



# Mental health and learning disabilities in the criminal courts

Information for magistrates, district judges and court staff

Polly McConnell and Jenny Talbot



### The Prison Reform Trust

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

The Prison Reform Trust’s advice and information service responds to over 5,000 prisoners and their families each year.



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We directly support almost 60,000 people every year across England to get through crises, to live independently and to realise they are not alone. We give information and advice to 500,000 more and we change policy and attitudes for millions.



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

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

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

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



# Foreword

Many people who come into contact with criminal justice services have multiple and complex needs, and high numbers have mental health and learning disabilities. In December 2007 I was invited by the government to undertake an independent review of people with mental health problems or learning disabilities in the criminal justice system.

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

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

Another of my key recommendations that should further help members of the judiciary concerns liaison and diversion services. Members of the judiciary need access to timely information concerning the particular support needs of individual defendants. For example, what help is needed to ensure effective participation in court proceedings, when certain disposal options might be appropriate, such as the mental health treatment requirement, and how disposal options might need to be adapted for offenders with a learning disability. I am pleased, therefore, that the government has made a commitment for every police custody suite and criminal court in England to have access to liaison and diversion services by 2014; similar services exist in Wales. These services should help members of the judiciary to identify when an individual might have mental health or learning disabilities, how best they might be supported through the criminal justice process or, where necessary, be diverted away from criminal justice and into treatment and care.

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

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

**The Rt Hon Lord Bradley**

# Section 1:

## Welcome and introduction

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

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

This resource has been produced primarily for magistrates. It is also useful for district judges, legal advisers and ushers. It provides information about some of the common characteristics of mental health conditions and learning disabilities, and highlights how members of the judiciary and court staff might deal with adult defendants with these conditions.

Members of the judiciary and court staff are not expected to diagnose mental health conditions or learning disabilities, neither is it their role to provide welfare services to defendants. They do, however, have a responsibility to raise concerns about defendants who they think might be vulnerable.

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

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

The Consolidated Criminal Practice Direction (CCPD) (2011) Treatment of vulnerable defendants notes that:

**...children and young persons under 18 or adults who suffer from a mental disorder within the meaning of the Mental Health Act 1983 or who have any other significant impairment of intelligence and social function... are referred to collectively as 'vulnerable defendants'.**

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

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

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

### FILM CLIP 1



#### **WHY THIS INFORMATION IS IMPORTANT, 01:51 minutes**

John Fassenfelt, chair of the Magistrates' Association (2011 – 13), talks about why this information is important for magistrates.

# Section 2:

## How to use this information

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

Film clips are used throughout the online version to help illuminate points made. The film clips are not a standalone resource. A disc of the film clips should be available with this hard copy. 'Hyperlinks' are used throughout the online version to help you manipulate the resource and to direct you to further reading.

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

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

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

### **For further information, contact:**

- [jenny.talbot@prisonreformtrust.org.uk](mailto:jenny.talbot@prisonreformtrust.org.uk)
- [feedback@rethink.org](mailto:feedback@rethink.org)

We welcome your feedback on this resource. You can give your views and comments using the evaluation form on the website [www.mhldcc.org.uk](http://www.mhldcc.org.uk)

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

# Section 3: Mental health

## a. What is a mental health condition?

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

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

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

Some people with mental health conditions live independently, others may live with a carer and some may live in supported accommodation with other people who have mental health conditions. If a person's mental illness is severe, they may need to spend some time in hospital for treatment under the Mental Health Act 1983 (amended 2007) or as a voluntary patient. Further information on the Mental Health Act can be found in Section 14: Mental Health Act.

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

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

## b. What are the main mental health conditions?

Some mental health conditions are more common than others. Conditions such as depression and anxiety are much more common than psychotic conditions such as schizophrenia and bipolar disorder (manic depression). There are also conditions that relate to someone's personality which are known as personality disorders. Mental health conditions are defined by the Mental Health Act. Further information on the Mental Health Act can be found in Section 14: Mental Health Act.

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

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

### i. Depression and anxiety disorders

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

#### Common symptoms of depression:

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

#### Common symptoms of anxiety:

- feeling irritable
- excessive worrying

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

## ii. Psychosis

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

The main symptoms of psychosis are hallucinations and delusions.

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

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

### Common symptoms of schizophrenia:

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

### Common symptoms of bipolar disorder (manic depression):

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

## iii. Personality disorder

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

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

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

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

Personality disorder is probably the most misunderstood diagnosis in mental health. Personality disorder was included in the definition of mental disorder in the 2007 amendments to the Mental Health Act. But there is still controversy over its inclusion.

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

## FILM CLIP 2



### MENTAL HEALTH: 05:04 minutes

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

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

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

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

- 66% of prisoners have a personality disorder compared to 5% of the general population
- 45% of prisoners have a mood disorder such as depression or anxiety compared to 14% of the general population
- 8% of prisoners have psychosis compared to 0.5% of the general population (Centre for Mental Health, 2009).

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

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

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

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

#### **Snapshot of offenders under supervision in one probation area:**

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

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

Leroy Simpson, Revolving Doors Service User Forum

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

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

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

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

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

There are some signs to look out for. A defendant with a mental health condition might:

- avoid eye contact
- lack in energy and appear very slow, almost 'switched off' and empty
- be very restless, fidgety, breathe heavily and be sweating
- be very emotional and crying
- talk very negatively about themselves
- appear flamboyant and speak very highly of themselves
- find it difficult to answer questions quickly or succinctly with yes/no answers
- speak very quickly and jump into conversations when they haven't been asked a question

- not make sense when they talk, they may have muddled or disordered speech
- look around the room, appear as though they're not listening
- forget what's just been said, or what they were saying
- talk to themselves or appear distracted
- turn up in court dressed inappropriately or be unkempt in their appearance.

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

### FILM CLIP 3



#### **MENTAL HEALTH AND THE CRIMINAL COURTS: 05:59 minutes**

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



### **Mental health summary:**

- Mental health conditions are very common and they can affect a person's thinking, feeling and behaviour.
- Mental health conditions are more common in the offending population than the general population.
- Mental health conditions may be short term or long term; in some cases, a condition can fluctuate.
- A mental health condition is a disability if it has a long term and adverse effect on a person's day to day activities. In this case, a person's condition would be covered by the Equality Act 2010.
- It can be very difficult to know if someone has a mental health condition, but there are some signs to look out for.



### **Further reading:**

- *A common sense approach to working with defendants and offenders with mental health problems*, Together for Mental Wellbeing (2010).
- *A common sense approach to working with women with health and wellbeing needs in the criminal justice system*, Together for Mental Wellbeing (2013).
- Equal Treatment Bench Book: chapter 5.3, page 21: mental disability (Judicial Studies Board, 2009). Note: a revised version of the ETBB is forthcoming; expected publication date, 2013.
- Rethink Mental Illness produce information on unusual thoughts and behaviour, conditions and access to treatment: [www.rethink.org](http://www.rethink.org)



# Section 4: Learning disability

## a. What is a learning disability?

### **A learning disability is a condition that combines:**

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

### **A learning disability:**

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

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

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

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

A learning disability is not the same as a learning difficulty. The terms are mistakenly used interchangeably, which can be confusing. Learning difficulties includes a range of conditions such as dyslexia, attention deficit disorder and attention deficit hyperactive disorder. People with learning difficulties can have a range of IQ levels from below average to above average. Further information about specific learning difficulties can be found in Section 5: Other disabilities and impairments.

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

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

### **People with learning disabilities are likely to:**

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

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

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

Not everyone with a learning disability will be known to social services, and not everyone with a learning disability will be aware of their condition.

Evidence shows that only around a fifth of people with a learning disability are known to learning disability services (Emerson et al, 2011).

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

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

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

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

## FILM CLIP 4



### LEARNING DISABILITIES:

06:07 minutes

Three people talk about their learning disability, how they came into contact with criminal justice, and their experiences of the criminal justice system. Certain terminology, names and organisations are referred to and these are described below:

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

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

Wayne Crocker, magistrate, Director, Mencap Cymru

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

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

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

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

## FILM CLIP 5



### LEARNING DISABILITIES AND THE CRIMINAL COURTS: 05:42 minutes

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

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

## Defendants experiences of court

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

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

[Note: interviewees referred to magistrates as judges.]



### Learning disabilities summary:

- Around 2% of the population has a learning disability; with appropriate support many can live independent lives.
- It is estimated that between 5 and 10% of adults who offend have learning disabilities.
- A learning disability is a lifelong condition; people with a learning disability frequently have greater health needs than the general population, including mental health conditions, and some might be on the autistic spectrum.
- A learning disability is different to a learning difficulty, although the terms are sometimes used interchangeably.
- A learning disability is considered a disability under the Equality Act 2010.
- People with learning disabilities will often try to hide their condition for fear of ridicule and to appear the same as everyone else.



### Further reading:

- *A common sense approach to working with defendants and offenders with mental health problems*, Together for Mental Wellbeing (2010); pages 19-21.
- *Access to Justice: a guidebook supporting the responsive and appropriate management of adults with a learning disability in the criminal justice system in Wales*, Public Health Wales (2013) <http://www.wales.nhs.uk/sitesplus/888/page/67512>
- *Positive Practice Positive Outcomes: a handbook for professionals in the criminal justice system working with offenders with learning disabilities*, Department of Health (2011); pages 5-36 and 41-45.
- *Prisoners' Voices: experiences of the criminal justice system by prisoners with learning disabilities and difficulties*, Talbot (2008); pages 21-25.
- The Advocate's Gateway Toolkit 4, *Planning to question someone with a learning disability*; [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)



# Section 5:

## Other disabilities and impairments

### a. Introduction

Members of the judiciary and court staff will routinely come across defendants with complex and multiple problems. High numbers of offenders are disadvantaged socially and educationally and many have psychological and physical health needs.

### b. Autism

Autism, which includes Asperger syndrome, is a lifelong developmental disability that affects how a person communicates and relates with other people. It also affects how they make sense of the world around them. Autism is a spectrum condition. This means that, while all people with autism share certain characteristics, their condition will affect them in different ways. Some people with autism are able to live relatively independent lives, while others may need a lifetime of specialist support. People with autism may experience over or under sensitivity to sounds, touch, tastes, smells, light or colours.

Many people with autism also have learning disabilities.

Asperger syndrome is a form of autism. People with Asperger syndrome can be of average or above average intelligence. They have fewer problems with speech but may still have difficulties with understanding and processing language.

It is estimated that there are 500,000 (around 1 in 100) people with autism in the UK. Many people may not have the condition diagnosed or will have been misdiagnosed with another condition, such as schizophrenia (National Autistic Society, 2011).

It is unclear whether people on the autistic spectrum are more highly represented in the criminal justice system than in the general population.

### c. Specific learning difficulties

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

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

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

#### **People with dyslexia may have difficulties:**

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

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

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

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

**Characteristics associated with ADD include:**

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

**Characteristics associated with impulsivity and hyperactivity include:**

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

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

## d. Communication difficulties

Communication difficulties are sometimes referred to as speech, language and communication needs or communication disabilities. Communication difficulties can be primary, such as specific language impairments or a stammer, or secondary, for example, as a feature of conditions such as learning disability, autism, hearing impairment and certain mental health conditions.

**People with communication difficulties might find it hard to:**

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

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

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

Research shows that 60% of children who offend have communication difficulties. Around half of this group has poor or very poor communication skills (Bryan, Freer and Furlong, 2007). Research involving adult prisoners with learning disabilities and difficulties showed that around two-thirds experienced problems with verbal comprehension skills, including understanding certain words and in expressing themselves (Talbot, 2008).

Further information on communication, including when an assessment might be necessary, can be found in Section 9e: Communication in court.

## FILM CLIP 6



### COMMUNICATION DIFFICULTIES:

02:20 minutes

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

## e. Literacy

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

Problems with literacy can be caused by difficulties understanding, processing and retaining information. Knowing whether an individual can read and write will help you to understand, and to further explore, what support needs individual defendants might have. For example, defendants might be unable to read their police interview, the oath or court orders. They might be able to read some but not all of the documents they are presented with. They might also have difficulties understanding certain words.

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



### Further reading:

- *Autism: a guide for criminal justice professionals*; The National Autistic Society, 2011.
- Equal Treatment Bench Book: chapter 5.5, page 40: specific learning difficulties. Note: a revised version of the ETBB is forthcoming; expected publication date, 2013.
- *Sentence trouble*; The Communication Trust: [www.sentencetrouble.info](http://www.sentencetrouble.info)
- The Advocate's Gateway Toolkit 3, *Planning to question someone with an autism spectrum disorder, including Asperger Syndrome*; [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)
- The Advocate's Gateway Toolkit 5, *Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and attention deficit disorder*; [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

# Section 6: Co-morbidity and dual diagnosis

## a. Co-morbidity

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

## b. Dual diagnosis

Dual diagnosis is the term used to describe people with mental health and substance abuse problems. The most recent statistics say that 75% of adult prisoners have a dual diagnosis (Offender Health Research Network, 2009). Many people with mental health conditions use drugs or alcohol to help them to deal with their symptoms.



# Section 7:

## Right to a fair trial and fitness to plead

### a. Introduction

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

### b. Right to a fair trial

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

#### These are:

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

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

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

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

### c. Fitness to plead

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

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

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

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

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

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

Vulnerability, disability or communication difficulties do not necessarily mean that an individual is unfit to plead. For example, one of the provisional proposals suggested in the Law Commission consultation (provisional proposal 5) recognises the role that special measures and other reasonable adjustments can play in enhancing the decision making capacity of the defendant to undergo a trial and enter a plea. The findings of the Law Commission consultation are being further reviewed and are yet to be published.

While there is no specific procedure by which fitness to plead can be determined in the magistrates’ court, arrangements do exist under section 11 of the Powers of the Criminal Court Sentencing Act 2000, whereby the defendant’s mental state can be determined, with a view to enabling the court to deal with the accused under section 37 of the Mental Health Act 1983.

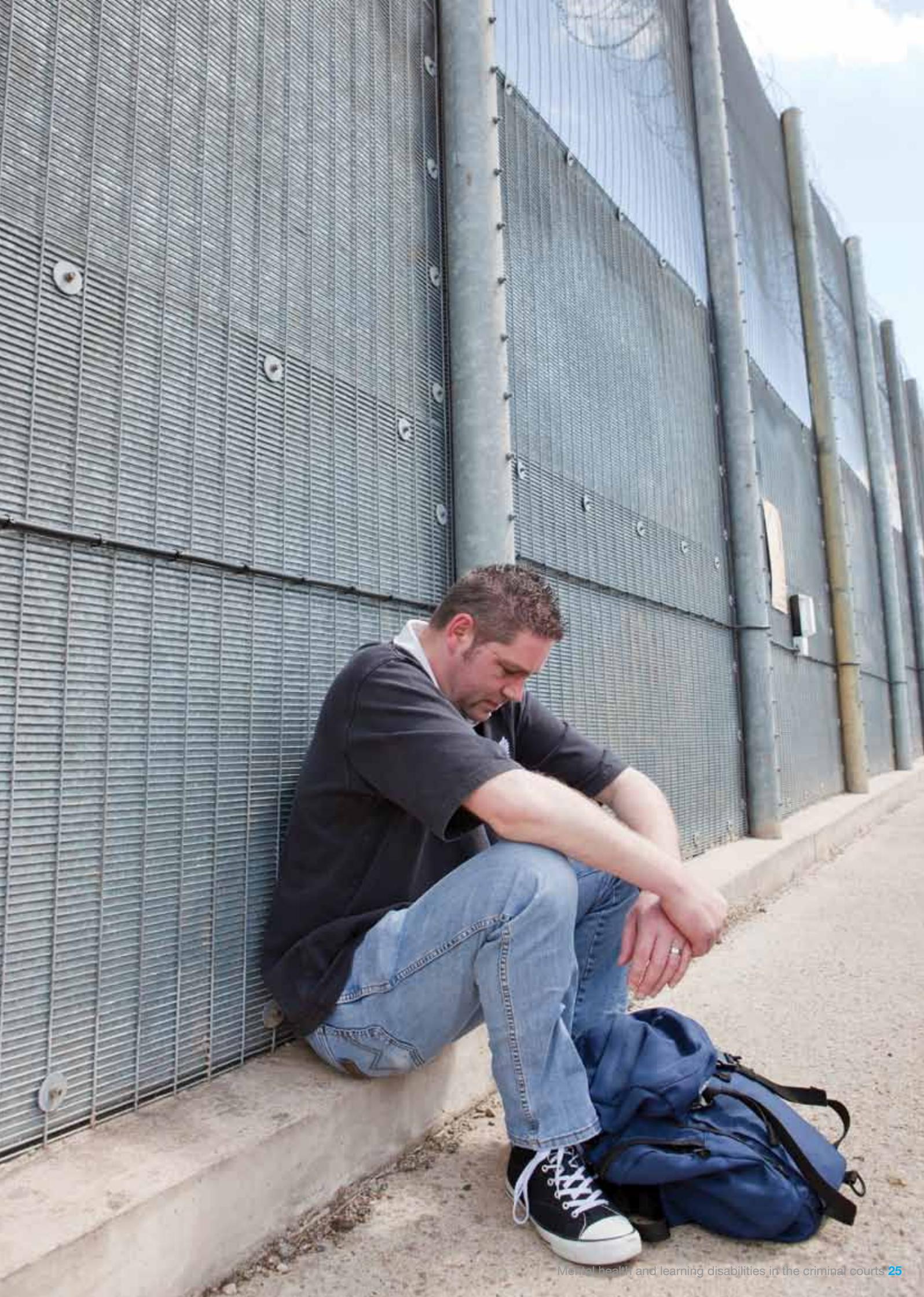
If you are concerned about a defendant’s fitness to plead you should seek advice from the legal adviser.

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

An offender with learning disabilities talking about his experience in court

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

Robert Gill, magistrate



# Section 8: Vulnerable defendants in court

## a. Introduction

Many defendants and witnesses in the criminal courts have mental health conditions or learning disabilities. Court officers often do not know that they have a mental health condition or learning disability. Some courts have a coordinated approach to recognising when defendants might have particular support needs but this is not always the case. The development of liaison and diversion services should begin to change this. Further information on liaison and diversion services can be found in Section 11: Liaison and diversion services (England) and criminal justice liaison services (Wales).

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

The Equal Treatment Bench Book (ETBB) notes:

**...there are many potential sources of discrimination and not being heard or being misunderstood by the judge (or magistrate) is just as discriminatory as an inability to access a court building (Judicial Studies Board, 2009).**

### FILM CLIP 7



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

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

## b. Difficulties recognising when a defendant might be vulnerable

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

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

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

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

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

- i. **At the pre-court briefing:** information about a defendant's support needs may or may not be available at the pre-court briefing. The Police and Criminal Evidence Act (PACE) Code C provides particular safeguards for 'mentally disordered' suspects held in police custody. This includes requiring an Appropriate Adult to be present during interviews with the police, and might involve the individual seeing a healthcare professional. If an Appropriate Adult has been present during an interview with the police, this could be a useful indicator that a defendant might be vulnerable and in need of particular support during court proceedings. However, it should be noted that not all vulnerable people are recognised by the police as being in need of support.
- ii. **The defendant's advocate:** if the defendant has legal representation you can ask the advocate for information about any support needs the representative may be aware of in respect of his or her client. You can also ask the representative whether an Appropriate Adult was requested by the police. However, it should be borne in mind that defence lawyers do not routinely receive awareness training in mental health or learning disabilities and may not be aware themselves that their client might have particular difficulties.
- iii. **The defendant:** although many people with mental health conditions or learning disabilities are reluctant to say they need support, some will readily volunteer information about what would help them to understand and to participate in court proceedings. Any questioning should be done quietly and sensitively, and not in open court.
- iv. **Community mental health services:** all courts should have some form of routine access to community mental health services to assist with information about individual defendants. Some

courts will have dedicated on-site services, however not all courts will have routine access to learning disability services.

- v. **Liaison and diversion services:** increasingly courts will have access to liaison and diversion services, see Section 11. All courts should have access by 2014. These services will be staffed by qualified healthcare professionals with access to mental health, learning disability and other expertise. An integral part of their role will be to provide information to members of the judiciary and court staff concerning relevant conditions and support needs of individual defendants.
- vi. **Medical reports:** you can request a medical report at a defendant's first appearance in court and at any point during court proceedings, under various provisions. The legal adviser will be able to advise which is most appropriate. The provisions include:
  1. Section 11 of the Powers of the Criminal Courts (Sentencing) Act 2000 enables you to adjourn/remand for medical reports for a defendant, who has not been convicted, but who you are satisfied did the act or made the omission charged and that you are of the opinion that an inquiry ought to be made into his/her physical or mental condition.
  2. Section 11 (3) requires the court to impose a condition of bail requiring the accused to:
    - undergo medical examination by a registered medical practitioner or, where the inquiry is into his mental condition and the court so directs, two such practitioners; and
    - for that purpose attend such an institution or place, or on such practitioner, as the court directs and, where the inquiry is into his or her mental condition, comply with any other directions which may be given to him for that purpose by any person specified by the court or by a person of any class so specified.
  3. Section 35 of the Mental Health Act 1983 enables a magistrates' court to remand a defendant to a specified hospital (with agreement of the hospital) to enable a report to be prepared on his/her mental condition. The

remand to hospital under this provision may take place only if the following conditions are met:

- the offence in issue is punishable on summary conviction with imprisonment
- the court is satisfied, on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the defendant is suffering from mental disorder.

**vii. Case management:** for cases that go to trial, plea and directions hearings should address potential problems that individual defendants might have in engaging with trial proceedings and help to inform the use of ‘special measures’ and ‘reasonable adjustments’. Such arrangements should be made in advance of the trial. New Criminal Procedure Rules 3.8(4) (b), effective 1 April 2013, requires the court, in preparation for the trial, to take ‘every reasonable step’ to facilitate the participation of any person, including the defendant. (See Section 9: Supporting vulnerable defendants in court).

The aims of pre-trial directions are threefold:

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

## d. Unrepresented defendants

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

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

Magistrates’ courts operate ‘duty solicitor schemes’ which provide advice and representation to defendants facing criminal proceedings. It is not uncommon for a court usher to refer an unrepresented defendant to the duty solicitor. The court duty solicitor can only provide advice to a defendant who:

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

Part of the role of the duty solicitor is to give advice on the general availability of legal advice and assistance. If it is appropriate, the duty solicitor can assist the defendant in completing an application for a Representation Order (commonly referred to as ‘Legal Aid’). Publicly funded representation can only be granted if the defendant can show that one or more of the statutory reasons for granting a Representation Order apply in the case. One of the reasons is that the accused person ‘may be unable to understand the proceedings or to state his own case’.

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



### **Vulnerable defendants summary:**

- People with mental health conditions and learning disabilities frequently appear before the criminal courts, however, their condition is not always recognised in advance of their appearance in court.
- Recognising and meeting a defendant's support needs are important in ensuring they are not unfairly disadvantaged or discriminated against during court proceedings.
- It can be difficult to spot when a defendant might be vulnerable in court.
- If you are in any doubt about a defendant's ability to understand or to participate effectively in court proceedings you should seek further information and advice.
- There are a number of ways in which you can obtain further information about a defendant's particular support needs.



# Section 9: Supporting vulnerable defendants in court

## a. Introduction

The overriding principle in supporting vulnerable defendants in court is that:

**All possible steps should be taken to assist a vulnerable defendant to understand and participate in [court] proceedings (Consolidated Criminal Practice Direction, 2011: treatment of vulnerable defendants).**

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

A number of guidance documents are available to assist you in making special arrangements and these include the Equal Treatment Bench Book (ETBB 2009), chapter 5: disability overview and the Consolidated Criminal Practice Direction, 2011: treatment of vulnerable defendants.

ETBB guidance notes that people with disabilities:

- are likely to need more time – so a longer time estimate may be required for a trial
- may not be able to hear, read or be understood or fully comprehend what is taking place
- will be using up much of their energy to cope with the disability and therefore tire more easily, and
- the stress of coming to court may exacerbate symptoms (Chapter 5.1).

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

## b. Special measures

While statutory protection and support exists for vulnerable witnesses, most notably provided for by the Youth Justice and Criminal Evidence Act 1999, there is little statutory provision for vulnerable defendants. The Police and Justice Act 2006 allows children and vulnerable adult defendants to give evidence via a live television link if certain conditions are met. If you wish to consider this option you should seek advice from the legal adviser. A further special measures provision is included in the Coroners and Justice Act 2009, which made provision for vulnerable defendants to give their oral evidence in court with the assistance of an intermediary. However, this provision has not yet been implemented. Further information about the role of intermediaries, including how an intermediary for a defendant can be appointed by the court, can be found in Section 9e: i) Specialist communication support – intermediaries.

The lack of parity between support for vulnerable witnesses and vulnerable defendants has been raised as unjust by a number of organisations, including the Royal College of Psychiatrists and the Prison Reform Trust (PRT); see PRT briefing paper, *Fair Access to Justice*. The Lord Chief Justice and the Director of Public Prosecutions, amongst others, have noted this lack of parity as a matter of concern.

## c. Practice direction

Despite lack of legislation, arrangements can be made to assist vulnerable defendants, and there is guidance in the Consolidated Criminal Practice Direction, 2011: treatment of vulnerable defendants. The direction outlines a range of measures that should be adopted, where appropriate, 'to assist a vulnerable defendant to understand and to participate in ...proceedings'. These include:

- arranging for a defendant to visit the court room before a court hearing or trial so he or she can familiarise themselves with it
- using 'simple, clear language that the defendant can understand'

- holding the proceedings in a court room in which all participants are on the same, or almost the same level
- allowing the defendant to sit with members of their family and/or other supporting adults, and in a place where they can easily communicate with their legal representatives
- restricting attendance by members of the public and reporters.

#### d. Reasonable adjustments

The Equalities Act 2010 requires public authorities, including courts, to seek to ensure that discrimination against disabled people does not occur. This could be by making ‘reasonable adjustments’ to existing provision and ensuring that future provision is accessible to people with disabilities. Courts are expected to make any reasonable adjustments necessary for people with disabilities to enable them to participate effectively in court proceedings. Although reasonable adjustments are ‘personal’ to the individual there are a number of common adjustments, concerned with communication and comprehension, that can help defendants with mental health conditions or learning disabilities. One example of a reasonable adjustment is communicating in a different way, see Section 9e: Communication in court. Another example is ‘easy read’, which is described in Box 1, page 32.

#### e. Communication in court

**Effective communication is the bedrock of the legal process. It is vital that justice is both done and seen to be done (Judicial College, 2012).**

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

For many vulnerable defendants some simple communication ‘rules’ can help, see Box 2, page 33. However, if you remain concerned that a defendant is unable to understand or to communicate effectively in court, specialist help should be sought; see Section 9e: i) Specialist communication support – intermediaries.

### FILM CLIP 8



#### COMMUNICATION DIFFICULTIES AND THE CRIMINAL COURTS: 06:07 minutes

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

#### i. Specialist communication support – intermediaries

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

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

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

The court has inherent powers to take such steps as are necessary to ensure that any defendant has a fair trial. The judgement in *R (on the application of C) v Sevenoaks Youth Court [2009] EWHC 3008* makes it

clear that the court can appoint an intermediary to support a defendant to follow proceedings and to give evidence if, without such assistance, they would not be able to have a fair trial.

Citing this particular case, the Crown Prosecution Service website notes that the appointment of the intermediary was: **...not made pursuant to a special measures direction under the Youth Justice and Criminal Evidence Act 1999, but is part of the court's duty to take such steps as are necessary to ensure that a youth has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for trial (Crown Prosecution Service, June 2013).**

Courts can appoint intermediaries to support children and vulnerable adult defendants who require specialist help to assist their communication and comprehension during court proceedings. You should consider using an intermediary, as early as possible, where difficulties become apparent.

It can take time to secure an intermediary who is appropriately matched to deal with the defendant's particular communication needs. The need for an intermediary should therefore be addressed well in advance of trial proceedings.

The Advocates Gateway Toolkit 8 addresses how to appoint an intermediary, and Annex A of the Toolkit gives examples of ways in which an intermediary may assist a defendant during the trial process (see the 'further reading' box at the end of this section).

HM Courts and Tribunals Service guidance is available on the use of intermediaries for defendants and guidance should be sought from the legal adviser.

Section 104 of the Coroners and Justice Act 2009 will insert into the Youth Justice and Criminal Evidence Act 1999 the provision to enable the court to appoint an intermediary to assist certain vulnerable defendants when giving oral evidence as a witness. This provision has not yet been brought into effect.

## FILM CLIP 9



### USE OF INTERMEDIARIES:

**02:00 minutes**

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

### Box 1: Easy Read

'Easy Read' documents present information using simple words and pictures making it easier to understand. The use of Easy Read is common in health and social care organisations, and is increasingly being used in other areas including criminal justice.

Easy Read can help people with reading comprehension difficulties, including those with learning disabilities, learning difficulties and also people for whom English is not their first language.

Easy Read is a 'reasonable adjustment' that helps to ensure equal access to information for people with reading and comprehension problems.

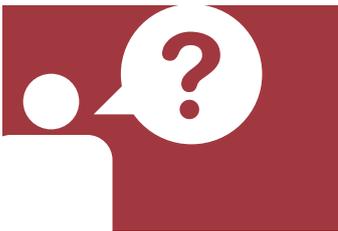
An Easy Read leaflet, *A guide on how and where to pay your fine* (form MC102), can be downloaded from HM Courts and Tribunals Service website: <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/mc102-eng.pdf>

Examples of Easy Read can be found at KeyRing: <http://www.keyring.org/cjs-easyread>

See also: *Am I making myself clear?* Mencap's guidelines for accessible writing: <http://www.easy-read-online.co.uk/media/10609/making-myself-clear.pdf>

## Box 2: Supporting communication and comprehension in court

- Use the defendant's name and ensure you have their attention before you begin speaking to him or her.
- Explain in simple language and short sentences what is going to happen at each stage of court proceedings. As a general rule give one piece of information per sentence.
- Don't ask, 'do you understand?' A 'yes' response or a nod does not necessarily mean the individual does understand. Instead, ask the defendant to tell you what they have understood.
- Avoid using jargon and technical or legal terminology. If such language cannot be avoided, explain what it means and check understanding.
- Allow extra thinking time so that the defendant can process information and consider their response before replying.
- Offer support with reading and understanding documents in court. Being able to read a document doesn't mean the defendant understands the content. This may still need explaining.
- If the defendant is unable to write very well, he or she might need help in making notes of proceedings. For example, a defendant might be able to follow proceedings or take notes but not do both at the same time.
- Allow a defendant to sit next to their advocate, carer or a family member. This can help to reduce the stress of appearing in court and enhance defendants' participation in proceedings.
- Ensure court documents are accessible, for example, written in 'Easy Read'. Further information about 'Easy Read' can be found in Box 1: Easy Read.
- Ensure the defendant can hear proceedings clearly. Ensure glass security screens do not impede the defendant's ability to hear.
- Defendants with communication and comprehension difficulties might tire more easily and need extra breaks. Such breaks should not be used as 'explanation time'.



### Some questions you might want to consider:

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



### Supporting vulnerable defendants summary:

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



### Further reading:

- Consolidated Criminal Practice Direction, 2011: treatment of vulnerable defendants. Note: a revised version of the CCPD is forthcoming; expected publication date, 2013/14.
- Equal Treatment Bench Book (ETBB), chapter 5: disability overview (Judicial Studies Board, 2009). Note: a revised version of the ETBB is forthcoming; expected publication date, 2013.
- Fairness in Courts and Tribunals – a summary of the Equal Treatment Bench book (Judicial College, 2012).
- *Fair Access to Justice* pages 12-16 (Talbot, 2012).
- The Advocate's Gateway Toolkit 8, Effective participation of young defendants; and section 7, Defendant intermediaries: the position at common law. [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

# Section 10:

## Bail and remand decisions

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

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

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

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

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

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

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

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

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

### FILM CLIP 10



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

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



### **Bail and remand decisions summary:**

- Vulnerable defendants have the same right to bail as defendants who are not vulnerable.
- There is an overuse of remand into custody for vulnerable defendants.
- Prison can exacerbate mental health conditions for which there is limited access to treatment, especially for short stay prisoners; prison has been shown to be ill equipped to deal with prisoners with learning disabilities.
- Information about community support for vulnerable defendants should be routinely available.



# Section 11: Liaison and diversion services (England) and criminal justice liaison services (Wales)

The establishment of liaison and diversion services to provide support for vulnerable suspects and defendants was recommended by the Reed Review (1992). However, services have been patchy and the focus of support has tended towards court provision for people with mental health conditions.

More recently, renewed attention has been given to extending the role of liaison and diversion services to include people with learning disabilities and in ensuring access to provision at the police station. The Government has made a commitment that all police stations and criminal courts in England will have access to liaison and diversion services by 2014; similar services exist in Wales.

A major role for liaison and diversion services in England and criminal justice liaison services in Wales is to assist police custody and court staff in identifying suspects and defendants with possible mental health conditions, learning disabilities and other impairments. Some of these individuals will be diverted away from criminal justice and into healthcare for treatment and care. It is, however, anticipated that many will continue through the criminal justice system, with the appropriate support.

Liaison and diversion/criminal justice liaison staff should be aware of the legal obligations and guidance that will help to facilitate appropriate support for vulnerable defendants. These include:

- reasonable adjustments for defendants with disabilities, as required by the Equalities Act 2010
- limited special measures, as provided for at section 47 of the Police and Justice Act, 2006
- relevant guidance issued to members of the judiciary and court staff, for example, the Consolidated Practice Direction and Guidance for HMCTS staff on the use of registered and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses.

Liaison and diversion/criminal justice liaison staff should also be aware of the inherent power of members of the judiciary to ensure that necessary support is made available to defendants, according to their personal need, to help ensure their effective participation in court proceedings and to uphold their right to a fair trial.

Further information about liaison and diversion services, including whether services exist in your area, can be found at the National Liaison and Diversion Development Network (NLDDN) [www.nliddn.org.uk](http://www.nliddn.org.uk)

## FILM CLIP 11



### **LIAISON & DIVERSION SERVICES:** **05:33 minutes**

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

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

## CASE STUDY

Avon and Wiltshire Mental Health Partnership NHS Trust have a liaison service that works with the police, probation, courts and prisons. There are four prisons and nine courts in their area.

Staff from the liaison service work with individuals with mental health conditions, learning disabilities and substance misuse problems. They receive referrals from a wide range of people, including solicitors, magistrates, district judges, custody staff and family members.

Liaison staff screen defendants on their first appearance in court and provide feedback to the court on the same day. Reports include information about the particular support needs of individual defendants and, where appropriate, suggested sentencing options. Referrals to relevant professionals and services, such as community mental health services and third sector organisations, are also made.

*Case study provided by Avon and Wiltshire Mental Health Partnership NHS Trust Criminal Justice Services.*

Avon and Wiltshire Mental Health Partnership Trust, together with 'Combat Stress', formed the South West Veterans Partnership to deliver care and support to former service personnel who suffer from mental health conditions. An increasing number of veterans are in contact with the criminal justice system.



### **Some questions you might want to consider:**

- Do you think you get enough information about defendants? Would further information be helpful, such as knowing if any concerns were raised at the police station or if the defendant has accessed mental health or learning disability services?
- What access to liaison and diversion services does your court have? For example, what times and days of the week do liaison and diversion staff work in your court?
- Are there any arrangements in place to ensure that people with suspected mental health conditions or learning disabilities appear in court on a day when liaison and diversion service staff are available?
- What support do you receive from liaison and diversion services? What other support might be helpful?
- Does your court receive routine information and/or awareness training from liaison and diversion staff?
- Who is the main contact for liaison and diversion services in your court? How often do you meet to discuss issues of mutual concern?



# Section 12: Sentencing

## a. Introduction

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

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

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

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

## b. Information you can ask for to inform sentencing decisions

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

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

### i. Pre-sentence reports (PSR) from Probation Trusts and Youth Offending Teams

Section 156 Criminal Justice Act 2003 states that the court is required to obtain a Pre-Sentence Report (PSR), or a Specific Sentence Report (SSR) before imposing a custodial or community sentence. The PSR can help to determine if a community order and its requirements is a suitable sentence for a particular offender.

#### The PSR should include:

- an analysis of the offence
- an assessment of the defendant's risk to the community
- the likelihood of re-offending
- a proposal for sentencing.

PSRs might include information on the health of the offender, including information about pre-existing conditions. They do not specifically screen for or assess mental health conditions or learning disabilities or any other health condition. The information provided in a PSR can help you decide whether a medical report is needed.

There are different types of PSRs – oral, fast reports or reports adjourned for a more detailed assessment.

The Probation Instruction, *Determining Pre-Sentence Reports* (Ministry of Justice, 2011), sets out a framework for providing the most appropriate information to courts. This framework builds on best practice achieved between Probation Trusts and courts. Probation Trusts determine which is the most appropriate and efficient report format for aiding sentence decisions.

If you have received a fast or oral report and think a more detailed report is needed, you can adjourn so that a fuller report is prepared.

If you are concerned that the offender might have a mental health condition or learning disability, you can specifically request that the report writer explores this issue. For example, the report writer could discuss your concerns with the offender, liaise with local healthcare professionals and, where services exist, arrange for the offender to be seen by the local liaison and diversion service. The liaison and diversion service could be asked to prepare a report to inform, or be included with, the PSR.

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

## ii. Medical reports

The court may already be in possession of a medical report that will help to inform your sentencing decisions, see Section 8c: How you can obtain further information about a defendant's support needs.

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

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

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

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

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

In some cases the offender may think they are well and do not need to see a healthcare professional. If you think that the offender's health warrants an assessment, and it would be in their best interests to see a healthcare professional, a request for a medical report can still be made. The legal adviser can assist with requesting a medical report but the decision rests with the magistrates or district judge.

### **A medical report should be:**

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

## FILM CLIP 12



### INFORMING SENTENCING DECISIONS: 02:49 minutes

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

## c. Sentencing options

The Sentencing Council produce sentencing guidelines that help magistrates and district judges decide the appropriate sentence for a criminal offence. The Equal Treatment Bench Book notes that '*sentencing options may be affected by the mental condition of the defendant*' (Judicial Studies Board, 2009). If an offender's underlying needs are addressed appropriately, this can help to prevent them from returning to the criminal justice system in the future.

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

- i. **Community Orders:** section 177 Criminal Justice Act 2003 introduced Community Orders. Court ordered community sentences have been shown to be more effective in reducing reoffending than short prison sentences. For example, reoffending rates in 2008 for offenders serving community sentences were 8% lower than similar offenders serving custodial sentences of less than 12 months (Ministry of Justice, 2012).

There are 14 different requirements that can be applied to Community Orders, according to the needs of the offender. The Ministry of Justice have highlighted the importance of tailoring Community Orders to the individual offender (Ministry of Justice, 2012). The Mental Health Treatment Requirement can be used to address an offender's mental health needs. Offenders with learning disabilities are likely to need additional support to undertake Community Order

requirements, and cognitive behaviour treatment programmes, such as offending behaviour programmes, will need to be adapted.

- ii. **Mental Health Treatment Requirement (MHTR)**

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

At least 40% of offenders on Community Orders are thought to have a diagnosable mental health condition and yet the MHTR is rarely used. Since its introduction in 2005, the MHTR still represents less than 1% of all requirements issued. Difficulties in access to psychiatric assessments, required for the MHTR, has been a substantial factor in their low level of use (Seymour and Rutherford, 2008). However, such difficulties may be affected by recent changes made by the Legal Aid, Sentencing and Punishment of Offenders Act (2012), which allows for a wider group of healthcare professionals to undertake such assessments.

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

### **A MHTR can be appropriate in the following situations:**

- if an offender does not require inpatient care
- if an offender has been treated in hospital since the offence and their mental health has improved to a point where care in the community is appropriate
- where the custody threshold has been passed as well as those cases in which it has not
- the offender's culpability is substantially mitigated by their mental state at the time of the offence and it is in the public interest to ensure they continue to receive treatment for their mental disorder.

A MHTR can provide access to necessary treatment and support that the offender might otherwise have had difficulty securing. Offenders with mental health conditions might need help to address their condition before they are able to undertake additional sentence requirements. Treatment and support could help an offender meet the conditions of their sentence and prevent a breach. The MHTR can be used alongside other requirements, such as a Supervision Requirement, so that probation can monitor compliance with the order.

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

Treatment could be medication, psychological therapy or a combination of both. The MHTR can be for a maximum of three years.

If you are considering this option you should seek advice from your legal adviser.

### iii. Alcohol Treatment Requirement and Drug Rehabilitation Requirement

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

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

Offenders with learning disabilities are unlikely to be able to cope with treatment requirements that have not been adapted to accommodate their particular needs. Additional support and/or special arrangements will be necessary, and

should be made available, if you consider the ATR or DRR appropriate for them.

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

## d. Knowing what sentencing options are available locally

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

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

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

### FILM CLIP 13



#### DECIDING WHEN TO USE A MENTAL HEALTH TREATMENT REQUIREMENT: 05:38 minutes

A magistrate suggests what information is important when considering a mental health treatment requirement. An individual talks about his experience of being subject to a mental health treatment requirement and what he found particularly challenging and beneficial.

## e. Explaining sentence requirements to a vulnerable offender

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

Written information for an offender about their sentence should be prepared in an accessible way, such as 'Easy Read'. Further information about 'Easy Read' can be found in Section 9d: Reasonable adjustments. For offenders on Community Orders, it may be necessary for them to receive regular reminders of what is expected of them, especially at the start of their sentence. For example, dates on which fine payments should be made and the consequences of non-compliance.

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

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

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

### FILM CLIP 14



#### APPROPRIATE SENTENCING: 04:23 minutes

Magistrates discuss the need to address the individual needs of an offender when imposing a sentence. People with mental health conditions and learning disabilities talk about their experiences of sentencing.



#### Some questions you might want to consider:

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

## CASE STUDY

*You Turn* is a project run by *Revolving Doors* and local services, including Durham Drug and Alcohol Action Team, Durham Community Alcohol Service and Balance North East (the North of England's alcohol office).

The project aims to address the mental health needs of women offenders with alcohol problems in order to reduce their social exclusion. *You Turn* works with women in County Durham who:

- are in contact with the criminal justice system or are at risk of offending
- misuse alcohol
- have low level mental health conditions.

The project consists of:

- a fast track community-based alcohol treatment service for women offenders with identified alcohol problems who have not been able to access local alcohol treatment services
- a designated 'aftercare' service that focuses on confidence building and self esteem through training, peer mentoring and group work, with the opportunity to pursue an accredited training and volunteering programme. The focus on confidence and self esteem is particularly relevant as many women offenders have low level mental health conditions that go unaddressed.

The women further receive one-to-one support to help encourage and maintain their participation in the programme.

*Case study material provided by Revolving Doors Agency.*

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

Jacquie Dabnor, magistrate



### **Sentencing summary:**

- Mental illness or disability can be a mitigating factor in sentencing.
- The particular support needs and abilities of individual offenders should inform your sentencing decisions.
- Taking an offender's individual needs into consideration can help to avoid unrealistic expectations being placed on them, which might lead to breach.
- You can seek information to help determine the most appropriate sentence for the individual defendant and this includes pre-sentence and medical reports.
- Some offenders with mental health conditions are likely to need help to address their condition before being able to undertake other sentence requirements.
- Despite high numbers of offenders with mental health conditions the Mental Health Treatment Requirement is rarely used.
- Community Order requirements can respond to the particular needs of vulnerable defendants.
- You should be aware of local services that can provide particular support to offenders undertaking community orders.
- You should ensure that offenders understand their sentence and the implications for non-compliance. Additional support might be necessary to serve as a reminder for certain offenders such as those with learning disabilities.
- An appropriate sentence that responds to the needs of the individual offender can help to avoid breach and prevent re-offending.



### **Further reading:**

- Crown Prosecution Service: Mentally Disordered Offenders [http://www.cps.gov.uk/legal/l\\_to\\_o/mentally\\_disordered\\_offenders/](http://www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders/)
- Good Practice Guidance: Commissioning, Administering and Producing Psychiatric Reports for Sentencing (Ministry of Justice and Her Majesty's Courts Service, 2010).
- London Probation Trust: Information for Sentencers [www.london-probation.org.uk/what\\_we\\_do/work\\_in\\_the\\_courts/information\\_for\\_sentencers.aspx](http://www.london-probation.org.uk/what_we_do/work_in_the_courts/information_for_sentencers.aspx)

# Section 13: Breach

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

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

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

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

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

## STAN'S STORY

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

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

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

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

*Stan (not his real name) is a former member of the Working for Justice Group.  
Material provided by the Prison Reform Trust.*



# Section 14: Mental Health Act

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

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

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

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

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

## a. Mental Health Act disposals

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

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

### **The main disposals for mentally disordered defendants and offenders are shown below:**

- Section 35 allows a magistrates' court to remand a defendant to a specified hospital (with agreement of the hospital) to enable a report to be prepared on his/her mental condition.
- Section 37: a hospital order permits the court to order the defendant's admission to hospital if the mental disorder makes detention for medical treatment appropriate, and appropriate treatment is available. The order can be made by a magistrates' court or the crown court following conviction for an imprisonable offence, or by a magistrates' court without a conviction if the court is satisfied that the defendant committed the act/omission with which he/she was charged. A hospital order can be for up to six months' duration in the first instance, but it can be renewed. Therefore unlike most criminal justice disposals, it is essentially indeterminate.

- Section 37: under a guardianship order, the defendant is placed under the responsibility of a local authority or a person approved by the local authority. Like a hospital order, this can be made by a magistrates' court or the crown court following conviction, or by a magistrates' court without a conviction if the court is satisfied that the defendant committed the act/omission.
- Section 38: an interim hospital order can be made, by the crown court or a magistrates' court, after conviction, when the court needs more time to decide whether to impose a hospital order or to use an alternative disposal.
- Section 41: a restriction order can be imposed by the crown court alongside a hospital order, where this is deemed necessary by the court to protect the public from 'serious harm'. The order places limits on the individual's discharge from hospital.



### Summary:

- The Mental Health Act can be used for defendants and offenders with severe mental illness and, in certain cases, for those with learning disabilities.
- If you think that recourse to the Mental Health Act might be appropriate, you should seek advice from your legal adviser.



### Further reading:

- Information on forensic sections of the Mental Health Act and forensic mental health services is available from Rethink Mental Illness at [www.rethink.org](http://www.rethink.org)



Andrew Aitchison www.prisonimage.org

## MATT'S STORY

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

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

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

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

*Material provided by Rethink Mental Illness.*

# Section 15:

## References

The Advocate's Gateway, *Responding to communication needs in the justice system* [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

British Psychological Society (2006) *Assessment of capacity in adults: interim guidance for psychologists*. British Psychological Society Professional Practice Board, Assessment of Capacity Guidelines Group.

Brooker, C., Sirdifield, C., Blizard, R., Maxwell-Harrison, D., Tetley, D., Moran, P., Pluck, G., Chafer, A., Denney, D. & Turner, M. (2011) *An investigation into the prevalence of mental health disorder and patterns of health service access in a probation population*. Lincoln: University of Lincoln.

Bryan K., Freer, J. and Furlong C. (2007) *Language and communication difficulties in juvenile offenders*. International Journal of Language and Communication Disorders, 42, 505-520.

Centre for Mental Health (2009) *Mental health care and the criminal justice system*. London: Centre for Mental Health.

Chitsabesan, P., Kroll, L., Bailey, S., Kenning, C., Sneider, S., MacDonald, W. and Theodosiou, L. (2006) *Mental health needs of young offenders in custody and in the community*. The British Journal of Psychiatry, 188, 534-540.

Consolidated Criminal Practice Direction (2011) London: Ministry of Justice.

*Criminal Justice Act 2003*, section 156, London: TSO. <http://www.legislation.gov.uk/ukpga/2003/44/section/156>

*Criminal Justice Act 2003*, section 157, London: TSO. <http://www.legislation.gov.uk/ukpga/2003/44/section/157>

*Criminal Justice Act 2003*, section 166. London: TSO. <http://www.legislation.gov.uk/ukpga/2003/44/section/166>

*Criminal Justice Act 2003*, section 177 London: TSO. <http://www.legislation.gov.uk/ukpga/2003/44/section/177>

Crown Prosecution Service website, June 2013 [http://www.cps.gov.uk/legal/l\\_to\\_o/mentally\\_disordered\\_offenders/#b08](http://www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders/#b08)

Department of Health (2001) *Valuing People White Paper*, Cm 5086. London: Department of Health.

Department of Health (2008) *Code of practice: Mental Health Act 1983 (2008 revised)*, UK: TSO.

Department of Health (2009) *The Bradley Report*, London: Department of Health.

Emerson, E., Hatton, C., Robertson, J., Roberts, H., Baines, S., Evison, F., & Glover, G. (2011) *People with learning Disabilities in England 2011*, London: Improving Health and Lives: Learning Disabilities Observatory.

Fazel, S., Doll, H., Langstrom, N. (2008) *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, Journal of the American Academy of Child & Adolescent Psychiatry, 47 (9), 1010-19.

Girolamo G. and Dotto, P. (2000) Epidemiology of personality disorders in M. G. Gelder, J. J. Lopez-Ibor and N. C. Andreasen (eds) *New Oxford Textbook of Psychiatry*, 1, 959-964, New York: Oxford University Press.

Hagell, A. (2002) *The mental health of young offenders, a report commissioned by the Mental Health Foundation*, London: Mental Health Foundation.

Harrington, R. and Bailey, S., with Chitsabesan, P., Kroll, L., Macdonald, W., Sneider, S., Kenning, C., Taylor, G., Byford, S., and Barrett, B. (2005) *Mental Health Needs and Effectiveness of Provision for Young Offenders in Custody and in the Community*, London: Youth Justice Board for England and Wales.

Healthcare Commission (2009) *Actions speak louder: a second review of healthcare in the community for young people who offend*, Commission for Healthcare Audit and Inspection and HM Inspectorate of Probation.

Judicial College (2012) *Fairness in courts and tribunals – A summary of the Equal Treatment Bench book*. London: Judicial College.

Judicial Studies Board (2009) *Equal Treatment Bench Book*. London: Judicial Studies Board.

Law Commission (2008) [http://lawcommission.justice.gov.uk/docs/insanity\\_scoping.pdf](http://lawcommission.justice.gov.uk/docs/insanity_scoping.pdf)

Law Commission (2010) [http://lawcommission.justice.gov.uk/docs/cp197\\_unfitness\\_to\\_plead\\_analysis-of-responses.pdf](http://lawcommission.justice.gov.uk/docs/cp197_unfitness_to_plead_analysis-of-responses.pdf)

*Magistrates' Court Act 1980*, section 10, London: TSO.  
<http://www.legislation.gov.uk/ukpga/1980/43/section/10>

*Mental Health Act 1983*, London: TSO.  
<http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Healthcare/Mentalhealth/InformationontheMentalHealthAct/index.htm>

Ministry of Justice and HM Court Service (2010) *Good practice guidance: commissioning, administering and producing psychiatric reports for sentencing*. London: Ministry of Justice.

Ministry of Justice/National Offender Management Service (2011) *Determining Pre-Sentence Reports: Probation Instruction 05/2011*. London: NOMS Agency Board.

Ministry of Justice (2012) Government response to Punishment and Reform: Effective Community Sentences consultation, IA No MOJ 174. London: Ministry of Justice.

Ministry of Justice (2012) *Punishment and Reform: Effective Community Sentences, Government Response*. London: TSO.

Ministry of Justice (2013) *Gender differences in substance misuse and mental health amongst prisoners*. London: Ministry of Justice

National Autistic Society (2011) *Autism: a guide for criminal justice professionals*. London: National Autistic Society.

National Liaison and Diversion Development Network (June 2013), [www.nliddn.org.uk](http://www.nliddn.org.uk)

National Institute for Mental Health for England (2003) *Personality Disorder – No Longer a Diagnosis of Exclusion. Policy Implementation Guidance for the Development of Services for People with Personality Disorder*, Gateway Reference 1055. London: NIMH(E).

Offender Health Research Network (2009) *A National Evaluation of Prison Mental Health In-Reach Services*, Manchester: University of Manchester.

Office for National Statistics (1998) *Psychiatric morbidity among prisoners: summary report*. London: ONS.

Office for National Statistics (2003) *Prison Statistics England and Wales 2001*, London: ONS. See also, Bromley Briefings Prison Factfile (November 2012:62). London: Prison Reform Trust.

R (on the application of C) v Sevenoaks Youth Court (2009) EWHC 3008.

Rack, J. (2005) *The Incidence of Hidden Disabilities in the Prison Population*, Egham, Surrey: Dyslexia Institute.

Reed Review of Services for Mentally Disordered Offenders and others requiring similar services – People with learning disabilities (mental Handicap) or with autism (1992) Departments of Health and Home Office. London: HMSO.

Rickford, D. and Edgar, K. (2005) *Troubled Inside: Responding to the Mental Health Needs of Men in Prison*. London: Prison Reform Trust.

Royal College of Psychiatrists (2011) *Schizophrenia* <http://www.rcpsych.ac.uk/mentalhealthinfoforall/problems/schizophrenia/schizophrenia.aspx>

SC v UK (2004) ECHR 263.

Sentencing Guidelines Council (2004) *Overarching principles – seriousness, Definitive Guidelines*, London: Sentencing Guidelines Council.

Seymour, L. and Rutherford, M. (2008) *The community order and the mental health treatment requirement*, London: Centre for Mental Health.

Talbot, J. (2008) *Prisoners Voices: experiences of the criminal justice system by prisoners with learning disabilities and difficulties*. London: Prison Reform Trust.

Talbot, J. (2010) *Seen and Heard: supporting vulnerable children in the youth justice system*. London: Prison Reform Trust.

Talbot, J. (2012) *Fair Access to Justice? Support for vulnerable defendants in the criminal courts*. London: Prison Reform Trust.

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

Richard Monkhouse, chair, Magistrates’ Association (from October 2013)



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and effective penal system**

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