

N O O N E K N O W S

police responses to suspects learning disabilities and learning difficulties:

a review of policy and practice

Jessica Jacobson



The work of the Prison Reform Trust is aimed at creating 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.

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This report was written by Jessica Jacobson.

First published in 2008 by Prison Reform Trust

ISBN: 0946209 84 7

Photo credit: Andy Aitchison www.andrewaitchison.com

Printed by Studio Projects

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Acknowledgements

Many people have provided invaluable assistance with the preparation of this report - by providing detailed comments and suggestions on early drafts, and supplying information for the case studies and appendices. I would like to thank all the following for their help:

Dr Isabel Clare, University of Cambridge
Judy Clements, Regional Director, London and South-East, Independent Police Complaints Commission
Deborah Hudspith, Home Office Policing Powers and Protection Unit
Dr Glyn Jones, Consultant Psychiatrist, Learning Disabilities Directorate, Bro Morgannwg NHS Trust
Professor Glynis Murphy, University of Kent
Wendy Narducci, Norfolk Appropriate Adult Scheme
Alan Pearson, Senior Diversity Trainer, Northumbria Police
Lis Pritchard, National Appropriate Adults Network
Louise Selby, Ministry of Justice Office for Criminal Justice Reform
Douglas Shad, Norfolk Primary Care Trust
Dr Layla Skinns, University of Cambridge
Kathryn Stone, VOICE UK
Paul Thornton and Allison Armstrong, Northumberland Tyne & Wear NHS Trust
Helen Schofield, Dawn McIlwrath and Neil Stewart, National Police Improvement Agency

I am also extremely grateful for the tireless and generous support with all aspects of the study provided by Jenny Talbot, the *No One Knows* programme manager.

The Prison Reform Trust *No One Knows* programme is supported by The Diana, Princess of Wales Memorial Fund.

Foreword

The police deal with high numbers of people, many of whom have complex and multiple needs. Custody officers in particular need a range of skills to identify effectively the kinds of support needed by people who come into police detention. Drug addiction, hazardous drinking and mental health problems are just some of the issues police officers face on a daily basis.

Research undertaken by the *No One Knows* programme demonstrates that between 20% and 30% of offenders have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system; of this group 7% will have very low IQs of less than 70. By implication this means that many more people with learning disabilities or difficulties pass through police custody.

In recent years support for victims and witnesses with learning disabilities has been the subject of much needed attention and some good progress has been made. However, the same cannot be said for people with learning disabilities who come into contact with the police as suspects.

This paper is a welcome review of police policy and practice in regard to suspects who are thought or known to have learning disabilities and, to a lesser extent, learning difficulties. A number of important topics are explored, including the identification of vulnerable suspects by police officers; the availability of appropriate adults to attend police interviews; learning disability awareness training for police officers; and diversion from the criminal justice system into treatment and support.

The need to identify and support people with learning disabilities through the criminal justice system, and the process by which some can be diverted more appropriately into healthcare settings, are concerns that have been neglected for too long. For many suspects, the first point of contact with the criminal justice system is at the police station. This paper provides a stimulus for further discussion and action not only by the police but also by colleagues in health and social care.



Jan Berry
Chairman
Police Federation

Summary

This report examines how, according to the policy framework, the police should respond to suspects with learning disabilities and learning difficulties; and how the police do respond, in practice. The material presented in the report derives from a review of existing research literature and other relevant documentation.

Main findings:

The most significant policy safeguards for suspects with learning disabilities and learning difficulties are:

- diversion into treatment and away from the criminal justice system is generally encouraged for mentally disordered offenders
- an appropriate adult (AA) should be called to the police station if a person who is 'mentally disordered or otherwise mentally vulnerable' has been detained
- a custody officer has a duty to seek clinical attention for a detainee who appears to be suffering from a mental disorder
- confession evidence is not admissible in court if the police had failed to ensure that the requisite safeguards were in place during interview.

In practice, the following difficulties arise in police responses to vulnerable suspects:

- decision-making on enforcement, diversion and disposal options is inconsistent
- AA provision is patchy because suspects' needs are frequently not identified, and there is a lack of individuals who can effectively perform the AA role
- in many areas, there is limited referral of suspects for clinical attention, and there are inconsistencies in the attention received from healthcare professionals
- criteria for assessing fitness to interview lack clarity
- presentation and follow-through of suspects' rights to legal advice is sometimes poor.

Background

This study was conducted as part of the Prison Reform Trust's *No One Knows* programme, which aims to effect change by exploring and publicising the experiences of people with learning disabilities and learning difficulties who come into contact with the criminal justice system.

The focus of the report is on five main aspects of the interaction between police officers and suspects, namely:

1. Pre-arrest and arrest
2. Caution and legal rights
3. Detention
4. Interview
5. Disposal

With respect to each of the above, the report considers both the policy that guides or should guide the police response, and what is known from existing research about the police response in practice. An underlying assumption that informs the report is that suspects with learning disabilities and, to a lesser extent, those with learning difficulties may face particular problems – in terms of their general welfare and, more fundamentally, the risk of wrongful conviction.

Policy

There are various safeguards in criminal justice and policing policy aimed at protecting the general welfare of vulnerable suspects, facilitating their access to treatment and support where appropriate, and reducing risks of miscarriages of justice that could arise from their vulnerability. These provisions tend to be framed within the language of ‘mental disorder’ as a broad term encompassing learning disability (and possibly significant learning difficulty) alongside mental illness. The statutory framework of this policy is largely established by the Police and Criminal Evidence Act 1984, and its accompanying Codes of Practice, particularly Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) (Home Office, 2006).

The main policy safeguards for suspects with learning disabilities and learning difficulties are as follows:

- Diversion into treatment and away from the criminal justice system is generally encouraged for mentally disordered offenders. Police officers have a considerable degree of discretion in determining whether suspects should be diverted.
- An appropriate adult (AA) should be called to the police station if a person who is ‘mentally disordered or otherwise mentally vulnerable’ has been detained. The AA, who can be the suspect’s carer or relative, social worker or other independent person, has the role of supporting, advising and assisting the suspect and should be present in any interview conducted by the police.
- A custody officer has a duty to seek clinical attention for a detainee who appears to be suffering from a mental disorder – whether or not the detainee requests this. Any medical examination is likely to include consideration of the suspect’s fitness to be detained and fitness to be interviewed.

- There are statutory grounds for excluding confession evidence from a trial, where the confession has been obtained under circumstances in which undue pressure was exerted on a vulnerable suspect in a police interview, or the police failed to ensure that the requisite safeguards (particularly, the presence of an AA) were in place.

Practice

The research literature on police practice indicates that there are marked inconsistencies and some inadequacies in police responses to suspects with learning disabilities and learning difficulties. The most problematic aspects of police responses appear to be:

- Decision-making on enforcement, diversion and disposal options is inconsistent, reflecting pragmatic issues such as the availability of treatment services and differences in general approach to the offending behaviour of suspects with mental disorders.
- AA provision for vulnerable adult suspects is patchy, because:
 - o many suspects who should be supported by an AA do not receive this help, largely because their needs are not routinely identified
 - o custody officers tend to rely too heavily on the advice of health professionals in assessing the need for an AA, rather than requesting an AA whenever they consider that a suspect may be vulnerable
 - o there is a lack of availability of individuals who can perform – and particularly those who can effectively perform – the role of AA
 - o significant delays are caused when officers have difficulty in contacting AAs.
- In many areas, there is limited referral of suspects for clinical attention, and inconsistencies in the attention received from healthcare professionals.
- Among custody officers and health practitioners alike, there is a lack of clarity in general approaches to and criteria for assessing fitness to interview.
- There is evidence of poor presentation and follow-through of suspects' rights to legal advice.

Some of the causes of the above problems are clear. Custody and investigating officers frequently lack training and expertise in identifying and responding to the varied and often profound needs of mentally disordered suspects. Accurate identification of a learning disability, or serious learning difficulty, can often be challenging even for an experienced and trained officer, given that such impairments may be largely hidden, and possibly deliberately disguised by the individual. Signs of impairment may also be obscured by a suspect's expressions of distress, anxiety or anger, the effects of drug or alcohol consumption, and co-existing psychiatric, social or behavioural problems.

There are various factors in addition to the difficulty of identification that inhibit the effectiveness of police responses to vulnerable suspects. The range of police procedures and duties with respect to detainees is – of necessity – large and complex: provisions relating to mentally disordered suspects are a small part of this much greater whole and can therefore be sidelined. The pressures of working to the ‘custody clock’ sometimes lead to poor practice and inappropriate decision-making, and the numbers of individuals passing through police custody are vast. Ineffectual liaison and partnership arrangements with external agencies limit options for referral to, or input from, health and social services. And there remain elements of police working culture that can counteract efforts to enhance the sensitivity of police responses to suspects’ needs and difficulties.

Conclusions

Notwithstanding the existence of certain protections and safeguards for vulnerable suspects, the basic elements of the police response – arrest, cautioning, detention, the presentation and exercise of legal rights and interviewing – are not altered where a suspect has learning disabilities or learning difficulties, and criminal prosecution is being pursued.

There is a case for providing greater statutory support for suspects with learning disabilities and learning difficulties. This could include, for example, giving police officers the duty to call for legal advice for all such suspects; widening the circumstances in which AA attendance is mandatory; and extending to vulnerable *suspects* some of the special measures and associated guidance currently focussed on vulnerable *victims* and *witnesses* – in particular, the provision for intermediaries to facilitate communication, and guidance on interviewing. An increase in the support available to vulnerable suspects could serve to enhance justice, not only by protecting the welfare and rights of these individuals as they undergo the process of prosecution, but also by making prosecution a viable option in cases which might otherwise be inappropriately discontinued or diverted.

Whether or not policy provision for vulnerable suspects is extended, there are shortcomings in police practice that should be addressed. However, these shortcomings do not necessarily reflect a lack of commitment or capacity on the part of the police. They are, in large part, a reflection of the lack of clarity in current policy; the complexity of defining forms of vulnerability and, consequently, of identifying individuals who are vulnerable; and the intrinsic pressures and tensions of police investigative work.

On the basis of this study’s findings, a series of recommendations have been produced for policy development, appropriate adult provision and police forces. These are presented at the end of the report, on pages 35-39.

Introduction

This report examines how, according to the policy framework, the police should respond to suspects with learning disabilities and learning difficulties; and how the police do respond, in practice. The material presented in the report derives from a review of existing research literature and other relevant documentation.

The study was conducted as part of the Prison Reform Trust's *No One Knows* programme. This is a UK-wide programme led by the Prison Reform Trust that aims to effect change by exploring and publicising the experiences of people with learning disabilities and learning difficulties who come into contact with the criminal justice system.

The focus of this report is on five main aspects of the interaction between police officers and suspects, namely:

1. Pre-arrest and arrest
2. Caution and legal rights
3. Detention
4. Interview
5. Disposal

With respect to each of the above, this report considers both the policy that guides or should guide the police response, and what is known from existing research about the police response in practice. In the discussions of 'policy', the primary concern is with the statutory framework which guides police dealings with suspects, and the associated police procedures. The statutory framework is largely established by the Police and Criminal Evidence Act 1984, and its accompanying Codes of Practice, particularly Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) (Home Office, 2006).

Background

An underlying assumption that informs this paper is that suspects with learning disabilities and, to a lesser extent, those with learning difficulties may face particular problems – in terms of their general welfare and, more fundamentally, the risk of wrongful conviction. This paper does not aim to test this assumption. It suffices to note that a range of empirical studies strongly suggest that suspects with learning disabilities (the issue of learning difficulties has featured less frequently in research) are 'vulnerable' in the sense that compared to their non-disabled peers they are:

- (i) *less likely to understand information about the caution and legal rights;*
- (ii) *more likely to make decisions which would not protect their rights as suspects and defendants; and*
- (iii) *more likely to be acquiescent... [and] more likely to be suggestible (Clare, 2003: 251).*

As this paper will demonstrate, the aim of certain elements of criminal justice policy is to lessen these vulnerabilities, while other elements of policy are 'blind' to the particular difficulties faced by psychologically vulnerable suspects.

Another issue that is not examined in this report, but which forms a vital part of the context, is the prevalence of offenders with learning difficulties and learning disabilities. A review of research on prevalence, also conducted as part of the Prison Reform Trust *No One Knows* programme, concluded that there is a 'vast hidden problem of high numbers of men, women and children with learning difficulties and learning disabilities trapped within the criminal justice system'; and that between 20% and 30% of offenders 'have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system' (Loucks, 2007a:1).¹

Just as individuals with learning disabilities and learning difficulties can commit crime, so they can also be victims and witnesses of crime. Policy developments aimed at protecting vulnerable victims and witnesses have been more extensive than those focused on vulnerable defendants. For example, Part II of the Youth Justice and Criminal Evidence Act 1999 provides for a range of 'special measures' to assist vulnerable and intimidated witnesses – that is, witnesses who are under 17, have a mental disorder and/or learning disability, or have a physical disability or disorder. Special measures include the use of screens in court to ensure that the witness does not see the defendant; permission to give evidence via a live TV link or in private; and the introduction of approved 'intermediaries' to help a witness communicate with legal representatives and the court. The measures do not, however, encompass vulnerable suspects or defendants, as Section 16 of the Act makes explicit: 'For the purposes of this chapter a witness in criminal proceedings (*other than the accused*) is eligible for assistance ...' [emphasis added]. The rationale for this exclusion, as set out in the *Speaking up for Justice* report which led to the introduction of special measures, is:

The law already provides for special procedures to be adopted when interviewing vulnerable suspects. Also the defendant is afforded considerable safeguards in the proceedings as a whole to ensure a fair trial. For example, a defendant has a right to legal representation which the witness does not and the defendant has a right to choose whether or not to give evidence ... Also, many of the [special] measures ... are designed to shield a vulnerable or intimidated witness from the defendants (e.g. live CCTV links, screens and the use of video-recorded evidence ...) and so would not be applicable in the case of the defendant witness (Home Office, 1998: 23).

Nevertheless, in a small number of cases 'intermediaries' have been appointed by the court (under the judge's common law powers) to facilitate communication with vulnerable defendants.²

1. For a more detailed discussion of prevalence, see Loucks (2007b)

Definitions

The *No One Knows* programme employs a broad definition of learning disabilities and learning difficulties. It follows the *Valuing People* White Paper definition of 'learning disability' as the presence of 'a significantly reduced ability to understand new or complex information, to learn new skills (impaired intelligence), with a reduced ability to cope independently (impaired social functioning)' (Department of Health 2001, para. 1.5). The term 'learning difficulty' is used by the *No One Knows* programme to refer to a broader set of cognitive, comprehension and communication difficulties. Hence people with learning difficulties are understood to include:

People with dyslexia or dyspraxia; people with speech, language, and communication difficulties; people with sensory impairments such as visual or auditory problems; people with attention deficit disorders; and those with autistic spectrum disorders such as autism and Asperger's syndrome (Loucks, 2007b: 8)

An immediate difficulty that arises in reviewing police policy and practice with respect to suspects with learning disabilities and learning difficulties is that there is little in either policy or practice that is explicitly and specifically responsive to such suspects. There are, however, some statutory provisions for detainees who have an obvious learning disability. The most significant of these is the requirement for an 'appropriate adult' to be present when a 'mentally disordered or otherwise mentally vulnerable' suspect is interviewed. Under this provision, the issue of learning disability (and possibly serious learning difficulty) is conflated with issues of mental illness, as in the following definitions offered by PACE Code C (paragraph 1G):

'Mentally vulnerable' applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. 'Mental disorder' is defined in the Mental Health Act 1983, section 1(2) as 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'.

Hence much of the discussion that follows is concerned with policy that relates to both mentally ill and learning disabled suspects, and within which issues of learning difficulty have less prominence. With respect to police practice, the reality is that many suspects do not have a single or clearly delineated form of intellectual or psychological difficulty. For example, mental illness and learning difficulty or disability may co-exist; or suspects may be cognitively impaired because of the effects of acute mental health problems and/or substance abuse, rather than a learning disability or difficulty.

An additional definitional difficulty encountered by this study is that much of the literature reviewed on these pages does not deal specifically with suspects with learning disabilities and learning difficulties. Some of the literature refers, more narrowly, to suspects with learning disabilities and some, more broadly, to *all* vulnerable suspects, whatever the

2. Seden (forthcoming) observes that, at the time of writing, intermediaries had been accessed by two vulnerable defendants, in cases that had not yet come to court. At the fourth national registered intermediary conference (12 June 2007, London), a case study of intermediary work with a vulnerable defendant, at a crown court trial, was presented. See Plotnikoff and Woolfson (2007) for an evaluation of the piloting of intermediaries in six pathfinder areas. See also the Office for Criminal Justice Reform guidance intermediaries for more detail on the intermediary role (OCJR, 2006)

nature of their vulnerability. Wherever possible, the subjects of the cited research will be made clear.

Content and structure of the report

In reviewing police responses to suspects with learning disabilities and learning difficulties, this study has identified various shortcomings in both policy and practice, which will be highlighted over the course of the report. However, in discussing these shortcomings, there is no intention to imply that the development and implementation of appropriate responses to vulnerable suspects is a straightforward matter. Far from it: it is clear that this is an extremely challenging aspect of police work. In particular, there are three areas of difficulty – all of which are recurring themes throughout this report.

First, there are no easy answers to the question of to what extent special provisions *should* be made for suspects who have learning disabilities and learning difficulties. While it is widely recognised that there is a need to offer special protections and assistance to the most vulnerable suspects, it is difficult to determine the level of vulnerability at which help should be made available, and the circumstances in which diversion into treatment or support is a more desirable outcome than the prosecution of a vulnerable suspect. The second area of difficulty – as noted above – is the complexity of defining forms of vulnerability and, consequently, of identifying individuals with particular problems and disabilities. The third area of difficulty is that the intrinsic pressures and tensions of police investigative work are such that the implementation of special provisions for vulnerable suspects is bound to be challenging.

A limitation of this report is that it does not address issues of gender, ethnicity or age. It is very possible that, for example, vulnerable suspects who are female, or are from minority ethnic backgrounds, or are aged under 18, face particular problems; but there is a lack of existing research data on these issues. Another possible limitation is that some of the research literature cited over the course of this report dates back to the early to mid-1990s and could therefore be considered out of date; however, the continuing relevance of the older studies is demonstrated by the fact that many of the issues they raise are reflected also in the more recent research.

The report comprises eight chapters. Following this introduction, each of the five aspects of police officer-suspect interaction is discussed in turn. Chapter seven then looks at the cross-cutting issue of appropriate adult provision. Chapter eight concludes the report with a discussion of the study's main findings, and a series of recommendations.

Pre-arrest and arrest

The police have a duty to investigate any criminal offence that is reported to them. That investigation may lead to the arrest of an individual who is suspected of having committed the offence. If the suspect has a learning disability or learning difficulty, this is unlikely to have a bearing on *how* any arrest is carried out.³ It might, however, have a bearing on whether the suspect is arrested.

The exercise of discretion by the police

Whatever the suspect's psychological state and capacity, an arrest is only one of several possible outcomes when an offence appears to have been committed by an identifiable individual. Assuming the alleged offence is reported, the police have a substantial degree of discretion in deciding what action to take. Potential outcomes other than an arrest include (this is not an exhaustive list):

- **No further action** is taken against the suspect
- The police issue an **informal warning**
- The police deploy a **non-judicial criminal punishment** such as a fixed penalty notice
- The police undertake **civil enforcement**, for example by taking out an anti-social behaviour order (Asbo) against the suspect
- The suspect is **removed to a 'place of safety'** under sections 135 or 136 of the Mental Health Act, on the grounds that he is in need of care or control
- A **psychiatric assessment** is carried out, having been arranged by the police, and treatment accordingly put in place
- Local agencies, in co-operation with the police, introduce or improve the **support services** available for the suspect, with the aim of preventing future offending.

The last three of the above list of potential outcomes can be referred to as diversion from the criminal justice system. Diversion may take place before a suspect is arrested: indeed some areas have specific 'diversion at the point of arrest' schemes (see, for example, Riordan et al, 2000, for an evaluation of such a scheme in south Birmingham). Very frequently, however, diversion occurs after an arrest has been carried out; this issue will be further considered below, in the chapter on 'disposal'.

Factors determining actions taken

A number of factors determine what, if any, action is taken by the police when an offence is believed to have been committed. These factors include:

3. As Murphy and Mason observe (2007): 'people with intellectual disabilities who break the law generally enter the criminal justice system much as other people would, though perhaps with more confusion and less appreciation of their circumstances than most'.

- a) *The nature and seriousness of the alleged offence:* Whether or not a suspect has a learning disability or difficulty, the more serious the offence, the more likely it is to be reported, and the more likely the police are to take action following the report. Likewise, certain kinds of offences, such as sexual offences, may be more likely than others to result in the involvement of the criminal justice system. Conversely, if the offence is relatively minor, the police may decide that an arrest and subsequent prosecution is not in the public interest and may take no further action save, possibly, issuing an informal warning. The police may also explore other enforcement options such as an Asbo (which may be considered appropriate if it is relatively minor nuisance behaviour that is part of a pattern of such behaviour) or a fixed penalty notice.
- b) *The context of the alleged offence:* A report by Murphy et al (forthcoming) notes that crimes committed in public places by people with learning disabilities are more likely to be reported than crimes committed in service settings. Research by Lyall et al (1995) and by McBrien and Murphy (2006) found some reluctance among care staff to report crimes committed by people with intellectual disabilities. However, the seriousness of the offence is also a factor here: for example, in McBrien and Murphy's study '48% of care staff thought that theft should be reported, 68% thought assault should be reported, and only 17% thought they would not report rape' (2006: 139).
- c) *The mental capacity of the offender:* Individuals with learning difficulties and with mild or moderate learning disabilities are more likely to be arrested for an offence than those with more severe learning disabilities. Where a severely learning disabled individual is suspected of having committed a crime and the crime is reported to the police, prosecution is unlikely to follow because the police would recognise early on that the individual could not participate meaningfully in an interview and other aspects of an investigation.⁴ Generally, the milder a learning disability, the more likely that formal action will be taken against a suspect, because the police will be more confident that the suspect can be interviewed and can ultimately be held responsible for his actions (given the requirement in law for mens rea, or the intention to commit the crime, to be committed). Offence seriousness may also be a consideration here: a relatively severely learning disabled suspect who is involved in a serious crime might be dealt with through 'unfit to plead' court proceedings (CSIP, 2007: 6).

The appropriateness of alternative courses of action

There is disagreement among practitioners – including police officers, healthcare workers and legal practitioners – about the appropriateness of taking formal action, and of alternative courses of formal action, against some suspects with learning disabilities. This reflects a lack of clarity in current policy and guidance on the application of the concept of criminal responsibility to these individuals.

On the one hand, the provision of treatment and support for learning disabled suspects, rather than prosecution, may help the individuals overcome the problems that led them to (allegedly) offend. The case study in Box 2.1 is an example of a case in which a locally-based, multi-agency team aimed at preventing offending by people at risk enhanced the support received by a woman in residential care, with promising results. Home Office circular 66/90 makes it clear that alternatives to prosecution should be considered where the prosecution of an individual with a mental disorder is not in the public interest (Home Office 1990).

On the other hand, failure to arrest and prosecute carries its own risks. For example, the individual

4. In fact, situations where severely learning disabled suspects come to the attention of the police in the first place are relatively unusual. Such individuals are likely to live with carers, have limited ability to go out alone (hence illegal activities would not occur in public), and are unlikely to be reported to the police by carers (Isabel Clare, personal communication, 16.7.07).

who has committed a crime but is not prosecuted may not appreciate the gravity of his actions and may reoffend, and possibly commit ever more serious offences, as a result (Murphy et al, forthcoming). Another risk is that a suspect may be subjected to compulsory treatment without ever being afforded the opportunity to prove his innocence (Seden, 2006; see also Strategic Policy Team, 2006: 29).

The deployment of alternative modes of formal enforcement with respect to learning

Box 2.1: Case study of multi-agency intervention

Ms J has mild learning disabilities, epilepsy, and an additional developmental disability, and many experiences of rejection. She was asked to leave her previous tenancy because of her verbally and physically threatening behaviour, hoax telephone calls to the emergency services, and two small fires, set in her bathroom. The police have often been involved with Ms J's difficulties and, on several occasions, she has been arrested. However, she has no criminal convictions.

For more than two years now, Ms J has held a tenancy in her own flat. She is supported by social care staff, based nearby. After a difficult start, things have progressed very well. However, there have been difficulties recently with Ms D, a new neighbour with learning disabilities, who is supported by staff from the same provider agency. Ms D routinely leaves her door open and the noise from her flat, as she entertains her large circle of friends, and her support workers, infuriates Ms J. She becomes more hostile to staff. On more than one occasion, she goes into Ms D's flat and starts shouting at her and throwing things. There is considerable concern that Ms J is 'bullying' her neighbour. Matters come to a head when there is a fire in a dustbin they share. Ms J admits that she was responsible but is adamant that, on this occasion, the fire was accidental. The police are involved.

The incidents are discussed by the local multi-agency Crime and Disorder Reduction Partnership Board (CDRPB) and it is suggested that Ms J should be issued with an 'acceptable behaviour contract'. The local community learning disabilities team raises concerns that the proposed contract a) is written in a way that is too difficult for her to understand; b) is very negative and focuses on what she should *not* do; and c) does not acknowledge that, as a 'vulnerable' person, she has not been receiving the social care required, and made available through funding to the provider agency, to meet her needs. Some issues around Ms D's understanding of her own personal safety are also raised.

After meeting with members of the local learning disabilities team, the CDRPB develops an agreement, rather than a 'contract' with its connotations of threat, for Ms J, to be implemented over six months. This is presented on the model of a parenting order, so that the responsibilities of the social care provider agency are very clear. The response from all those involved is very positive and, at the end of the six months, there have been no further difficulties. Ms J and Ms D, while not friends, are on 'good neighbour' terms with each other.

Case study material provided by an integrated health and social care community team for people with learning disabilities. 'Ms J' is a real person and this summary describes what took place. However, some details have been changed to protect her anonymity.

disabled suspects is also potentially problematic. It is noted in a Strategic Policy Team report that the use of penalty notices for disorder for offenders with 'mental health disorders' is questionable given that national guidance states 'a penalty notice will not be appropriate where the suspect is unable to understand what is being offered to them, for example, those with a mental handicap⁵ or mental disorder' (Criminal Justice and Police Act 2001, cited in Strategic Policy Team, 2006: 32). Seden (2006) notes that:

There is also concern that people with learning disabilities are being meted out anti-social behaviour orders inappropriately, such as the young boy with autism who was given an Asbo forbidding him from staring over a neighbour's fence, and a boy with Tourette's syndrome who received an Asbo banning him from swearing in public.

5. The term 'handicap' is used in this report only when citing documents or studies in which the term appears.

The caution and legal rights

Individuals who have been arrested have certain rights, which are safeguarded by PACE. In addition to the long-standing right to silence, there are three legal rights which are presented to the suspect in writing in the 'notice of rights and entitlements' (Home Office 2005). The first and most significant of these is the right to see a solicitor. The second is the right to have someone told that you are at the police station; the third is the right to look at the police Codes of Practice.

The right to silence and the three legal rights apply to all suspects, regardless of any learning disability or difficulty. The particular consideration with respect to suspects with intellectual impairments is whether they are able to understand and thereby exercise their rights.

The right to silence

The right to silence has a long history in English law. However, it was amended under the Criminal Justice and Public Order Act 1994, to allow adverse inferences to be drawn from a suspect's refusal to answer questions from the police. The amended right to silence is expressed in the police caution which must be given when a suspect is arrested, and at the outset of each formal police interview:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something that you later rely on in court. Anything you do say may be given in evidence (PACE Code C, para 10.5).

Under PACE, minor variations in the wording of the caution are permitted, and 'if it appears that a person does not understand the caution, the person giving it should explain it in their own words' (PACE Code C, notes for guidance 10D). If a suspect is not cautioned at the outset of an interview, any confession evidence obtained in the course of the interview can be ruled inadmissible (see chapter five).

An issue of concern with respect to suspects with learning disabilities and learning difficulties is that the caution as currently worded is difficult to understand. Indeed, various studies have demonstrated that the caution is difficult for suspects in general and the wider population to comprehend. Fenner et al (2002), for example, examined comprehension of the caution among police station suspects and individuals attending a job centre in the same area, and found very limited understanding.⁶ Research by Clare et al (1998) found limited understanding of the caution not only among the general population and among a sample of A-level students, but also *among serving police officers* – with only two-thirds of the officers in the sample providing an adequate explanation of the middle sentence. This clearly suggests that the allowance for officers to explain the caution 'in their own words' may frequently be of little benefit to suspects.

If it is clear from the content of the subsequent interview that a suspect has failed to

6. See also Bucke et al (2000), who found that both police officers and legal advisers had doubts about the level of understanding of the caution among suspects generally.

understand the caution, adverse inferences from the suspect's silence should not be drawn in court; or, if the suspect gave evidence having not understood the caution, that evidence may be ruled inadmissible. Where a legal adviser is present and is aware that the suspect fails to understand the caution (and/or the process and content of the interview more generally), he may advise the suspect to give a 'no comment' interview. As noted by Cape (2006), the receipt of legal advice not to answer police questions does not necessarily prevent adverse inferences being drawn from the silence. However, the current practice of the courts appears to be that adverse inferences are not drawn if the suspect can be shown to have genuinely relied on 'reasonable' legal advice to remain silent. Advice is likely to be deemed reasonable in the event that 'the suspect has substantial difficulty in responding [to questions] as a result of factors such as ill-health, mental disability, confusion, intoxication, or shock' (Cape, 2006: 7).

The right to legal advice

Section 58 of PACE gives a detainee the right to consult a solicitor, in private, at any time. Section 6 of PACE Code C sets out some of the detail with regard to the right to legal advice. Paragraph 6.8, for example, states that a detainee (with some specified exceptions) 'shall be entitled on request to have the solicitor present when they are interviewed'.

The critical importance of legal advice to 'mentally disordered' suspects is highlighted by Robertson et al (1996), who argue that the legal rights of such detainees 'are best ensured by the presence in the station and at interview of a legal adviser', and that ideally such a person should be a solicitor with experience of working with mentally vulnerable suspects. They note that regardless of a suspect's mental capacity, the basic components of legal advice are likely to be the same; but for a mentally vulnerable detainee 'the additional service requirement is likely to be extra time and help in understanding the legal process' (1996: 307). They also point out that the presence of an appropriate adult (see below) is not an adequate substitute for legal advice, although an appropriate adult may help to obtain that advice.

Writing more generally about legal advice, Clare (2003: 28) notes that:

though many criticisms have been made of the competence and effectiveness of legal advisers ... there is overwhelming evidence that suspects who receive such help are less likely to make self-incriminating confessions, and more likely to exercise their right to silence.

Despite this, Clare notes, previous research indicates that fewer than two-thirds of all suspects have a solicitor present when interviewed by the police. In many cases, this is because they have not asked for legal advice – which may in turn reflect the custody officers' failure to present the right to legal advice clearly. In other cases, custody officers are – with varying degrees of intent – obstructive when suspects attempt to exercise this right. Clare concludes that 'in practice it may be difficult even for suspects who are not "vulnerable" to use the safeguards which are meant to protect them during police

detention and interview' (2003: 30).⁷ This implies that the difficulty is greater for those who are vulnerable – as is suggested also by the following comments from individuals with learning disabilities who have experience of the criminal justice system⁸ (cited in a Prison Reform Trust submission, 2007):

Police sort of con you, turn around and say, 'Do you want a solicitor? It will take three to four hours to get here.'

I was arrested on a Sunday and they told me it would take eight hours for my solicitor to come. I went in [to be interviewed by a police officer] on my own, I didn't want to wait that long.

7. More recently, Skynns (forthcoming) found that 69% of detainees in a police custody area requested and 53% received legal advice. Among the factors that explained why legal advice was *not* requested in a significant proportion of cases was the common perception among detainees that obtaining advice would delay their release from custody. Another factor was the inconsistency in the presentation of legal rights by the police, which 'may have compromised detainees' ability to understand and thereby make use of their rights'.

8. The work of *No One Knows* is supported by a group of people with learning disabilities who have experience of the criminal justice system. The group is called The Working for Justice Group and is supported by KeyRing, the Avon Forensic CLDT and Centre Community

Detention

After being arrested, a suspect must be taken to a police station as soon as is practical. At the police station, the suspect can be detained without charge for up to 24 hours in the first instance if the custody officer determines that this is necessary to preserve or obtain evidence relating to the offence. The conditions of detention are governed by PACE Code C (Home Office, 2006). The Home Office and the Association of Chief Police Officers have also produced detailed national guidance on 'The Safer Detention and Handling of Persons in Police Custody' (ACPO/Home Office 2006). This guidance was developed with the aim of preventing and reducing deaths and adverse incidents in police custody, by standardising processes and extending good practice.

Most of the statutory provisions with respect to police detainees apply to all suspects, regardless of any learning disability or learning difficulty. These include the restrictions on periods of detention, and suspects' legal rights. Suspects are also entitled to a certain level of care while in police custody. The statutory provisions for detainees that have most specific relevance to suspects with learning disabilities and learning difficulties are those relating to medical attention and to the provision of appropriate adults (AAs) to support vulnerable detainees, particularly during interviews.

This chapter looks, first, at general welfare provisions for detainees and, secondly, at medical attention. AA provision is a large and extensively researched issue which has a bearing on many aspects of police-suspect interaction. This is therefore discussed in a separate chapter of the report – chapter seven.

An additional issue to be noted in the context of this discussion of police detention – although it is beyond the scope of the present study to explore this in depth – is that aspects of the police custody process have recently been civilianised. The Police Reform Act 2002 permitted civilians to act as detention officers, and the Serious Organised Crime and Police Act 2005 amended PACE to allow chief officers to appoint civilians as custody officers. (Previously, custody officers were required to be uniformed officers of at least the rank of sergeant.) The implications of this partial civilianisation of police custody for the treatment of suspects, including vulnerable suspects, are not yet known.⁹

General welfare

The statutory requirements relating to general conditions of detention are set out in Section 8 of PACE Code C, and are summarised in the 'notice of rights and entitlements' (Home Office, 2005) with which all detainees are provided. The key welfare provisions contained in this notice are reproduced in Box 4.1, below.

9. Skinns (forthcoming) considers some implications of the civilianization of the police custody process for detainees' access to legal advice.

Box 4.1: Standards of care for detainees, as set out in the 'notice of rights and entitlements'

Keeping in touch

As well as talking to a solicitor and having a person told about your arrest you will usually be allowed to make one phone call ... You can also ask for a pen and paper ...

Your cell

If possible you should be kept in a cell on your own. It should be clean, warm and lit. Your bedding should be clean and in good order. You must be allowed to use a toilet and have a wash.

Clothes

If your own clothes are taken from you, then the police must provide you with an alternative form of clothing.

Food and drink

You must be offered 3 meals a day with drinks.

Exercise

If possible you should be allowed outside each day for fresh air.

If you are unwell

Ask to see a doctor if you feel ill or need medicine. The police will call a doctor for you and it is free ...

In every police station, the treatment of detainees and the conditions in which they are held are regularly checked by independent custody visitors. These are volunteers, whose activities are organised and overseen by police authorities, acting in consultation with chief constables. Independent custody visiting was placed on a statutory footing by Section 51 of the Police Reform Act 2002, and a specific Code of Practice has been issued to outline the functions and parameters of the service (Home Office, 2003a).

There is evidence that general welfare provisions may have particular significance for suspects with learning disabilities. A small study of the experiences of learning disabled people who were interviewed by the police found that several of them 'appeared particularly concerned with aspects of the environment and services, such as refreshments, provided to them. At times such concerns seemed to override those about the actual interview and AA provision' (Leggett et al, 2007). Physical/ environmental issues also seemed to be a source of particular anxiety for the individuals with learning disabilities who contributed to the Prison Reform Trust submission (PRT 2007), as is illustrated by the following two quotations:

Cells are very claustrophobic, it's frightening. People shout a lot, it's noisy, you don't know what's happening. They do things to you. They take over.

I pressed the bell [to say I needed the toilet] and no one came and I didn't get to go to the toilet until after they had interviewed me.

Medical attention

Under PACE Code C:

9.5 The custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person:

- a) appears to be suffering from physical illness; or
- b) is injured; or
- c) appears to be suffering from a mental disorder;
- d) appears to need clinical attention.

9.5A This applies even if the detainee makes no request for clinical attention...

A suspect's identifiable learning disability may or may not, in itself, necessitate clinical attention; or the disability may be associated or co-exist with physical or psychiatric problems that need attention. Two key issues to be addressed in any medical examination deemed necessary by the custody officer are likely to be whether the detainee is fit to be detained and, if so, whether he is fit to be interviewed. According to BMA guidance on healthcare for detainees (BMA, 2004, para 1.4), the specific issues to be addressed in assessing fitness for detention and interview are as follows:

Fitness for detention

- assessment of illness/injuries/drug and alcohol problems
- advice to custody officer on general care whilst in custody
- provision of necessary medication
- referral to hospital
- admission under mental health legislation

Fitness for interview

- assessment of competence to understand and answer questions
- where the patient is mentally ill or mentally vulnerable, advising on the need for an appropriate adult
- advising on any special provisions required during interview
- reassessment after interview.

Clinical examinations must be carried out by an appropriate 'healthcare professional' which, under recent revisions to the PACE code of practice, can include a nurse or paramedic as well as a police surgeon.¹⁰ Home Office/Department of Health Circular 12/95 advises that each police force develop a policy on inter-agency working with health services to ensure that mentally disordered detainees receive the clinical attention they require (Home Office/Department of Health 1995).¹¹

Robertson (1992) examined the work of police surgeons in a number of police stations across eight forces. He found that 9% of detainee examinations carried out by the doctors related to perceived mental illness, and 0.5% to perceived mental handicap. Most examinations were seen, by both the doctors and the police, as being for the purpose of determining 'fitness to detain'. A total of 12 out of 68 detainees considered definitely

10. See ACPO/Home Office guidance (2006) and Home Office Circular O20/2003 (Home Office 2003b) on the roles and responsibilities of healthcare professionals in custody suites.

11. A more recent Home Office circular is 17/2004, which sets out principles for local partnership working between the police, health bodies and other relevant agencies in dealing with vulnerable and potentially violent individuals in their care (Home Office 2004a).

mentally ill or handicapped were deemed unfit to detain and admitted to hospital. Robertson found that two rules governed this outcome: first, if the local hospital would admit the suspect and, secondly, the nature of the offence. He concluded that the assessment of fitness to detain was a complex process that did not simply revolve around the mental health and capacity of the individual. Bucke and Brown (1997) found that about three-quarters of suspects considered mentally disordered or mentally handicapped received medical attention, and that the doctors' recommendations most frequently concerned the need for an AA or fitness for detention.

In a qualitative study, Palmer and Hart (1996) also looked at the role of police surgeons with respect to detainees, and found that they generally defined a suspect as 'unfit' for detention where there was evidence of need for treatment under the Mental Health Act 1993. They also found that there were occasions on which a doctor was not called despite the mental state of the detainee indicating a need for attention. This generally occurred where the custody officer wished to caution or release the suspect very soon, or was confident that he had himself appropriately identified the mental disorder and would therefore take the necessary steps to protect the individual's welfare.

Laing (1996) briefly reviews a range of research studies on the role of the police surgeon with respect to mentally disordered detainees. She finds 'widespread dissatisfaction with the levels of advice and attention given by professionals to detainees', and notes that the pressures faced by police surgeons are increasing because of the growing numbers of mentally ill suspects to be found in police custody, and the enormously wide range of both clinical and legal issues with which they have to deal.

Interview

A police interview with the suspect is very often a critical element of the investigative process. The interview will normally be carried out by the main investigating officer involved in the case. Section 11 of PACE Code C contains general provisions relating to the police interview, which is defined as 'the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences' (11.1A). The particular vulnerability of some suspects in police interviews is explicitly recognised in paragraph 11C:

Although ... people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person ...

For reasons made clear in the above paragraph, a suspect who is 'mentally disordered or otherwise mentally vulnerable' should only be interviewed in the presence of an appropriate adult (AA). The issue of AA provision is discussed in chapter seven of this report. Three further, inter-linked issues relating to the police interview are of particular relevance to vulnerable suspects, and are discussed in turn in this chapter:

1. the assessment of fitness for interview
2. interviewing style
3. the statutory safeguards on the use of confession evidence.

Fitness for interview

As has been noted above, where a suspect is referred to a health professional because of an apparent physical or mental need or vulnerability, one aim of the medical examination may be to assess the suspect's fitness for interview. Annex G of PACE Code C deals specifically with this; paragraph 3 states that the following should be considered in any assessment:

- a) how the detainee's physical or mental state might affect their ability to understand the nature and purpose of the interview, to comprehend what is being asked and to appreciate the significance of any answers given and make rational decisions about whether they want to say anything
- b) the extent to which the detainee's replies may be affected by their physical or mental condition rather than representing a rational and accurate explanation of their involvement in the offence
- c) how the nature of the interview, which could include particularly probing questions, might affect the detainee.

The healthcare professional's advice to the custody officer with regard to suspect's fitness

for interview 'should be made in writing and form part of the custody record' (para. 7).

Robertson (1992) looked at how fitness to be interviewed was assessed by police surgeons. He found that while there was variety in the criteria used, the basic considerations were the detainee's orientation in time and place, and his capacity to understand questions and to produce relevant answers. The detainee's emotional state was generally not considered in assessments – correctly, in Robertson's view, given that a suspect's emotional state is likely to change during an interview and that anxiety is not necessarily debilitating. Robertson concludes that the criteria used in assessing fitness for interview are basic but adequate, since 'other than in the terms already mentioned, there is no objective or scientific basis for determining what constitutes a person's fitness to be interviewed' (1992: 40). He notes as a failing, however, the fact that custody records tended not to show whether or not fitness had been assessed.

More recently, Gudjonsson et al (2000) surveyed a sample of consultant psychiatrists, forensic medical examiners, lawyers and police officers about the psychological factors they considered important in assessing fitness for interview. The factors given the greatest weight were confusion and disorientation, withdrawal from heroin, communication problems, paranoid beliefs, and poor understanding of simple questions. Among factors that were *not* rated highly were apparent suggestibility and eagerness to please. The researchers also found 'quite a diversity of opinion, both between and within professional groups'. This, they argue, suggests that the treatment of potentially vulnerable suspects at police stations is inconsistent – a problem 'compounded by an absence of agreed guidelines on making the assessment as to whether a detained person is fit to be interviewed' (2000: 90). Gudjonsson et al conclude that there is a strong case for the development of a clear framework to guide the inevitably complex and challenging process of making these assessments.

Interviewing style

Although, under PACE, police officers are expected to show 'special care' when interviewing a mentally disordered or vulnerable suspect, and the presence of an AA is required in this situation, no specific guidance has been developed with respect to interviewing style.

In contrast, Home Office guidance on the interviewing of vulnerable victims and witnesses was developed in the wake of the publication of 'Speaking up for Justice' (Home Office, 1998) - the publication which led to the establishment of 'special measures' for vulnerable and intimidated witnesses under the Youth Justice and Criminal Evidence Act 1999. The document *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses* (Home Office 2002a), which is aimed at the police and other agencies involved in criminal investigations, contains a highly detailed section on 'planning and conducting interviewing with vulnerable and intimidated witnesses'. This discusses the importance of going at a relatively slow pace, providing sufficient breaks and pauses, and allowing plenty of time for establishing rapport. With respect to the general approach to interviewing (paragraph 3.112), it is noted that:

Both research and best practice have found that vulnerable interviewees may well have

great difficulty with questions unless these

- are simple
- do not contain jargon
- do not contain abstract words and/or abstract ideas
- contain only one point per question
- are not too directive/suggestive
- do not contain double negatives.

Similarly, another Home Office publication, 'Vulnerable Witnesses: A police service guide', produced for operational police officers, notes that in communicating with vulnerable witnesses officers must be aware of (among other factors):

- the need to simplify the language and concepts used to a level which will be understood. It may be necessary to use non-verbal language to supplement communication
- the need to take extra time when interviewing
- being patient with the witness
- the risk of the person's special susceptibility to authority figures, including a tendency to give answers that the person believes are expected
- the dangers of leading or repetitive questions
- ... the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers
- ... where appropriate, repeating back to the witness what the police officer understands the witness has said. (Home Office, 2002b: 11)

It can be argued that the above instructions are equally applicable to the interviewing of vulnerable suspects as to the interviewing of vulnerable witnesses, and that there is thus a strong case for extending the scope of the cited guidance documents.¹²

Admissibility of confession evidence

A confession is defined in Section 82 (1) of PACE as including:

- any statement wholly or partly adverse to the person who made it
- whether made to a person in authority or not
- whether made in words or otherwise.

Sections 76 to 78 of PACE deal with the admissibility of confession evidence in court: that is, with the circumstances under which evidence in the form of a confession by the defendant can or cannot be used in the case against him. While this issue has more direct relevance to court proceedings than to police investigative work, it has profound implications for police interviewing of suspects with learning disabilities and learning difficulties. This is because sections 76 to 78 of PACE mean that the exercise of undue pressure on a vulnerable suspect, or the failure to provide the requisite safeguards – such as an AA – when interviewing such a suspect, can lead to a confession being ruled inadmissible.

Section 76 (2) directs the court to exclude confession evidence obtained:

12. As set out in Appendix 2 (Police Training), the current Initial Police Learning and Development Programme for new recruits includes a module on interviewing suspects that covers the same issues relating to vulnerability as the module on interviewing victims and witnesses.

- a) by oppression of the person who made it; or
- b) in consequence of anything said or done which was likely in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof.

'Oppression' is defined as including 'torture, inhuman or degrading treatment, and the use or threat of violence' (Section 76(8)). Confession evidence may be deemed 'unreliable' for a wide variety of reasons; these include where there has been an inducement offered, where questioning has been aggressive, where there was a failure to caution, where no AA was provided when one was required (see CPS guidance, undated [a]). According to Palmer and Hart (1996: 17), 'most of the cases involving mental impairment which have received judicial scrutiny have been with a view to excluding evidence under 76 (2) (b)'.

Section 77 of PACE offers an explicit safeguard for defendants suffering from a 'mental handicap'. Under this section, evidence cannot be *excluded*, but the jury can be warned to exercise caution in convicting a defendant on the basis of a confession if he is mentally handicapped and the confession was not made in the presence of an independent person (usually assumed to be an AA). However, as noted by Clare (2003), this provision has been used less frequently than those of 76 and 78 in challenging confession evidence from learning disabled defendants.

Section 78 is a broader provision which provides the court with discretion to exclude any evidence that is 'unfair'. No guidance has been developed on how this discretion should be exercised, and it has been argued that:

There are three main factors which recur in the decisions under s78, viz:

1. *'bad faith' on the part of the police*
2. *impropriety, often in the form of breaches of PACE or its Codes of Practice*
3. *the effect of such impropriety on the outcome of the case (Stone, 1995).*

Clare observes that 'by far the most frequent basis for [section 78's] application has been substantial breaches of the Codes of Practice or other aspects of PACE' (2003: 34). These breaches include the failure to provide an AA where this was appropriate.

Where the admissibility of confession evidence can be challenged under sections 76 and/or 78, this issue is in most cases raised by the defence team – although the judge can also do so if the defence does not.¹³ If the court then rules the evidence inadmissible, it will not be presented to the jury. Whether or not the case can proceed without the confession evidence will depend on the strength of any other evidence that can be put before the court. Thus the Crown Prosecution Service advises prosecutors that in reviewing cases which depend on confession evidence, they should consider whether a challenge is likely to be made to the admissibility of that evidence, and 'should decide whether or not there is a realistic prospect of a conviction on other evidence where it appears probable that the confession will be excluded by the court' (CPS Guidance, undated [a]). There are a number of cases in which convictions have quashed on appeal, on

13. If admissibility is challenged under section 76 (2), the prosecution must prove beyond reasonable doubt that the evidence can be admitted, and the challenge takes the form of a trial within a trial (*a voir dire*) heard in the absence of the jury. If the defence questions the admissibility of confession evidence under section 78 only, there is not usually a requirement for a *voir dire* (CPS Guidance, undated [a]).

the grounds that confession evidence from defendants with learning disabilities should have been excluded – usually under the section 76 (2) provisions (see Clare, 2003, for a discussion).

Disposal

After arresting a suspect and undertaking initial investigative work, the police will be required to choose between various possible courses of action. As applies also to the initial decision as to whether or not to make an arrest, the police often exercise a considerable degree of discretion in determining the disposal; and if the suspect is mentally disordered or vulnerable, this *can*, but does not necessarily, impact on the decision taken.

Options

The major options available to the police are the following:

- **Discontinue** the investigation because of lack of evidence or because prosecution is not believed to be in the public interest
- Release suspect on **police bail** pending further investigation, in the expectation that further evidence may be forthcoming
- Issue a **formal caution**, if the suspect admits the offence and gives informed consent to a caution and the offence is not serious. CPS guidance states that the use of cautions for mentally disordered suspects can be difficult because of the requirement that the offence is admitted and the suspect agrees to the caution and understands its implications. If there are doubts about a suspect's level of understanding or the truthfulness of his admissions, a caution is inappropriate (CPS, undated [b])
- Where sufficient evidence is available and prosecution appears to be in the public interest, proceed to **charge**. If the case is minor and straightforward, the police can charge; otherwise, the case must be referred to the Crown Prosecution Service for the decision on charge.¹⁴ Following the charge, the police must decide whether to remand the suspect in custody or release him on bail pending the first court appearance – unless the suspect has been compulsorily or voluntarily admitted to hospital. As an alternative to charging, the CPS have the option of issuing a 'conditional caution', to which restorative or rehabilitative conditions are attached¹⁵
- Engage with local health and social care services for the purpose of **diverting** the suspect into treatment or support, in view of his particular psychological or psychiatric needs. Some forms of diversion could be combined with a formal caution.

PACE Code C specifies that where the decision has been taken to proceed with a prosecution, the resulting action – primarily the charging – should be undertaken in the presence of the appropriate adult, if the suspect is mentally disordered or otherwise mentally vulnerable (Annex E, para. 11). However, it is also specified that the AA's presence is required only if he is already at the police station, and that 'there is no power under PACE to detain a person and delay action ... solely to await the arrival of the appropriate adult' (16.1; 16C). In their response to the 2007 PACE review consultation, the National

14. Prior to charging or making the referral for a decision on charge, the police can seek advice on the case from the locally-based CPS Duty Prosecutor. This advice might, for example, relate to potential lines of enquiry or the evidential requirements for a charge to be made (Home Office 2004b).

15. See Home Office (2004c). Conditional Cautions were introduced by the Criminal Justice Act 2003, and cannot be issued by the police.

Appropriate Adult Network (2007) note that police forces and AA schemes vary widely in how they deal with the (qualified) requirement for AA attendance at charge – reflecting both the lack of clarity on this point in the PACE code, and the frequent delays in CPS charging decisions. (For more on AA provision, see the next chapter.)

Diversion

The option of diversion is likely to be considered for a suspect who has learning disabilities or, possibly, significant learning difficulties. Diversion requires collaboration between the police and health and social care agencies, and could take the form of referral to community health services, voluntary admission to hospital, or compulsory admission to hospital under the Mental Health Act 1983. Home Office Circular 66/90 requires that diversion for mentally disordered offenders be considered before a decision on charging is made, and that mentally disordered offenders should wherever possible receive health and social care as an alternative to being punished by the criminal justice system.

However, Home Office/Department of Health Circular 12/95 emphasises that: ‘the existence of mental disorder should never be the only factor considered in reaching a decision about charging. The need to protect the safety of the public may indicate that formal action is needed.’ In deciding whether to proceed to charge, the circular advises that the police should consider whether the incident was an isolated event, the risk to others if it is repeated, and whether ‘it represents the latest in a developing pattern of dangerous behaviour which requires intervention by the criminal justice system for the protection of the public’.

It should be noted that the term ‘diversion’ is a broad one, that encompasses the deployment of support and treatment options at any stage of the criminal justice process from pre-arrest to post-conviction. Nacro conducts a regular survey of a range of schemes falling under the headings of ‘court diversion’ or ‘criminal justice mental health liaison’. The report of the 2004 survey (the most recent) highlights the range of contexts in which such schemes operate: while some, for example, cover magistrates’ courts only, others cover both crown and magistrates’ courts as well as police stations, probation offices and prisons (Nacro, 2005a). (The survey also found that only 3 of the 64 schemes which responded had learning disability workers.) A report by the Centre for Public Innovation (2005:14) draws attention to the distinction between ‘diversion’ and ‘liaison’ work with offenders, as follows:

- *Diversion means diverting from the criminal justice system towards treatment in mental health facilities*
- *The overall effect of appropriate diversion would be to reduce the number of offenders with mental health problems and disorders who are sent to prison who should be in NHS mental health facilities*
- *Liaison has a broader meaning and includes linking, brokering, advocating for appropriate care and continuity of care, often in the community, and making links with mental health services in the prisons where individuals are given a custodial sentence.*

Differential outcomes?

The extent to which mentally disordered or vulnerable suspects in practice receive differential treatment in terms of disposal is difficult to assess from the existing research literature. Palmer and Hart (1996) cite research by Robertson et al which found that police in London were more likely to take no further action on suspects with mental illness than on other suspects arrested for comparable offences. Their own study in Yorkshire found that officers would often favour no further action for mentally disordered offenders if the offence was relatively minor and the suspect had a support network. Some officers indicated that they preferred this simpler option of no further action to the complexity of obtaining treatment under the Mental Health Act.

In some cases, officers favoured proceeding to charge in the belief that this was the most realistic route to appropriate treatment for the suspect – leading the researchers to ‘question whether the court system should be used as a mechanism of securing treatment for mentally ill people and suggest that the proper approach would be to secure diversion at an earlier stage’ (1996:78). Another of Palmer and Hart’s findings was that mentally disordered suspects who were charged were sometimes refused bail by the police because of assumptions about the risks they posed to themselves and others, and because many lacked a support network. This is despite the assertion in Home Office Circular 66/90 that mentally disordered offenders should have the same right to bail as others. Nacro guidance (2005b) on the treatment of mentally disordered offenders notes that the police should avoid inappropriate use of custody through police bail, following charging, and that ‘police bail decisions are known to have some impact on subsequent decisions by magistrates in respect of remands in custody’.

Recent research conducted in London and Devon and Cornwall by the Strategic Policy Team (2006) found little difference in terms of charge rates and pre-charge disposals between offenders with and those without mental health disorders (MHD) in Devon and Cornwall. In London, in contrast, suspects with MHD were charged at a *higher* rate than those without, although some of the MHD suspects were diverted at an early stage. MHD suspects in London were cautioned much less frequently than non-MHD suspects. On the basis of discussions with Metropolitan Police officers, the researchers concluded that the high charge rate for MHD suspects partially reflected officers’ lack of awareness of force-level guidance on the circumstances in which prosecutions should be continued.

As the national guidance makes clear (Home Office, 1990; Home Office/Department of Health 1995; CPS undated [b]), decisions about disposal for mentally disordered suspects are frequently complex and entail consideration of a range of factors relating to the offence, the offender and the wider public. In any given case, assessing the relative significance and implications of the different factors, and developing an appropriate response, is bound to entail a difficult balancing act.

Appropriate adult provision

Under PACE Code C, an appropriate adult (AA) should be called to the police station if a person who is 'mentally disordered or otherwise mentally vulnerable' has been detained. AAs are also required for detainees under the age of 17. The appropriate adult can be a relative or carer of the detainee, an individual with experience of working with mentally disordered or mentally vulnerable people, or any other responsible adult. The AA must not be employed by the police. (See Appendix 1 for a brief account of national and local arrangements for AA provision.)

Over the past 15 years, extensive research has been conducted into AA provision. This research has consistently found the provision to be patchy, and that many vulnerable adult detainees, in particular, do not receive the support of an AA. The shortcomings in AA provision appear to have two main causes: a) failures in the identification of vulnerable suspects; and b) practical problems associated with AA input. These difficulties are discussed below, after a brief look at the AA role.

The role of the appropriate adult

The role of the AA, as outlined in Home Office guidance (2003c) is:

- *to support, advise and assist the detained person, particularly while they are being questioned*
- *to observe whether the police are acting properly, fairly and with respect for the rights of the detained person. And to tell them if you think they are not*
- *to assist with communication between the detained person and the police*
- *to ensure that the detained person understands their rights and that you have a role in protecting their rights.*

PACE Code C specifies that the caution must be repeated in the AA's presence; that a mentally disordered or otherwise mentally vulnerable person must not be interviewed or provide or sign a written statement in the absence of an AA, other than in exceptional circumstances; and that a suspect should only be charged in the presence of the AA (if the AA is already at the police station). In addition, it is specified that an intimate or strip search must take place in the presence of an AA other than in urgent cases where there is a risk of serious harm to the detainee or others.

Guidance for AAs provided by a Mencap factsheet (undated) makes it clear that the AA should *not* do the following:

- *speak on behalf of the vulnerable person*
 - *discuss the alleged offence with the vulnerable person*
 - *be compromised by receiving a confession of guilt from the vulnerable person, as your relationship with them is not actually confidential*
 - *give legal advice – this is the responsibility of the solicitor who is their confidential legal adviser.*
-

The Home Office is currently carrying out a review of the PACE powers and codes of practice. The accompanying consultation paper touches on the role of AAs. It notes that there is scope for devising recruitment and retention, training and reporting mechanisms for both AAs and independent custody visitors, and for developing a regional or national approach to these processes. It also asks for comments on the impact of AAs and independent custody visitors, and how the quality of their input could be improved (Home Office, 2007, paras 3.45-3.46).

Problems associated with the identification of vulnerable suspects

While there is a lack of very recent research specifically on *levels* of AA input across police forces, the theme of poor identification of vulnerable suspects frequently recurs in both the older and the more recent studies of AA provision and related issues.

Bucke and Brown (1997), for example, conducted research at 25 police stations in 10 force areas and found that 2% of detainees were treated as mentally disordered or handicapped: a figure that, based on other research, is likely to be a significant underestimate of the actual number of mentally disordered/vulnerable detainees. Moreover, in only two-thirds of the cases of identified mental disorder/handicap was an AA present. A somewhat older study, by Gudjonsson et al, involved clinical interviews with suspects at two London police stations. On the basis of these interviews they concluded that around 15% of the sample 'fulfilled the PACE criteria for the presence of an appropriate adult ... [which] is considerably higher than the 4% whom the police identified as needing an appropriate adult (1993: 25)'.

Lack of screening

The failure to identify vulnerable detainees in large part reflects a general absence of routine screening mechanisms.¹⁶ Individuals with learning disabilities who have had the experience of being interviewed by the police have themselves observed that 'police officers did not routinely ask if they had learning difficulties and did not always believe them when they said they had' (PRT, 2007: 5). However, the difficulty of accurately identifying suspects' vulnerability should not be under-estimated - particularly given that there may be no obvious visual or behaviour clues to this vulnerability; that many detainees ('vulnerable' or not) may display signs of anxiety and distress; and that matters may be further confused where detainees are under the influence of alcohol or drugs (Palmer and Hart, 1984). Additionally, when suspects are asked, as part of an assessment process, about sensitive issues such as mental illness, learning disabilities/difficulties and self-harm, they may not wish to share such information – especially in an environment which does not afford much privacy.

Clare (2003) describes a pilot initiative involving a self-identification questionnaire for use with adult suspects at police stations. This resulted in a significant increase in the number of suspects who were identified as 'vulnerable' by custody officers and received support from an AA. (The questionnaire was subsequently adopted for general use by the Metropolitan Police Service.¹⁷) However, under the pilot initiative, the total numbers of

16. Inadequate or absent screening has implications well beyond the suspect's treatment at the police station. Home Office Circular 12/95 recommends the development of recording and monitoring arrangements to ensure that information about mentally disordered suspects is made available to other agencies dealing with those individuals. However, where suspects' difficulties are not identified in the first place, arrangements for passing on information are meaningless. Research recently conducted (also for the Prison Reform Trust No One Knows programme) on prisoners with learning disabilities and learning difficulties strongly suggests that information exchange, as well as the identification of suspects' difficulties, tends to be highly inadequate across the criminal justice system. The research found that 'information accompanying people into prison is unlikely to show that the presence of learning difficulties or learning disabilities had been identified prior to their arrival'. The research also found that in prisons, as in police stations, 'there is no routine or systematic procedure for identifying prisoners with learning difficulties or learning disabilities' (Talbot, 2007: 38-39).

suspects for whom an AA was provided remained low, relative to the proportion of suspects believed to be 'vulnerable'. This may have been a function of suspects' reluctance to admit their difficulties and/or unsympathetic presentation of the questionnaire by some custody officers.¹⁸

There appears to be a tendency among some custody officers to call for an AA only when advised to do so by a health professional. In an early study of AAs, Bean and Nemitz (1993) found that: 'many custody officers ... assume that the need for an appropriate adult is a medical decision'. Several later studies have had similar findings: including those of Bucke and Brown (1997), Palmer and Hart (1996) and Medford et al (2000). These researchers point out that according to PACE Code C, the custody officer's suspicion of a detainee's vulnerability is in itself sufficient to trigger the requirement for an AA;¹⁹ hence it is inappropriate that 'custody officers are abrogating their responsibility of deciding whether to call an AA to the FME [forensic medical examiner]' (Medford et al, 2000: 19). Moreover, it cannot be assumed that medical practitioners – any more than custody officers – have the necessary skills and experience to identify learning disabilities and learning difficulties.

Training

The training undertaken by all police probationers includes some modules focussing on learning disabilities and learning difficulties; all officers are also required to undertake a race and diversity training programme which covers issues of disability. However, to date there has been little consistent and comprehensive training specifically for custody officers on the identification of learning disabilities and learning difficulties in suspects. (This situation will change, as a new custody officer training programme is being developed, with the expectation that it will be released at the end of 2007; for details on this and other relevant training provision, see Appendix 2.) Robertson (1992) reports that custody officers felt they lacked training on identification of vulnerabilities, with the result that:

When asked to describe what would alert them to the possibility that a person might be mentally ill or mentally handicapped, they referred to factors such as inappropriate or bizarre behaviour, inappropriate response to questioning or a history of admission to psychiatric hospital. It is likely that the grossly psychotic or deluded person will be readily identified using such criteria. Subtler manifestations of abnormality, including some which would be indicative of psychotic illness, are unlikely to be identified by custody officers and it would be unreasonable to expect them ever to do so.

Lack of training does not only impact on the identification of vulnerable suspects, but has wider repercussions, as observed by Seden (2006):

It is fair to say that not all police officers will understand how a learning disability can affect someone, and how they will need to alter their communication and general interviewing techniques. It is certainly true that most police officers and lawyers will not have had training on how best to do this.²⁰

Despite the general weaknesses in training provision for custody officers, there are examples of good practice in certain force areas. One such example is an initiative

17. Metropolitan Police Service custody record form 57M: 'Risk assessment, medical care and need for other help'. The form is currently being reviewed.

18. Clare quotes one officer who complained: 'We give them [suspects] a solicitor and all these rights. And now you want us to give them this "special help". It's taking the piss' (2003: 246).

19. Paragraph 1G of PACE Code C states that 'When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and the AA called.'

20. Lack of training on learning disabilities and in related areas has a bearing on police dealings with vulnerable victims and witnesses as well as their dealings with vulnerable suspects (see Burton et al, 2006).

developed by Northumbria Police in partnership with the local NHS Trust, which is described in Box 7.1.

Box 7.1: Case study of joint training initiative involving Northumbria Police

Background

The background to the initiative was a general recognition that police officers frequently misunderstood the basic principles of mental health and associated legislation. Anecdotally, officers acknowledged that they lacked confidence in dealing effectively with suspects who might have learning disabilities or learning difficulties; and people with learning disabilities and learning difficulties who had come into contact with the police reported negative experiences.

Over the past two years, a joint training initiative has been developed between Northumbria Police and Northgate & Prudhoe NHS Trust, now part of Northumberland Tyne & Wear NHS Trust. The overall aim of this partnership is to have a positive impact on the experiences both of police officers, when they come into contact with mentally disordered individuals, and of mentally disordered individuals, when they come into contact with the police service – whether as victims, perpetrators or witnesses.

The initiative

The initiative is delivered as part of the police diversity training on working with difficult-to-access communities. It comprises both classroom-based teaching and experiential placements within specialist health services for people with learning disabilities and learning difficulties.

Placements are not meant to be seen as a range of ‘happy’ visits, nor as activities that do not present a learning challenge. Rather, placements are intended to present a range of experiences that will erode misconceptions, break down barriers and build feelings of confidence among officers. It is made clear that during the placements, the presence of the officers should be communicated to all concerned, in order that everyone can benefit from the experience.

NHS staff deliver the training and accommodate practice placements for police officers free of direct charge. In return, police services deliver bespoke training packages for NHS staff on particular issues including drug awareness.

Outcomes

Evaluations of the training indicate that it has had positive outcomes for both services and for individuals with learning disabilities and learning difficulties. In particular:

- People with learning disabilities and learning difficulties who come into contact with the police are more likely to get the support they need

- People who need to be charged and processed are helped to understand what is happening to them
- Police officers are aware of specialist services in their locality and can develop working relationships with professionals to ensure that appropriate support is available at the point of arrest or subsequently
- People with learning disabilities and learning difficulties are less likely to be held in custody inappropriately and can be diverted to a place of safety if necessary; and they are more likely to be processed through the criminal justice system appropriately.

The approach has been presented at a number of conferences nationally and received positive feedback. The possibility of replicating the model within Cheshire and Wirral Constabulary is being explored.

Case study material provided by Northumberland Tyne and Wear NHS Trust

Practical difficulties associated with appropriate adult provision

The use of AAs is limited not only by problems of identification of vulnerable suspects, but also by a lack of availability of people who can perform the role, and a lack of awareness on the part of the police of what is available. Medford et al found that among custody officers in the Metropolitan Police Service there was a degree of confusion about the existence of formal AA schemes: 'some officers believed that a scheme existed when it did not, and others stated there was no scheme when indeed one did exist'; and they were also uncertain about the availability and terms of reference of schemes (Medford et al, 2000: 19).

The delays typically associated with the use of AAs - Medford et al found that, on average, a vulnerable adult spends over 4.5 hours in custody prior to the AA's arrival, with some waiting more than 20 hours – add to the practical difficulties.²¹ It is clear that in the sometimes highly pressurised context of the custody suite, various factors in combination can dissuade a custody officer from calling an AA, as described by Robertson et al: 'This constellation of circumstances – doubt about the mental status, a police surgeon passing as fit, and investigating officers who are pressing the custody officer for action – might be liable to cause custody officers to act against their better judgement' [i.e. in not calling an AA.] (1996: 305).

Research on AA provision also indicates that even where AAs are present for vulnerable adult detainees, their input can be ineffective. Many AAs may be unclear about their role, having received little or no training or advice from custody officers (Palmer and Hart, 1996; Bucke and Brown, 1997). Custody officers themselves can be confused or ambivalent about the role of the AA (Bean and Nemitz, 1993). Leggett et al (2007) found that among a small sample of learning disabled suspects, most said that the AA 'said and did nothing during the interview, leading a number to explicitly question the usefulness of the safeguard'. As highlighted by Palmer and Hart, the implications of ineffective AA input are serious, given that the simple presence of an AA is often considered by the courts to be a sufficient safeguard on the reliability of confession evidence gathered from a police interview:

21. One respondent in Leggett et al's study (2007) of experiences of police interviews described having refused both an AA and a solicitor on being told that they would take four hours to arrive. He was then interviewed without either.

The criminal courts may be reluctant to scrutinise the way in which professionals or lay people carry out this role, yet it is essential that some consideration be given to the standard that is necessary to ensure that those at risk are genuinely protected. A failure to do so may leave the vulnerable suspect apparently protected, but in reality no more so, and probably less, than if the safeguards had not been implemented (1996: 23).

Nevertheless, a study by Medford et al (2003), involving analysis of police interviews with under-17 and vulnerable adult suspects, suggests that the presence of an AA in a police interview often has a significant positive impact. The researchers conclude that while AAs may directly say and do little in interview, their presence makes it more likely (in the case of adult suspects) that a legal representative will also be in attendance; lessens the interrogative pressure exerted by the interviewing officer; and encourages the legal representative to be more active. And notwithstanding the various practical difficulties associated with AA provision, there are many AA schemes in existence that operate effectively. An example of a long-established scheme which provides extensive coverage, and is well-integrated with other local services, is the Norfolk AA scheme; this is described in Box 7.2.

Box 7.2: Case study of the Norfolk AA scheme

This AA scheme was set up about 10 years ago. It was originally located within social services, and dealt only with vulnerable adult suspects. In 1999, with the establishment of Youth Offending Teams (YOTs), the scheme was asked to take on work with juveniles. The scheme currently resides within the local Primary Care Trust and has various funding sources including the YOT and adult social care. The scheme has 4 paid members of staff (an operational manager and three administrators) and around 80 to 90 voluntary AAs. Most volunteers work one session a week, although some do more. All volunteers are required to complete an initial two-day training package.

The scheme covers all six police custody suites across the county, and AAs also see a small number of suspects in other locations, such as the local secure hospital, learning disabilities secure unit, and Primary Care Trust forensic service. At the main custody suites, cover is provided from 7.30 am to 10 pm, 7 days per week. Across the six custody suites, AAs saw a total of 2,822 adult suspects in 2005 and 2,328 in 2006, spending a total of 5,602 hours in custody in 2005 and 5,309 hours in 2006. The numbers of under-17s seen were 1,150 in 2005 (2,176 hours in custody) and 1,131 in 2006 (3,119 hours in custody).

The volunteers' rota is provided to the police; hence when a custody officer identifies a need for an AA, the officer will call directly a volunteer who is scheduled to be on duty at that time. However, if the suspect has been detained in relation to a serious offence, the custody officer may contact the AA office to ask for an experienced AA.

Norfolk has a team of criminal justice mental health practitioners which has a

strong working relationship with the AA scheme. The practitioners cover the police stations and some courts, and their duties include carrying out assessments of offenders who are considered vulnerable. They liaise closely with AA volunteers in custody suites – for example, taking referrals for assessment and receiving feedback from AAs on the needs of specific individuals. On the basis of the assessments they carry out, they may make recommendations to custody officers – for example, regarding the need for an AA.

The AA volunteers understand the boundaries of their role as these are defined by PACE, and recognize that they attend police custody in order to act in the detainee's best interests. As such, in addition to providing a presence during police interviews, they routinely carry out their own informal assessment of a detainee's needs prior to an interview. If they are concerned that a detainee is not fit for interview or is otherwise particularly vulnerable, they will request an assessment by the health practitioner or a criminal justice mental health practitioner. Even if the detainee has already been assessed as fit, the AA can ask for him to be reassessed if this seems necessary – for example, if some time has passed since the initial assessment. This can cause delays and, consequently, tension between the AA and the custody officer; however, most custody officers appear to value the input of the AAs.

Case study material provided by the AA scheme and a member of the MDO practitioners team

Conclusions and recommendations

This report examines how, according to the policy framework, the police *should* respond to suspects with learning disabilities and learning difficulties; and how the police *do* respond, in practice. The material presented in the report derives from a review of the policy literature and existing research literature on police practice. In this concluding chapter, main findings on policy and practice are presented, followed by a series of recommendations that draw on these findings.

Main findings on policy

There are various safeguards in criminal justice and policing policy aimed at protecting the general welfare of vulnerable suspects, facilitating their access to treatment and support where appropriate, and reducing risks of miscarriages of justice that could arise from their vulnerability. These provisions tend to be framed within the language of 'mental disorder' as a broad term encompassing learning disability (and possibly significant learning difficulty) alongside mental illness. The most significant of the safeguards are as follows:

- Diversion into treatment and away from the criminal justice system is generally encouraged for mentally disordered offenders. Police officers have a considerable degree of discretion in determining the circumstances under which, the mode in which and the stage at which diversion is undertaken.
- An appropriate adult (AA) should be called to the police station if a person who is 'mentally disordered or otherwise mentally vulnerable' has been detained. The AA, who can be the suspect's carer or relative, social worker or other independent person, has the role of supporting, advising and assisting the suspect and should be present in any interview conducted by the police.
- A custody officer has a duty to seek clinical attention for a detainee who appears to be suffering from a mental disorder – whether or not the detainee requests this. Any medical examination is likely to include consideration of the suspect's fitness to be detained and fitness to be interviewed. The latter includes assessment of competence to understand and answer questions.
- There are statutory grounds for excluding confession evidence from a trial, where the confession has been obtained under circumstances in which undue pressure was exerted on a vulnerable suspect in a police interview, or the police failed to ensure that the requisite safeguards (particularly, the presence of an AA) were in place during interview.

Notwithstanding the above protections and safeguards, the basic processes involved in arrest,

cautioning, detention, the presentation and exercise of legal rights, interviewing (albeit in the presence of an AA), and so on, are not altered where a suspect has learning disabilities or learning difficulties, and criminal prosecution is being pursued.

There is a case for providing greater statutory support for suspects with learning disabilities and learning difficulties. This could include, for example, giving police officers the duty to call for legal advice for all such suspects; widening the circumstances in which AA attendance is mandatory; and extending to vulnerable suspects some of the special measures and associated guidance currently focussed on vulnerable victims and witnesses – in particular, the provision for intermediaries to facilitate communication,²² and guidance on interviewing. An increase in the support available to vulnerable suspects could serve to enhance justice, not only by protecting the welfare and rights of these individuals as they undergo the process of prosecution, but also by making prosecution a viable option in cases which might otherwise be inappropriately discontinued or diverted.

The disability equality duty contained in the Disability Discrimination Act 2005, which came into force in December 2006, requires statutory authorities actively to promote disability equality. Accordingly, appropriate support should be made available, as appropriate and as a matter of course, to ensure that people with disabilities are not disadvantaged. This can involve, for example, providing more accessible written information and forms for people with learning disabilities and learning difficulties (such as dyslexia). Others can also benefit from the translation of information into 'easy read' – for example, people whose first language is not English, or who have missed out on formal education. On these grounds, it can be argued that 'easy read' should be the 'language' of choice for police forces.

Main findings on practice

The research literature on police practice indicates that there are marked inconsistencies and some inadequacies in police responses to suspects with learning disabilities and learning difficulties. The most problematic aspects of police responses appear to be:

- Decision-making on enforcement, diversion and disposal options is inconsistent, reflecting pragmatic issues such as the availability of treatment and differences in general approach to the offending behaviour of suspects with mental disorders.
- AA provision for vulnerable adult suspects is patchy, because:
 - o many suspects who should be supported by an AA do not receive this help, largely because their needs are not routinely identified
 - o custody officers tend to rely too heavily on the advice of health professionals in assessing the need for an AA
 - o there is a lack of availability of individuals who can perform – and particularly those who can *effectively* perform – the role of AA
 - o significant delays are caused when officers have difficulty in contacting AAs.
- In many areas, there is limited referral of suspects for clinical attention, and inconsistencies in the attention received from health professionals.

22. As noted by Seden (forthcoming), the ruling of the European Court of Human Rights in the case of *SC v the UK* (15.6.2004) contains the 'message for the UK Government ... that they must provide for some "special procedures" for vulnerable defendants, including children'. In this case, the prosecution of an 11-year-old boy for robbery was found to be a violation of the right to a fair trial, because the defendant's age and limited intellectual ability (he had the cognitive ability of a child of about 8) meant that he was unable to have 'effective participation' in the trial.

- Among custody officers and health practitioners alike, there is a lack of clarity in general approaches to and criteria for assessing fitness to interview.
- There is evidence of poor presentation and follow-through of suspects' rights to legal advice.

Some of the causes of the above problems are clear. Custody and investigating officers frequently lack training and expertise in identifying and responding to the varied and often profound needs of mentally disordered suspects. Accurate identification of a learning disability or serious learning difficulty can often be challenging even for an experienced and trained officer, given that such impairments may be largely hidden, and possibly deliberately disguised by the individual. Signs of impairment may also be obscured by a suspect's expressions of distress, anxiety or anger, the effects of drug or alcohol consumption, and co-existing psychiatric, social or behavioural problems.

There are various factors in addition to the difficulty of identification that inhibit the effectiveness of police responses to vulnerable suspects. The range of police procedures and duties with respect to detainees is – by necessity – large and complex: provisions relating to mentally disordered suspects are a small part of this much greater whole and can therefore be sidelined. The pressures of working to the 'custody clock' sometimes lead to poor practice and inappropriate decision-making. The numbers of individuals passing through police custody are vast; while national figures on police detainees are unavailable, the Metropolitan Police Service, for example, dealt with just under 319,000 detainees over the course of 2007.²³ Ineffectual liaison and partnership arrangements with external agencies limit options for referral to or input from health and social services. And there remain elements of police working culture that can counteract efforts to enhance the sensitivity of police responses to suspects' needs and difficulties.

If genuine improvements are to be made to police practice, it is therefore critical that the issue of motivation – at all levels within the police – is addressed. This necessitates making explicit the principles of justice on which fair and appropriate treatment of vulnerable suspects is based. It also means ensuring that the relevant legislation is adequately enforced by the courts – so that there is a clear risk of non-compliance resulting in failed prosecutions. It is vital also that police officers are sufficiently resourced and supported to meet the legislative and other policy requirements that might otherwise be seen as too burdensome and could hence be *de-motivating*.

Recommendations

Three sets of recommendations – aimed at improving police responses to suspects with learning disabilities and learning difficulties – are outlined below. The recommendations focus on general policy development, the provision of appropriate adults, and police forces.

Recommendations for policy development

- Greater precision in policy terminology is required. Currently, the terminology tends to conflate issues of learning disability and learning

23. Figure supplied by MPS Territorial Police Headquarters; total includes those in police detention for their own protection, on transfer and on production from prison.

difficulty with mental illness – in referring, for example, to suspects who are ‘mentally disordered or otherwise mentally vulnerable’. This runs the risk that specific problems relating to suspects’ learning disabilities or difficulties are overlooked both in further policy development and in the implementation of current provisions.

- Some of the ‘special measures’ for vulnerable victims and witnesses – particularly the provision of intermediaries – should be extended to vulnerable suspects. The related guidance on the interviewing of vulnerable witnesses could likewise be extended.
- PACE provisions on police detention and interviewing should be amended to give the police the *duty* to call for legal advice for any suspect who is deemed to be mentally disordered or vulnerable, whether or not the suspect requests the advice. This will ensure that the suspect’s legal rights are protected.
- The concept of criminal responsibility appears unclear when applied to people with learning disabilities. Guidance is required on the circumstances which should prompt specialist care services to bring an incident to the attention of police and on the factors which make it appropriate for an individual to be diverted from the criminal justice system to specialist health services.
- There should be statutory provision to ensure that police officers can routinely access mental health and learning disability services to carry out assessments of mentally disordered offenders and to liaise with local agencies with respect to suspects whom it is appropriate to divert for further assessment and treatment.
- There is a need for national guidelines on methods and criteria for the assessment of fitness for interview by healthcare professionals. These guidelines should also promote standardised recording of the results of assessments on custody records.
- The implications of the partial civilianisation of the police custody process for the treatment of police detainees, including vulnerable detainees, should be reviewed.

Recommendations for AA provision

- There should be statutory provision of AAs for vulnerable adult suspects, equivalent to the provision for suspects aged under 17. Whether overall statutory responsibility for providing the adults AA service is given to local authorities or primary care trusts, ring-fenced funding will be required to ensure that the statutory functions are carried out.
- Consideration should be given to changing the definition of ‘juveniles’ under PACE to include 17-year-olds, so that they would have an automatic right to appropriate adult support.
- PACE Code of Practice C should be amended to make it mandatory for custody officers to call for an AA to attend the police station if they have sufficient concerns about a suspect’s mental state or capacity to request a

- health professional's assessment of fitness for detention and/or interview.
- The PACE requirements with respect to AA attendance when a vulnerable adult suspect is charged are contradictory and should be clarified. If it is deemed impractical, because of resource limitations, to make AA attendance at charge mandatory, there should be clear guidance about the circumstances under which a vulnerable suspect can be charged in the absence of an AA.
- Home Office guidance on the AA role is currently under revision. When finalised, the guidance should be provided – verbally and/or in writing – to all AAs when they arrive at the police station, in order to encourage them to contribute actively and constructively to the proceedings they attend.
- AA schemes should facilitate police access to their services by ensuring that all local stations have their contact details and details of their availability. This may require sending regular reminders and updates about their services, with requests that the information be clearly displayed in custody suites.

Recommendations for police forces

- A system should be introduced across all police forces for screening suspects for vulnerability, to include identification of difficulties associated with communication and comprehension. Training for custody officers on how to undertake the screening must also be put in place.
 - Alongside the screening, mechanisms for recording the results of the process and ensuring appropriate follow-up actions are taken (for example, referrals for assessment or AA attendance) should be devised and implemented.
 - All forces should provide training for all officers, and particularly custody officers, on methods of presenting the caution and legal rights with maximum clarity. For example, officers can be taught to present the caution sentence by sentence if there is any doubt about the suspect's comprehension. Officers should also be encouraged to test suspects' understanding of the caution and legal rights routinely.
 - All custody officers should be provided with full details on the availability of, and means of contacting, local AA schemes.
 - Forces should strengthen liaison arrangements with local health and social care agencies and services - including, in particular, criminal justice liaison and diversion schemes - that can carry out specialist assessments of vulnerable suspects and offer treatment and support to suspects (whether as part of diversionary arrangements or alongside prosecution).
 - Decisions on disposal for vulnerable suspects should be routinely reviewed by senior officers, in order to identify any potentially discriminatory treatment and to assess the appropriateness of actions taken. Police bail decisions should also be monitored.
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Appendix 1: National and local arrangements for appropriate adult provision

When an appropriate adult (AA) is required, under PACE Code of Practice C, to support a suspect aged under 17 or a mentally vulnerable adult suspect, this role can be played by a family member, carer or professional social worker. Where no such individual is available to act as the AA, the police may call on a 'professional' AA who might be a volunteer or performing the role in a paid capacity. Many police force areas have specific local agencies or organizations that have been set up to provide volunteer or paid AAs for adult and/or under-17 defendants.

However, AA schemes are not universal; and even in areas in which schemes exist, custody officers often have difficulty accessing 'professional' AAs as and when they require them. As noted by Medford et al (2000: 21), 'the concept of an AA was introduced in secondary legislation and has never enjoyed a supporting framework which allows officers to summon an AA with the same ease with which they can a solicitor, or an FME [forensic medical examiner]'. Section 38 of the Crime and Disorder Act 1998 requires local authorities to provide 'youth justice services' which should include 'persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers'. In contrast, there is no equivalent statutory provision of AAs for vulnerable adult detainees.

The National Appropriate Adult Network (NAAN) provides guidance, support and advice to local AA schemes. In late 2005 NAAN undertook a review of its member schemes (NAAN, 2006), which at the time numbered 63 - of which 39 responded to the survey. The review found that almost half of the schemes ran a volunteer scheme; 18% used paid workers; and the others used a combination of both. Most of the schemes had between 10 and 30 AAs, and a majority provided a service for around 12 to 14 hours per day, while 14 provided a 24-hour service. The funding of the schemes was variable – ranging from none identified to £200,000 per annum, with a median annual figure of £43,500. The large majority of the funding was received from statutory bodies, including Youth Offending Teams and police authorities.

The NAAN review also included a survey of police authorities, to which there were 38 responses (including individual responses from London boroughs). Only a little over half of the police authority responses expressed overall satisfaction with AA provision. The reasons given for dissatisfaction included unreliability, poor response times, inadequate numbers of volunteers, and disputes between statutory bodies about where responsibility for the service lay.

A review of AA schemes in London, conducted by the MPA in 2001 (MPA, 2002), illustrates the range of type and scope of services across the city. 24 boroughs reported having some sort of scheme on which the police could call when a suspect's

parent/guardian or social worker was not available. six boroughs reported having no scheme; and in two cases no response was forthcoming. Of the 22 schemes on which information was available (two schemes covered two boroughs each), 12 were for both adults and under-17s, seven were for under-17s only, and three were for adults only. The vast majority of the schemes were, to varying extents, funded and run by the local authority (usually social services) and/or the YOT. Hours of service varied between 24 hours, weekdays only, and out-of-hours only. The police provided some support to most of the schemes, usually in the form of training.

Appendix 2: Police training

There are three forms of police training relevant to how officers deal with suspects with learning disabilities and learning difficulties: the training provided for all new recruits; race and diversity training; and training for custody officers.²⁴

Training for new recruits

The Initial Police Learning and Development Programme (IPLDP) is undertaken by all new recruits over a two-year period, and includes both mandatory and voluntary modules. Modules with the title 'OP' are operational, and focus on the skills required in undertaking police work. 'LG' modules are about legislation, policy and guidelines.

Mandatory elements of the IPLDP that relate to learning disabilities and learning difficulties are the following:

- OP 6a: interviewing victims and witnesses – includes how to assess whether a victim or witness is vulnerable, procedures for interviewing vulnerable witnesses, how to determine special assistance that may be required. Vulnerable people are described as people 'who are incapable of fully representing themselves or protecting their own interests', including 'those with learning difficulties'.
- OP 6b: interviewing suspects – includes assessment of vulnerability in a suspect. All the learning in OP6a with respect to learning difficulties and learning difficulties is also covered in this module.
- OP 8 : escort suspect and present to custody – the needs of suspects with learning disabilities and learning difficulties is a cross-cutting theme in this

24. The information about current training and current developments in training is derived from personal communications with the National Police Improvement Agency.

module; e.g. student officers are taught that when escorting detained persons they must monitor their behaviour and condition, and take action when problems occur.

- OP 9: prepare and present case information, present evidence and finalise investigations - covers witnesses with learning difficulties.
- LPG 1.3.18 - strategies for dealing with persons suffering from mental disorder - this module covers the term 'mental disorder' under the Mental Health Act 1983, the identification of people with learning disabilities, and court appearances for people with learning disabilities.
- LPG 1.3.19: mental health - has a chapter dedicated to dealing with and interviewing people with learning disabilities.

Race and diversity training

All police officers and staff are required to undertake the Police Race and Diversity Learning and Development Programme (PRDLDP). This programme has been created to enable the Police Service to comply with the 'Strategy for Improving Performance in Race and Diversity, 2004-2009'. The programme consists of seven modules, each covering a different area of diversity:

- Age and the Police
- Disability and the Police
- Diversity and the Police
- Gender and the Police
- Race and the Police
- Religion and Belief and the Police
- Sexual Orientation and the Police

The 'Disability and the Police' module addresses in detail aspects of disability within society, the police and the workplace that members of the police service will be working with. The module covers ways of looking at disability, models of disability and how these issues impact upon the student's role. It also looks at relevant legislation, including the requirements of the Disability Discrimination Act. This section offers brief explanations of types of impairments under the DDA and the ways in which communication can help to overcome any issues and problems that may be faced. Disability and the Police covers learning difficulties and learning disabilities and offers techniques and reasonable adjustments that can be made to accommodate staff and customers; these can be found in both text-based and e-learning modules.

Training for custody officers

Research by the Police Complaints Authority conducted in 1998 (reported in Visiting Times OnLine, 1999) found 39 out of 43 police forces ran a dedicated custody officer training course. In only seven forces, however, was this course always undertaken before taking up custody officer duties; and in 20 forces the course was 'generally' undertaken before taking up custody officer duties. The extent to which (if at all) courses covered issues relating to learning disability is not clear.

In 2004, the issue of police custody officer training was raised by the Parliamentary Joint Committee on Human Rights, in its Third Report: Deaths in Custody. In an ACPO memorandum submitted to the Committee, it was observed that while a national training programme for custody officers had been developed by Centrex, for delivery by individual forces, 'there is variation in custody training and no nationally agreed standard' (ACPO, 2004). The Committee reported that:

In our view, the significant responsibilities of custody officers, not least their responsibilities under the Human Rights Act, and the skilled nature of their work, should be recognised. Expecting inadequately trained or wholly untrained staff to take responsibility for the custody of detainees who may be physically or mentally ill, disturbed, violent, or affected by a range of drug or alcohol addiction, places detainees at most risk, and may lead to breaches of the police force's positive obligations to protect Convention rights ..., through failure to identify risk, to ensure the provision of appropriate and adequate healthcare, or to prevent suicide or self-harm. Management of police custody should be supported by a more reliable training structure than the present model (Parliamentary Joint Committee on Human Rights, 2004).

Currently, the National Policing Improvement Agency is developing a new custody officer training programme, the Safer Detention Learning Programme. Its content will reflect the provisions of the 2006 ACPO/Home Office *Guidance on Safer Detention and Handling of Persons in Police Custody*. The intention is that the programme will be released at the end of 2007. The programme will be in the first instance aimed at new custody officers; however, the development of the package will subsequently allow it to be used as refresher training for existing staff. There is also an opportunity for the programme to be developed into training for other roles within the custody suite – for example, detention officers - to ensure a common minimum standard is achieved.

The Safer Detention Learning Programme comprises several session plans, trainer notes, hand-outs and case studies. The case studies are all capable of linking directly to the learning outcomes from the PRDLDP. Each session is created in such a way that the character in the module can be used to illustrate various aspects of diversity. Specific reference to learning disabilities/difficulties, mental health and vulnerable adults and juveniles is included within the session on care and welfare of detainees and the session that focuses on juveniles in detention.

In recent years support for victims and witnesses with learning disabilities has been the subject of much needed attention and some good progress has been made. However, the same cannot be said for people with learning disabilities who come into contact with the police as suspects.

The police deal with high numbers of people, many of whom have complex and multiple needs. Custody officers in particular need a range of skills to identify effectively the kinds of support needed by people who come into police detention. Drug addiction, hazardous drinking and mental health problems are just some of the issues police officers face on a daily basis.

Research undertaken by the *No One Knows* programme demonstrates that between 20% and 30% of offenders have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system; of this group 7% will have very low IQs of less than 70. By implication this means that many more people with learning disabilities or difficulties pass through police custody.

This report examines how, according to the policy framework, the police should respond to suspects with learning disabilities and learning difficulties; and how the police do respond, in practice.

A number of important topics are explored, including the identification of vulnerable suspects by police officers; the availability of appropriate adults to attend police interviews; learning disability awareness training for police officers; and diversion from the criminal justice system into treatment and support.

This report provides a stimulus for further discussion and action not only by the police but also by colleagues in health and social care. It also lays out a set of policy and practice recommendations for radical reform which require commitment and leadership across government departments.



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Registered charity no: 1035525

Company Limited by Guarantee no: 2906362

Registered in England.

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ISBN 0 946209 84 7



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