a life sentence as the court may wish to consider a hospital order.

Any failure to obtain a medical report does not invalidate a sentence. However, if the case is taken to appeal, the court must obtain a report.

Alongside the medical report, you should also consider other relevant information, such as that contained in pre-sentence reports and from liaison and diversion services. You should consider the likely effect of a custodial sentence on the particular condition of the offender, and on any treatment that may be available.

In some cases the offender may think they are well and do not need to see a healthcare professional. If you think that the offender's health warrants an assessment, and it would be in their best interests to see a healthcare professional, a request for a medical report can still be made.

The legal adviser can assist with requesting a medical report but the decision rests with the magistrates or district judge.

A medical report should be:

- clear, succinct and directly address any questions asked in the letter of instruction
- an appropriate length (for example, a summary report could be two to four pages long, and full report up to eight pages long)
- easy to understand with any medico-legal terminology explained.

c. Sentencing options

The Sentencing Guidelines Council produce sentencing guidelines that help magistrates and district judges decide the appropriate sentence for a criminal offence. The Equal Treatment Bench Book notes that '*sentencing options may be affected by the mental condition of the defendant*'.

If an offender's underlying needs are addressed appropriately, this can help to prevent them from returning to the criminal justice system in the future.

There are various sentencing options that can be considered for offenders and you will be aware of these.

i. Community Orders

Section 177 Criminal Justice Act 2003 introduced Community Orders. Court ordered community sentences have been shown to be more effective in reducing reoffending than short prison sentences. According to the Ministry of Justice, 'short-term custody (less than 12 months in prison, without supervision on release)... was consistently associated with higher rates of proven re-offending than community orders and suspended sentence orders' (Ministry of Justice, 2016).

There are 12 different requirements that can be applied to Community Orders, according to the needs of the offender. The Ministry of Justice have highlighted the importance of tailoring Community Orders to the individual offender (Ministry of Justice, 2012). The Mental Health Treatment Requirement can be used to address an offender's mental health needs.

Offenders with learning disabilities or autism are likely to need additional support to undertake Community Order requirements. Cognitive behaviour treatment programmes, such as offending behaviour programmes, will need to be adapted, as necessary, in accordance with the requirement for 'reasonable adjustments' to be made for individuals with a disability (Equality Act 2010).

ii. Mental Health Treatment Requirement (MHTR)

The MHTR allows offenders with mental health conditions to engage with treatment and support in the community whilst also serving a sentence for their offence. This requirement has a number of benefits such as improving health outcomes, reducing reoffending and cutting the cost of crime. It is also an alternative to a custodial sentence as most prisons are generally ill-equipped to manage prisoners with mental health conditions.

At least 40% of offenders on Community Orders are thought to have a diagnosable mental health condition and yet the MHTR is rarely used. Since its introduction in 2005, the MHTR still represents less than 1% of all requirements issued.

The investment in liaison and diversion services should help to increase the use of the MHTR. Liaison and diversion services will be able to identify defendants with mental health conditions and provide courts with timely information to enable them to make more informed sentencing decisions.

A MHTR can be appropriate in the following situations:

- if an offender does not require inpatient care
- if an offender has been treated in hospital since the offence and their mental health has improved to a point where care in the community is appropriate
- where the custody threshold has been passed as well as those cases in which it has not

- the offender's culpability is substantially mitigated by their mental state at the time of the offence and it is in the public interest to ensure they continue to receive treatment for their mental disorder.

A MHTR can provide access to necessary treatment and support that the offender might otherwise have had difficulty accessing. Offenders with mental health problems might need help to address their condition before they are able to undertake other sentence requirements. Treatment and support could help an offender meet the conditions of their sentence and prevent a breach, and to reintegrate into society and reduce their reoffending. The MHTR can be used alongside other requirements, such as an alcohol treatment requirement, a drug rehabilitation requirement or a required activity requirement.

MHTRs can only be issued when the offender gives their consent to engage with treatment and mental health services are willing to accept the individual. It would be counterproductive to issue a MHTR if the offender does not give consent or if services are unwilling to work with them. This would be likely lead to a breach.

Treatment could include: psychological therapy, medication or a combination of both. The MHTR can be for a maximum of three years. If you are considering this option you should consult with your Legal Advisor and seek advice from liaison and diversion services and/or court mental health team.

iii. Alcohol Treatment Requirement and Drug Rehabilitation Requirement

The Alcohol Treatment Requirement (ATR) focuses on offenders who are dependent on alcohol or whose alcohol use contributes to their offending. The aim is to reduce or eliminate the offender's dependency on alcohol. The Drug Rehabilitation Requirement (DRR) focuses on offenders with drug abuse problems and whose drug use contributes to their offending. The offender works towards a drug free lifestyle with support from specialist agencies.

High numbers of offenders with mental health conditions also have problems with alcohol and drug abuse. This is known as dual diagnosis. Unfortunately, many mental health services are unwilling to work with individuals with substance misuse problems and vice versa.

Offenders with learning disabilities are unlikely to be able to cope with treatment requirements that have not been adapted to accommodate their particular needs. Additional support and/or special arrangements will be necessary, and should be made available, if you consider the ATR or DRR appropriate for them.

You will need to know whether services in your area are commissioned to work with offenders with mental health conditions and substance misuse issues before including both requirements in a Community Order. A drug or alcohol requirement could run in parallel with a MHTR. You might want to explore these options further with local service providers.

d. Knowing what sentencing options are available locally

The need to focus on an offender's multiple needs, such as mental health, learning disability and drug and alcohol use, relies on a multi-agency approach. This involves the courts, the National Probation Service, and health and social care services. Liaison and diversion services should be able to assist with this multi-agency approach.

Local benches are encouraged to be proactive in developing good working links with liaison and diversion staff and other local health and social care providers. For example, it can be beneficial to have close links with local services, such as learning disability and mental health services and relevant voluntary organisations such as Mencap and Rethink Mental Illness.

These organisations may also have local groups or services that can help the courts by providing further information about particular conditions and how best to support individual offenders.

Mental health and learning disability champions should be an effective link between a local branch, liaison and diversion teams and health and social care providers. More information on a champions' role can be found in 'Box 2: Good Practice Example, Magistrates' Association Mental Health and Learning Disability Champions' on page 40.

e. Explaining sentencing requirements to a vulnerable offender

Once you decide on a sentence, it is important that the offender understands the terms of the sentence, what is expected of him or her, when and what will happen if he or she fails to comply.

Written information for an offender about their sentence should be prepared in an accessible way, such as Easy Read. Further information about Easy Read can be found in Section 11d: Reasonable adjustments. For offenders on Community Orders, it may be necessary for them to receive regular reminders of what is expected of them, especially at the start of their sentence. For example, dates on which fine payments should be made and the consequences of non-compliance.

Most people with learning disabilities are unable to read very well or may not be able to read at all. Probation staff might need to find other ways to communicate with such offenders. For example, some probation areas contact offenders by phone or by text messaging to remind them of appointment times.

Many people with learning disabilities have difficulties telling the time – a digital clock is often easier than analogue. For offenders unable to manage either, clock drawings might be necessary that can be 'matched' to real time.

Probation staff should be able to assist with accessible information for offenders concerning their sentence and you might want to highlight the need for such help.



Sentencing summary:

- Mental illness or disability can be a mitigating factor in sentencing.
- The particular support needs and abilities of individual offenders should inform your sentencing decisions.
- Taking an offender's individual needs into consideration can help to avoid unrealistic expectations being placed on them, which might lead to breach.
- You can seek information to help determine the most appropriate sentence for the individual offender, including from liaison and diversion services, and from pre-sentence and medical reports.
- There are very few dual diagnosis services where professionals will work with an offender with both mental illness and alcohol or drug issues. Some, but not all, offenders will need to address their mental health prior to substance misuse or vice versa. An offender's individual needs and local service provision should be considered so that sentence requirements can be achievable.
- Despite high numbers of offenders with mental health conditions the Mental Health Treatment Requirement is rarely used.
- Community Order requirements can respond to the particular needs of vulnerable offenders.
- You should be aware of local services that can provide particular support to offenders undertaking community orders.
- You should ensure that offenders understand their sentence and the implications for non-compliance. Additional support might be necessary to serve as a reminder for certain offenders such as those with learning disabilities.
- An appropriate sentence that responds to the needs of the individual offender can help to avoid breach and prevent re-offending.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- Crown Prosecution Service: Mentally Disordered Offenders: www.cps.gov.uk
- London Probation Trust: Information for Sentencers: www.london-probation.org.uk
- *Liaison Arrangements Between Sentencers and Providers of Probation Services PI 49/2014* (National Offender Management Service, 2014): www.justice.gov.uk
- Mental health and the courts (Mind, 2010): www.mind.org.uk
- *Mental Health Treatment Requirements – Guidance on Supporting Integrated Delivery* (National Offender Management Service, 2015): www.gov.uk



Some questions you might want to consider:

- What arrangements are in place in your court to ensure the particular needs of offenders with mental health conditions, learning disabilities or other support needs are taken into consideration during sentencing?
- What arrangements are in place in your court to discuss the need for adapted programmes and activities with the National Probation Service and Community Rehabilitation Company?
- Have you ever used a Mental Health Treatment Requirement (MHTR)? How many MHTRs has your court imposed in the last 12 months?
- What are your court's local procedures for arranging medical reports? Who can you go to if there are problems with finding a hospital bed for someone who is severely unwell?
- What services are available in your area that specialise in mental health, autism, learning disabilities, substance misuse and dual diagnosis?
- What voluntary agencies work in your area that specialise in these fields?
- Do you have a mental health and learning disability champion? Do they have strong links with local services?

Section 15: Breach

There are many reasons why an offender might breach the conditions of their sentence. For vulnerable offenders, reasons might be linked to their condition and you should attempt to explore this during breach hearings.

For example, a person with learning disabilities may not fully understand their sentence and might be unaware of what was expected of them and the consequences of non-compliance. Unless written in an accessible format, such as Easy Read (see Section 11d, Reasonable adjustments), someone with a learning disability may not be able to read or understand information about their sentence or probation letters about appointments.

For many people with mental health conditions, the fluctuating nature of their condition can interfere with their ability to manage their lives, including the conditions of their sentence. Offenders with mental health conditions might need help to address their condition before they can manage other sentence requirements.

Imposing additional sanctions for vulnerable offenders, in punishment for breach, can make compliance even more difficult, and could lead to further breach.

You might want to consider why an offender breached their sentence and try the order again, rather than making it more onerous.

Practical arrangements can be put in place to help to avoid breach and, ideally, these should be considered during sentencing.

STAN'S STORY

Stan had been told that he might be sentenced to prison. He was therefore relieved when he realised this was not the case. Stan was given a community sentence that involved a curfew between the hours of 6pm and 7am.

Within a week Stan was returned to court for breaking his curfew – he had been playing football with his friends in the local park at 7pm.

Stan didn't know what the word 'curfew' meant and he didn't have a watch because he couldn't tell the time.

Stan was sentenced to prison, where his learning disability was recognised. He was later diverted away from prison into a secure health unit. Stan subsequently received support to help him to live independently in the community. He now does voluntary work, which involves giving talks to school children about why it is important to stay away from crime.

Stan (not his real name) is a former member of the Working for Justice Group.

Material provided by the Prison Reform Trust.



Section 16: Mental Health Act

Most people with a mental health condition live their lives without being affected by the Mental Health Act. For the relatively small number of people who experience more severe mental health conditions, the Mental Health Act 1983 provides the framework by which they can be admitted, detained and treated in hospital against their wishes.

a. Introduction

The Act covers the rights of people while they are detained, how they can be discharged from hospital and what aftercare they can expect to receive. Part 3 of the Mental Health Act focuses on how the Act applies to the criminal justice system.

The Act covers England and Wales. The Mental Health Act 1983 was amended by the Mental Health Act 2007.

The Mental Health Act applies to people with mental disorder. Mental disorder is defined by part 1 of Act as 'any disorder or disability of mind'. According to chapter 3 of the Mental Health Act Code of Practice, this definition includes conditions such as schizophrenia, depression, bipolar disorder, anxiety disorder, obsessive-compulsive disorder, eating disorders, personality disorders, autistic-spectrum disorders, organic disorders such as dementia, behavioural changes due to brain injury and mental disorders due to drug use.

The definition includes learning disability only where it is associated with 'abnormally aggressive' or 'seriously irresponsible behaviour'.

b. Mental Health Act disposals

If a defendant or offender's mental health condition seems moderate to severe, or an individual with a learning disability is displaying 'abnormally aggressive' or 'seriously irresponsible behaviour', you may need to consider whether they should be in hospital. This could be for a temporary admission for assessment and/or treatment, or it could be more long term. There are a number of sections of the Mental Health Act that you can use during court proceedings and as a sentencing option.

Arrangements for such disposals can be complex and the legal adviser will be able to provide further information.

The main disposals for mentally disordered defendants and offenders are:

- **Section 35**
Allows a magistrates' court to remand a defendant to a specified hospital (with agreement of the hospital) to enable a report to be prepared on his/her mental condition.
- **Section 36**
An interim hospital order can be made at any time by the Crown Court to remand a defendant to hospital to see how they respond to treatment.
- **Section 37**
A hospital order permits the court to order the defendant's admission to hospital if the mental disorder makes detention for medical treatment appropriate, and appropriate treatment is available. The order can be made by a magistrates' court or the Crown Court following conviction for an imprisonable offence, or by a magistrates' court without a conviction if the court is satisfied that the

defendant committed the act/omission with which he/she was charged. A hospital order can be for up to six months' duration in the first instance, but it can be renewed. Therefore unlike most criminal justice disposals, it is essentially indeterminate.

- **Section 37**

Under a guardianship order, the defendant is placed under the responsibility of a local authority or a person approved by the local authority. Like a hospital order, this can be made by a magistrates' court or the Crown Court following conviction, or by a magistrates' court without a conviction if the court is satisfied that the defendant committed the act/omission.

- **Section 38**

An interim hospital order can be made, by the Crown Court or a magistrates' court, after conviction, when the court needs more time to decide whether to impose a hospital order or to use an alternative disposal.

- **Section 41**

A restriction order can be imposed by the Crown Court alongside a hospital order, where this is deemed necessary by the court to protect the public from 'serious harm'. The order places limits on the individual's discharge from hospital.

MATT'S STORY

Matt was arrested for assault. While in police custody he was seen by a nurse who thought he might be on the autistic spectrum. Although Matt didn't have a formal diagnosis of autism, his family reported concerns about his behaviour consistent with that reported by the nurse.

Matt's case went to court and he was found guilty of assault. During his trial, the magistrates felt that something wasn't 'quite right' and asked for a medical report to help them decide what sentence would be appropriate. Matt was remanded into custody for medical reports, which took longer than expected. Eventually Matt was seen by two doctors and their reports were presented to the court.

Both reports described Matt as being on the autistic spectrum with underlying psychosis and recommended hospital to see if Matt would respond to treatment. He is currently in a low secure hospital ward in his local area that specialises in autistic spectrum disorders and mental illness.

Matt now has a diagnosis, which means he is likely to receive appropriate treatment and support for his condition. This, in turn, should help him to manage his behaviour and reduce re-offending.

Case study provided by Rethink Mental Illness.



Andrew Aitchison www.prisonimage.org



Mental Health Act summary:

- The Mental Health Act covers a small proportion of people with mental health conditions and learning disabilities, and provides the statutory framework for how they can be admitted, detained and treated in hospital against their wishes.
- Part 3 of the Mental Health Act focuses on how it applies in the criminal justice system and permits the court to order a defendant's admission to hospital, for example, for a report to be prepared on their condition, or for medical treatment to be provided.
- If you think that recourse to the Mental Health Act might be appropriate, you should seek advice from your legal adviser.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- Information on forensic sections of the Mental Health Act and forensic mental health services is available from Rethink Mental Illness at **www.rethink.org**

Section 17:

Women in the criminal justice system

The Prison Reform Trust has long called for a reduction in women's imprisonment and a step change in how the criminal justice system responds to women.

In October 2015 the Prison Reform Trust started a three year UK-wide programme to reduce women's imprisonment, with support from the Big Lottery Fund and in partnership with Families Outside (Scotland), Soroptimist International (UK), User Voice Women's Councils, and Keyring Living Support Networks.

The programme, *Transforming Lives*, has a strong emphasis on local practice and engaging with local statutory and voluntary sector services, as well as working with Government to identify and tackle drivers to women's imprisonment and foster greater use of early intervention and community responses.

This section, *Women and the criminal justice system*, is from a briefing paper by the Prison Reform Trust, *Why focus on reducing women's imprisonment?* (2016); and references are included in that paper. Further information about Transforming Lives, and a range of briefings, publications and resource materials, is available on our website www.prisonreformtrust.org.uk/women.

Reducing women's imprisonment

Since the *Transforming Lives* programme began on 1 October 2015, there has been a welcome 4% decrease in the number of women received into prison and a 17% fall in the number of women remanded into prison. The challenge remains, however, to ensure that women receive timely and appropriate support so that custody is used only as a last resort.

Profile of women who offend:

- Mental health problems are more prevalent among women in prison than among men in prison. Women are nearly twice as likely as men in prison to have depression – 65% and 37% respectively, and are more than three times as likely to have depression as women in the general population (19%). Almost a third (30%) of women in custody had a psychiatric admission prior to entering prison.
- Women in prison are highly likely to be victims of much more serious offences than the ones they are accused of committing. More than half (53%) report having experienced emotional, physical or sexual abuse as a child compared to 27% of men. 57% of women report having been victims of domestic violence.

“The greater energy with which the Government has begun to address the issue of women offenders needs to be... continued. [T]his applies to matters such as reliable funding of women's centres, the effectiveness of rehabilitation provision for women by Community Rehabilitation Companies, and the potential of smaller custodial units.”

House of Commons Justice Committee, 2015



- Women can become trapped in a vicious cycle of abuse and criminal activity. Their situation can be worsened by poverty, poor mental health, and substance misuse. Leaving an abusive relationship doesn't guarantee that violence will stop. The period when a woman is planning or making her exit is often the most dangerous time for her and her children.
- Women are more likely than men to report needing help with a drug problem on entry to prison – 49% and 29% respectively. Around 70% of women coming into custody require clinical detoxification compared with 50% of men. Women prisoners are more likely than men to associate drug use with their offending.
- Alcohol is a significant driver to women's offending. 56% of women prisoners who drank alcohol in excess four weeks before custody felt they had a problem with alcohol compared to 10% of the women in the general population.

Impact of imprisonment

- Women are imprisoned further from home and receive fewer visits. This adversely affects their ability to maintain relationships and contact with home.
- Women are more likely to harm themselves whilst in prison. In the year ending June 2016, 297 women self harmed per 1,000 prisoners, compared to 115 men.
- In the year ending September 2016, 19 women had died in custody, of which 8 were self-inflicted. This equates to 4.9 deaths in custody per 1,000 women, an increase from 1.8 the previous year.
- 60% of women do not have homes to go to on their release from prison. In the absence of safe and decent accommodation it is much harder to find work and, for mothers, to be reunited with their children.

“We want to see fewer women in custody and to promote a greater focus on early intervention, diversion and multi-agency approaches to ensure that the justice system can take proper account of the specific needs of women.”

House of Commons Justice Committee, 2015

Mothers in prison

- Supreme Court and Court of Appeal decisions have addressed the need for criminal courts to consider the welfare of dependent children and the consequences for family life. For example, R v. Petherwick 2012 made it clear that the rights of a child must be considered when the courts sentence a mother who has a dependent child.
- Women prisoners are more likely to be primary carers of children than are men. Six in ten women in prison have (on average two) dependent children; fewer than one in ten children whose mother is in prison are cared for by their father.
- Women’s imprisonment results in an estimated 17,240 children being separated from their mothers each year. Parental imprisonment can treble the risk of antisocial behaviour in children, double their chances of poor mental health, and increase the risk of children living in poverty and insecure housing – each of which can result in high personal and economic cost.

Alternatives to custody

Evaluations of community services for women have shown that they can help to reduce reoffending, provide effective programmes, activity and support for women who offend and for women who are at risk of offending.

- Outcomes for women who are sent to prison are worse than for those given community orders: 56% of women released from prison reoffend within a year compared to 26% of those commencing a community order; and 95% of women successfully complete their community order or licence period.
- A women’s police triage project in Hull found a 46% reduction in the re-arrest rate of women over

a 12-month follow up period. The success of this scheme has led to Humberside Police piloting a similar model for adult young offenders.

- Women’s Centres can provide the help that women need to stop offending; meaning that women achieve positive outcomes in multiple areas, such as health, education, relationships, resilience, employment and social integration – as well as reduced reoffending.
- HM Inspectorate of Probation’s thematic review of the provision and quality of services in the community for women who offend (2016) found that:

Women’s Centres are particularly vulnerable and some have already lost funding, yet they have an important role to play. We found cases where they had been pivotal in turning women away from crime and helping them to rebuild their lives.

The reform agenda for women in contact with criminal justice services

- In England and Wales, the Ministerial Advisory Board on Female Offenders provides the mechanism for a cross-government strategy to reduce women’s imprisonment. The judiciary are represented on this Board, including the Magistrates’ Association.
- Section 10 of the Offender Rehabilitation Act 2014 requires the specific needs of women to be taken into account in the planning of supervision and rehabilitation arrangements.
- The Ministry of Justice Prison Safety and Reform white paper (November 2016) refers to a forthcoming women’s strategy, which will look at how the Ministry of Justice can:

...reduce the number of women offending and ending up in custody, including through early and targeted interventions.

- New technology is being considered that may enable more women with young children to serve their sentence in the community.
- The Government has committed to a ‘whole systems approach’ in England and Wales to achieve coherence between policy, commissioning and service delivery across, and between, criminal justice, health and social care, welfare, children’s and other community services. Increasingly, this has focused on particular support for women at the point of arrest, sentencing, and on release from prison.
- The Government strategy, *Violence Against Women & Girls 2016-2020*, recognises the need to support female offenders affected by domestic abuse.

FILM CLIP



WOMEN

Women’s voices: a film clip of women talking about their experiences of the criminal justice system will be available online during 2017.



Some questions you might want to consider:

- What programmes or interventions for women are available in your area?
- Do you know if there is a women’s centre in your area and, if so, have you visited it?
- Do pre-sentence reports provide the necessary information about a woman’s needs, including whether she has dependent children?
- How often does your Bench defer sentence for a restorative justice programme?



Women and the criminal justice system summary:

- Women are a small minority of defendants who come before the courts; it is helpful, therefore, for magistrates to be aware of the particular needs of women in the criminal justice system as these may be relevant to the individual before you.
- Women’s offending is often linked to the abusive and coercive relationships in which they have become trapped, to histories of trauma and abuse, or time spent in care as children.
- Women are much more likely than men to be the sole or primary carer of children; therefore, the impact on children of sentencing should be considered.
- There is evidence that specialist women’s centres and services are particularly effective in helping women address their problems, reduce their reoffending and turn their lives around.
- Women are more likely than men to successfully complete a community order or licence supervision order.
- Prison is seldom a place of safety for individuals with multiple and complex needs.



Further reading:

Please note: hyperlinks to further reading are embedded in the online version of this resource, www.mhldcc.org.uk:

- *Sentencing of Mothers: Improving the sentencing process and outcomes for women with dependent children*: Prison Reform Trust (2015).
- *Leading change: the role of local authorities in supporting women with multiple needs*: Prison Reform Trust (2016).
- Further information on reducing women's imprisonment, including a range of briefings, publications and resource materials are available at: www.prisonreformtrust.org.uk/women



Section 18:

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Section 19: Feedback

Your views are extremely valuable in helping us to improve the content and quality of this resource, and to help us secure much needed funding to allow us to continue our work.

We would be grateful for your feedback, which should be emailed to:

jenny.talbot@prisonreformtrust.org.uk

Thank you.

“Reading this made me reflect on how the courts deal with people with a mental health condition or learning disability. For the magistrates, the key is the information coming at the initial stage so we can take such factors into immediate account when dealing with the person in court, as well as in our sentencing. It is vital that the other agencies, who deal with the individual at an earlier stage, recognise his/her support needs and advise the court.”

Jacquie Dabnor, magistrate



Concern for Mental Health

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CHARITABLE TRUST

• T H E • M O N U M E N T • T R U S T •

“The Magistrates’ Association has been pleased to be involved in the development and updating of this resource. Magistrates see vulnerable defendants before them far too often and it is important we can be confident in ensuring they can participate fairly in all processes. This resource has been invaluable in helping magistrates learn how to respond more appropriately towards vulnerable individuals. Magistrates’ Association Mental Health and Learning Disability Champions have shared this resource through their branches across England and Wales and it has been a vital tool in raising awareness about communicating with any vulnerable individuals in court. As the national chairman of the Magistrates’ Association, I will continue to encourage its use for all magistrates.”

Malcolm Richardson, national chairman, Magistrates’ Association (from 2015)



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