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Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children

Jessica Jacobson with Jenny Talbot



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Foreword

Court proceedings are often complicated for anyone who is relatively unfamiliar with the criminal justice system. Many children and some adults, for example people with learning disabilities and difficulties, face particular problems, such as understanding the language used in court and knowing what is expected of them. This is especially pertinent when people are required to give evidence in court or – as is the focus of this report, are the accused.

High numbers of children who come before the youth courts are vulnerable, not only due to their young age and developmental immaturity, but because many also experience mental health and emotional problems, learning disabilities and communication difficulties. All defendants have the right to a fair trial, fundamental to which is their ability to participate effectively in the criminal proceedings to which they are subject.

There are a range of provisions, both legislative and practice guidance, that encourage the effective participation of vulnerable defendants. However these are often predicated on court staff knowing about the particular needs that a defendant may have. It is of considerable concern that many vulnerable defendants, children and adults alike, do not understand either the court proceedings or the language of the court and are left feeling confused and alienated – as highlighted in this report.

It is, however, pleasing to see that that some good work is underway to identify and support vulnerable adult defendants and children. One such example is the Norwich Combined Courts Assessment Scheme, which is cited in this report. The scheme undertakes initial screening and assessment of defendants; provides practical assistance to defendants and the courts; facilitates diversion, where appropriate, by linking criminal justice professionals to health and social care services, and provides support following conviction. Another example is the youth justice liaison and diversion pilot led by the Sainsbury Centre for Mental Health and the Department of Health. Working closely with the police, healthcare and youth offending services, these schemes identify, at an early stage, children with mental health problems, learning disabilities and related needs in order that the most appropriate response can be made to their offending behaviour.

Further, Lord Bradley's review into people with mental health problems or learning disabilities in the criminal justice system, commissioned in 2007 by the government and published in April 2009, and the government's subsequent national delivery plan, *Improving Health, Supporting Justice*, has added great impetus to work in this area.

To ensure that justice is done, it is vital that our courts are fully accessible to everyone.

I applaud the work that has been done on this report and I hope that the far reaching recommendations will be given serious consideration.



Joyce Quin, House of Lords
Chair, Prison Reform Trust advisory group, *No One Knows*

Preface

The subject of this report is the treatment of vulnerable defendants within the criminal courts of England and Wales. The report is in two parts: Part I is concerned with vulnerable adult defendants, and particularly those with learning disabilities; Part II is about child defendants - that is, defendants aged between 10 and 17. The report assesses existing provision for these two groups of vulnerable defendant, and identifies gaps in provision. In addition, the report presents a number of recommendations.

This report has been prepared as part of two programmes of work being undertaken by the Prison Reform Trust, both of which are kindly supported by The Diana, Princess of Wales Memorial Fund:

- *No One Knows* is a Prison Reform Trust programme that aims to effect change by exploring and publicising the experiences of people with learning disabilities and learning difficulties who come into contact with the criminal justice system
- *Out of Trouble* is the Prison Reform Trust's five-year strategy to reduce levels of child and youth imprisonment across the UK.

An important part of the context for this report is the review by Lord Bradley of people with mental health problems or learning disabilities in the criminal justice system. This review was commissioned by the government in December 2007 with the following aims:

- to examine the extent to which offenders with mental health problems or learning disabilities could, in appropriate cases, be diverted from prison to other services and the barriers to such diversion
- to make recommendations to government, in particular on the organisation of effective court liaison and diversion arrangements and the services needed to support them.¹

The Bradley review and the government's response were published on 30 April 2009, and were followed, on 17 November 2009, by The National Delivery Plan of the Health and Criminal Justice Programme Board, *Improving Health, Supporting Justice* (2009), which incorporates the full response to Bradley's recommendations.

The Prison Reform Trust's interest in provision for vulnerable defendants in court stems from the recognition that court proceedings can be particularly difficult for these individuals. Court processes are often extremely complicated – not only for child defendants and for those with learning disabilities and learning difficulties, but for anyone who is relatively unfamiliar with the criminal justice system. All defendants appear initially before a magistrates court after they have been charged; whether a case is subsequently completed in the magistrates court (as the vast majority are) or is committed to the crown court for trial or sentence largely depends on the seriousness of the offence. As a case proceeds from charge to conviction and sentence or other outcome, the defendant may be required to appear at several hearings, at which the language used, procedures followed, and range of professionals involved may all contribute to a sense of stress, confusion or alienation. For a defendant who is vulnerable because of youth, disability, or any other factor, this can compound the disadvantages he already faces - in terms of his general welfare, and his capacity to exercise his legal and human rights - within the criminal justice process.

1. Bradley's findings have more direct relevance to Part 1 than to Part 2 of this report; although his review recognized the importance of looking at the needs of children in contact with the criminal justice system they were not the focus of his review. The recently published National Delivery Plan of the Health and Criminal Justice Programme Board, *Improving Health, Supporting Justice* (November, 2009), notes that recommendations from Bradley's review specific to children will be addressed in the forthcoming strategy and action plan, *Healthy Children, Safer Communities*, due in 2009.

This report examines the extent to which criminal justice policy and practice relating to the criminal courts effectively addresses the particular support needs of vulnerable defendants. It is hoped that the recommendations based on this review of provision will contribute to efforts to create a criminal justice system within which all defendants, whatever their level of need, receive fair and equitable treatment.

There are, necessarily, two strands of provision for vulnerable defendants – both of which are considered over the course of this report. One strand is provision for defendants who, because of their particular needs, are diverted away from the criminal justice system and into health or social care. The other strand is provision of support for vulnerable defendants who remain within the criminal justice system. These defendants may require access to services at the same time as they are undergoing criminal prosecution; they may also need practical assistance during court proceedings to ensure they understand the process they are being subject to and that their rights and well-being are protected.

Structure of the report

There are many commonalities to provision for child defendants and vulnerable adult defendants; however, there are also a number of marked differences in aspects of the legislative framework and broader legal and political context of provision for the two groups. This is the rationale for incorporating discussion of both child and vulnerable adult defendants in separate sections of the same report – each of which contains its own set of conclusions and recommendations. It should be noted, also, that the subject of provision for vulnerable defendants is extremely broad; hence within the pages of a single, relatively short report it is not possible to undertake a detailed and exhaustive examination of all the relevant policy concerns and questions of law. Rather, the report seeks to provide an overview of the key issues.

Part I of the report, adult defendants, comprises four chapters. The first of these looks at the position of defendants with learning disabilities, and the laws which frame the appearance of these individuals and other vulnerable adults before the courts. Next, the focus is on the scope for identifying vulnerabilities, including learning disabilities, in adult defendants, and for supporting these individuals within the criminal justice process. Chapter 3 considers some of the possible outcomes of cases involving vulnerable adult defendants; more specifically, it looks at diversion away from the criminal justice system, mental health disposals, community sentences and remand decision-making. This is followed by a short concluding chapter which includes a series of recommendations for improving provision.

In Part II of the report, the focus shifts to child defendants – although, where appropriate, parallels with the situation of vulnerable adult defendants are drawn. All child defendants are deemed vulnerable by virtue of their young age and developmental immaturity. High numbers, however, can be described as doubly vulnerable due to a range of often complex support needs, for example mental health problems, communication difficulties, learning disabilities, learning difficulties and emotional problems. This section comprises five chapters, of which the first discusses the components of the criminal courts system as it applies to child defendants, and the age of criminal responsibility. This is followed by a discussion of the particular difficulties and disadvantages that child defendants may face when they appear in court, and some of the implications of these. Chapter 7 looks at the support that can be offered to child defendants in the courtroom, and at the issue of training for professionals working with child defendants. The following chapter then addresses the sentencing of child defendants, including the principles that are meant, by law, to underlie sentencing decisions. Finally, Chapter 9 presents conclusions and recommendations relating to child defendants.

Part I: vulnerable adult defendants

Summary

Main points

- In order to exercise their right to a fair trial, enshrined in Article 6 of the European Convention on Human Rights, and to be deemed fit to plead, defendants must be able to understand and to participate effectively in criminal proceedings. In practice, many vulnerable defendants, such as those with learning disabilities, find their experiences of court extremely confusing and feel unable to participate in a meaningful way.
- The criminal courts can take various practical steps to facilitate the participation in proceedings of defendants who are vulnerable. Under the Disability Discrimination Act, the courts have a duty to ensure they are fully accessible to defendants with disabilities. However, the extent to which this occurs is variable.
- Inclusion is a goal of public policy with respect to people with disabilities. The inclusion agenda fosters the presumption that, where appropriate, vulnerable defendants, such as those with learning disabilities, should be subject to the full range of disposal options rather than necessarily being diverted away from the criminal justice system.
- Diversion away from the criminal justice system, and into appropriate health or social care services, remains the necessary option for defendants who do not have the capacity to participate in proceedings, even with support.
- Adequate provision for vulnerable defendants, within or outside the criminal justice system, depends on effective systems for identifying defendants' needs and referring them to the appropriate health or social care services. At present, a minority of courts have access to liaison and diversion schemes which can undertake needs assessments and make referrals. Few of the schemes that are in place have learning disability expertise.
- Vulnerable defendants do not have the same statutory rights to help and support as vulnerable witnesses.
- There are few provisions in criminal justice policy that explicitly target defendants with learning disabilities. Relevant provisions tend to focus on the broader issue of 'mental disorder', within which learning disability is conflated with mental illness.

This review of provision for vulnerable adult defendants is primarily, but not solely, focussed on adult defendants with learning disabilities. It has been produced as part of the Prison Reform Trust *No One Knows* programme, which aims to effect change by exploring and publicising the experiences of people with learning disabilities and learning difficulties who come into contact with the criminal justice system.

There is a general recognition in law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part. This is reflected in the right to a fair trial enshrined in Article 6 of the European Convention of Human Rights, and the case law that supports it. The requirement for effective participation is reflected also in the criteria used to determine 'fitness to plead': namely that the defendant can plead with understanding, can follow the proceedings, knows a juror can be challenged, can question the evidence, and can instruct counsel.

The principle of effective participation has clear implications for vulnerable adult defendants, including those with learning disabilities. One implication is that criminal prosecution may be deemed inappropriate for such a defendant. Government policy has long been that the diversion of 'mentally disordered' offenders into health or social care services should be considered as an alternative to prosecution and punishment by the criminal justice system – with the concept of 'mental disorder' understood as encompassing both mental illness and learning disability.

However, it is widely recognised that many vulnerable defendants have the potential to participate effectively in criminal proceedings, provided they are given the necessary support. The criminal courts can take various practical steps to assist defendants' participation. For example, a 'vulnerable accused' aged 18 or over can give evidence to the court by a live television link, where certain conditions are met; and a practice direction issued by the Lord Chief Justice outlines various measures that courts can adopt in order to make the court environment less intimidating for vulnerable defendants. If the defendant is subsequently convicted, the court has various options for addressing the defendant's needs through the type of (criminal justice or non-criminal justice) disposal it selects.

Under the Disability Discrimination Act 1995 (as amended by the 2005 DDA), HM Courts Service – as a public body – has a duty to eliminate unlawful discrimination on the basis of disability, and to promote equality. This applies to members of the public who come into the criminal and other courts in any capacity, including as defendants. It follows from this that, by law, defendants with learning disabilities should be provided with the practical assistance and facilities they require to participate fully in court proceedings. More broadly, the DDA supports the principle of inclusion with respect to people with disabilities, whereby individuals with disabilities of any kind are understood to have the same duties and obligations as their fellow citizens who do not have disabilities. The inclusion agenda thus fosters the presumption that, unless their capacity to participate effectively is severely limited, vulnerable defendants, such as those with learning disabilities should be subject to the full range of disposal options as their non-disabled peers, for example from no further action being taken by the police against a vulnerable suspect through to charge and prosecution in the courts. (See for example, Talbot, 2008.)

Notwithstanding the existing systems of support and policy safeguards for vulnerable adult defendants, there are notable gaps in provision of services for vulnerable defendants across, and beyond, the criminal justice system. Particular areas of concern include local agencies' lack of capacity for screening and assessing defendants' needs; this reflects, in part, the wider problem of courts' limited access to local liaison and diversion schemes which can undertake assessments and refer vulnerable defendants to treatment and support services. Another concern is that vulnerable defendants do not have the same statutory rights as vulnerable witnesses to assistance and support during court proceedings. Additionally, in both policy and practice, the needs of defendants with mental health problems tend to be prioritised over the needs of those with learning disabilities.

Part I of this report concludes with seven recommendations for improving provision for vulnerable adult defendants. The recommendations are not aimed at securing favourable treatment for these defendants; the focus is on fair and proportionate treatment. The overall aims are, first, to ensure that, wherever possible, defendants can participate effectively in court proceedings, thus allowing justice to be done; and, secondly, to ensure that the defendants' needs are adequately addressed both within and outside the criminal justice system, thus reducing risks of future offending as well as protecting the individual's welfare.

The seven recommendations are:

1. There should be a review of the policy framework for supporting vulnerable adult defendants, with the aims of:
 - o developing clearer principles for determining the circumstances under which the criminal prosecution of a defendant should and should not be continued
 - o revising the fitness to plead criteria
 - o establishing parity in statutory support for vulnerable witnesses and vulnerable defendants²
 - o ensuring that policy responses to 'mentally disordered' defendants take into account specific concerns relating to learning disability as well as mental health problems.
2. Every court should have access to a local liaison and diversion scheme.³ All liaison and diversion schemes should have input from, or at a minimum direct access to, learning disability specialists,⁴ and should perform the following functions:
 - o screening and assessment/referral for assessment of defendants' needs
 - o facilitate access to health and social care services (alongside or as an alternative to criminal prosecution, as appropriate)
 - o advise courts on measures for supporting vulnerable defendants in the courtroom
 - o contribute to the development and implementation of court disposals.
3. Improved systems for screening and assessing defendants' needs should be introduced. These systems should be implemented by liaison and diversion schemes (as above) and entail:
 - o screening when any party raises a concern about a defendant, at any stage in the court process
 - o referral for timely, full assessments (including psychiatric assessments) as required⁵
 - o systematic reporting of screening/assessment findings to the courts, including in pre-sentence reports.⁶
4. Judges and magistrates should receive training⁷ on the range of impairments (including learning disabilities) that defendants can display, the implications of these impairments for the criminal justice process, and methods by which vulnerable defendants' participation in court proceedings can be enhanced.

2. See Bradley (2009) recommendation 17, and paragraph 3.6, *Improving Health, Supporting Justice* (Department of Health, 2009).

3. See Bradley (2009) recommendations 14 and 28, and paragraphs 3.7 – 3.12, *Improving Health, Supporting Justice* (Department of Health, 2009).

4. See Bradley (2009) recommendation 68.

5. See Bradley (2009) recommendations 23 and 24, and paragraph 3.6, *Improving Health, Supporting Justice* (Department of Health, 2009).

6. See Bradley (2009) recommendations 15 and 26, and paragraphs 3.7 – 3.12 *Improving Health, Supporting Justice* (Department of Health, 2009).

7. See Bradley (2009) recommendation 25.

5. HM Courts Service should ensure that all its provision complies with the Disability Discrimination Act, such that courts are fully accessible to vulnerable defendants (as well as to all other court users who are vulnerable), and these defendants receive the practical support and assistance they require in order to participate effectively in proceedings. Monitoring of the Courts Service's compliance with the Disability Discrimination Act should be undertaken.
6. In order to minimise the use of custodial remand for vulnerable defendants, healthcare and other support services for defendants on bail, and provision for hospital remands, should be extended. Improved access to psychiatric and other assessments (see recommendation 3) should also help to reduce custodial remands of vulnerable defendants.
7. There should be greater and more flexible use of the community order in sentencing vulnerable defendants,⁸ ensuring full compliance with the Disability Discrimination Act and particularly the Disability Equality Duty. This can be achieved by making 'activity' and 'programme' requirements fully accessible to offenders with learning disabilities and mental health needs, and broadening the scope of the mental health treatment requirement.

I. Vulnerable adults in court

The main focus of this section of the report is adult defendants with learning disabilities, rather than vulnerable adults more generally. This focus reflects that of the Prison Reform Trust *No One Knows* programme, of which this study is a part.⁹ It also reflects the fact that much of the existing provision for vulnerable defendants tends (explicitly or implicitly) to prioritise the needs of individuals with mental health problems over the needs of those with learning disabilities - and hence some of the most pressing gaps in provision relate particularly to learning disability. Nevertheless, many of the issues to be addressed over the course of this report have a bearing on mental health as well as learning disability.

The definition of learning disability employed by the *No One Knows* programme is that of the World Health Organisation: 'reduced level of intellectual functioning resulting in diminished ability to adapt to the daily demands of the normal social environment' (WHO, 1996). Most definitions of learning disability refer to a low IQ (usually under 70) as generally indicative of a learning disability, although it is widely recognised that impairments of social functioning and communication skills are also defining features of learning disability. An earlier *No One Knows* report notes that people with learning disabilities, those with learning difficulties and those on the autistic spectrum do not comprise a homogeneous group, but are individuals with a wide variety of experiences, strengths, weaknesses, and support needs; nevertheless, 'many will share common characteristics, which might make them especially vulnerable as they enter and travel through the criminal justice system' (Talbot, 2008: 3). Some of these common characteristics are outlined in the Appendix to this report.

This chapter briefly considers some of the issues faced by defendants with learning disabilities, and then discusses the main elements of the legal framework that ultimately determines whether or not defendants with learning disabilities appear in court, and how they are treated when they are there.

Defendants with learning disabilities

The prevalence of learning disabilities among defendants is difficult to measure. A review of research on prevalence, conducted as part of the *No One Knows* programme, concluded that there is a 'vast hidden problem of high numbers of men, women and children with learning difficulties and learning disabilities trapped within the criminal justice system'; and that between 20% and 30% of offenders 'have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system' (Loucks, 2007: 1). As noted by Murphy and Mason (2007), very little research in Britain or elsewhere has specifically examined prevalence of learning disabilities among those who appear before the courts.

Suspects and defendants with learning disabilities may face particular problems – in terms of their general welfare and, more fundamentally, the risk of wrongful conviction. Many empirical studies strongly suggest that suspects and defendants with learning disabilities are 'vulnerable' in the sense that, compared to their non-disabled peers, they are:

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

9. *No One Knows* covers learning difficulties as well as learning disabilities; however, the issues addressed by this report tend to be more pertinent to the latter than the former, because a defendant's learning disabilities tend to have the most obvious and direct implications for the fairness and effectiveness of court proceedings.

The vulnerability of a defendant with learning disabilities can be heightened during court proceedings, given the intrinsic stresses associated with court appearances and the potentially enormous impact of the court process on the life of the individual. Some of the difficulties associated with appearing in court are vividly illustrated by the comments in Box 1.1. These are replies to the question 'What was it like when you went to court?' given by prisoners with learning disabilities and learning difficulties who were interviewed for the *No One Knows* report *Prisoners'Voices* (Talbot, 2008).

Box 1.1: Responses of prisoners with learning disabilities and learning difficulties to the question: 'What was it like when you went to court?'

I just felt out of place, being in court, that's the only way I can explain it. Everyone was talking; I didn't know what was going on. You just have to wait until you're alone with your solicitor.

I just felt sick, you go backwards and forwards. In court, the psychology woman said I was like a kid. I can talk to people and I like people around but I don't think they realised that I couldn't read and write very well. They said I had learning difficulties.

The judge started to laugh and the jury started to laugh, while my life was on the line they were laughing. They use the guiltiness of other people to say that everyone is the same. They think that they are better people, [but] wrong and right, positive and negative - everyone has that in their life.

I don't know, 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 always find it hard in court, because there's a crowd of people there and I find it hard. But I'm in my own box, so it's not that bad.

I was on my own, no family or friends were with me, just my solicitor and the guy with the wig, the barrister.

It was weird. The court was big and there were lots of people, people could just walk in off the streets. I didn't know who they all were.

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?

Court was frightening. I have been to a magistrates court before when I was younger... When I went to the crown court my legs were shaking; all with wigs on, about 30 people.

I didn't like it, it shocked me. The judge asked me if I understood and I said yes even though I didn't. I couldn't hear anything, my legs turned to jelly and my mum collapsed.

There are few provisions in criminal justice policy that explicitly and specifically target defendants with learning disabilities, and even fewer that have specific relevance to defendants with learning difficulties. Relevant provisions tend to focus on the broader issue of 'mental disorder', within which problems of learning disability and, to a limited extent, learning difficulty are conflated with issues of

mental illness. For example, the Crown Prosecution Service provides guidance on 'mentally disordered offenders', which cites the 2007 Mental Health Act definition of mental disorder as 'any disorder or disability of the mind' (section 1(2)).¹⁰ With respect to certain provisions of the Mental Health Act 2007, learning disability is explicitly excluded from this definition unless it is 'associated with abnormally aggressive or seriously irresponsible conduct' (section 2(2)).¹¹

The conflation of learning disability with mental illness, under the broad heading of 'mental disorder', is problematic to the extent that it masks the more specific needs of defendants with learning disabilities. However, the reality is that many individuals who appear before the courts do not have a single or clearly delineated form of intellectual or psychological difficulty. Mental illness and learning disability (or learning difficulty) may co-exist; or defendants may be cognitively impaired because of the effects of acute mental health problems and/or substance abuse, rather than a pre-existing learning disability or difficulty.

Even where mental illness does not co-exist with learning disability, some of the difficulties faced by defendants with learning disabilities may, of course, be shared by those with mental health problems. The relationship between mental illness and offending has been widely researched, and the available evidence indicates that the prevalence of mental health problems among offenders is high.¹²

The legal framework

This part of the chapter looks at three aspects of the legal framework governing the treatment of defendants with learning disabilities and other vulnerable defendants: first, the right to a fair trial; secondly, fitness to plead; and, thirdly, the Disability Discrimination Act 2005 and the inclusion agenda. Mental Health Act provisions are also relevant to the discussion, but these are dealt with elsewhere in the report.

Another relevant component of the legal framework is that, for a defendant to be convicted, he must not only have committed the criminal act (*actus reus*) but must also have had a degree of criminal intent or guilty mind (*mens rea*). If a defendant has learning disabilities or mental health problems, the defence might argue that he lacked *mens rea*, in which case this question could be addressed by an expert witness.

The right to a fair trial

Article 6 of the European Convention on Human Rights (which was incorporated into British law by the Human Rights Act 1998) sets out the right to a fair trial. It states that everyone charged with a criminal offence should be presumed innocent until proved guilty by law, and establishes five minimum rights for the defendant:

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

10. www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders/

11. The 1983 Mental Health Act provided for a similar qualified exclusion of 'learning disability' from the general category of 'mental disorder'.

12. For example, a large-scale survey of psychiatric morbidity among prisoners in England and Wales found that around 20% of male and 40% of female prisoners had received help for a mental or emotional problem in the 12 months before entering prison (Singleton et al, 1998).

The above 'minimum rights' are arguably violated in cases where a defendant's learning disabilities significantly inhibit his understanding and involvement in the trial and where the necessary support is not provided. This principle was reinforced by two cases, cited below, which although concern child defendants their significance for vulnerable adult defendants lies in the fact that the children's cognitive impairments were recognised as having direct implications for the conduct of criminal proceedings:

- Case of *SC v UK*,¹³ in which the European Court of Human Rights ruled that the right to fair trial of the applicant, an 11-year-old boy, had been breached because his young age and significant learning difficulties¹⁴ meant that he had had insufficient understanding of the proceedings and their potential consequences. The court therefore judged him not to have had 'effective participation' in the trial.
- In the later case of *R (TP) v West London Youth Court*,¹⁵ the administrative court ruled that neither youth nor limited intellectual capacity on the part of the defendant necessarily leads to a breach of the right to a fair trial; but that the court hearing the case should adapt its procedures to ensure the defendant can actively participate in the proceedings. The judgement outlined a number of practical steps that could be taken for this purpose, including:
 - o keeping the claimant's level of functioning in mind
 - o using concise and simple language
 - o having regular breaks
 - o taking additional time to explain court proceedings
 - o being proactive in ensuring the claimant has access to support
 - o explaining and ensuring the claimant understands the ingredients of the charge
 - o explaining the possible outcomes and sentences
 - o ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised.

Continuing concerns about potential infringement of the right to a fair trial were highlighted by a Prison Reform Trust submission to the Joint Committee on Human Rights (JCHR) enquiry on adults with learning disabilities. In its subsequent report, the JCHR concluded that:

We are concerned that the problems highlighted by this evidence could have potentially very serious implications for the rights of people with learning disabilities to a fair hearing, as protected by the common law and by Article 6 ECHR. Some of this evidence also suggests that there are serious failings in the criminal justice system, which give rise to the discriminatory treatment of people with learning disabilities (JCHR, 2008: paragraph 212).

Fitness to plead

It is a long-standing principle in criminal law in England and Wales that any individual who stands trial 'must be capable of contributing to the whole process of his or her trial, starting with entering a plea' (British Psychological Society, 2006: 68). The Article 6 enshrinement of the right to a fair trial, as demonstrated in the above discussion, reinforces this principle. Where there are concerns about a defendant's mental state or capacity, a 'fitness to plead' hearing can be held in the crown court (there is no specific procedure by which fitness to plead can be determined in the magistrates court). The main criteria used in determining fitness to plead date from the 1836 case of *R v Pritchard*, and 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.

The law on fitness to plead is contained in various statutes, the most recent of which is the Domestic Violence, Crime and Victims Act 2004 (sections 22-25). The prosecution, defence or judge can raise the question of fitness to plead; this is usually done before arraignment. The issue is decided by the judge, without a jury, on the basis of evidence submitted by two or more medical practitioners who are appropriately qualified under the Mental Health Act. Although the legislation does not distinguish between the determination of fitness to plead for defendants who are mentally ill and for those who have learning disabilities, it is clear that the process differs to some extent between the two groups. While mentally ill suspects might, following treatment, become fit to plead, this is unlikely to be a possibility for those who have learning disabilities and whose level of understanding is therefore relatively constant.

If a defendant is found to be fit to plead, the case will continue, although the judge may choose to make certain forms of support available for the defendant. If a defendant is found to be unfit to plead, a 'trial of the facts' may be held, at which the jury decides whether or not the defendant committed the act or omission of which he has been accused. Under section 24 of the Domestic Violence, Crime and Victims Act 2004, three disposals are available to the court if the jury determines that the accused had done the act or made the omission: a hospital order under the Mental Health Act; a supervision order which places the individual under the supervision of a social worker or probation order and may include a treatment requirement; or an absolute discharge.

An academic study of fitness to plead hearings found that between 1997 and 2001 there were 329 findings of unfitness to plead; and in just under a third of these cases 'mental impairment' was the primary diagnosis (Mackay, 2009). Official statistics on fitness to plead hearings are lacking, but internal data from HM Courts Service show that 115 fitness to plead hearings were heard in England and Wales in 2007, although data on outcomes of these hearings are not available. There is anecdotal evidence that psychiatrists rarely find defendants to be unfit to plead – probably because suspects with the most obvious and significant forms of mental disorder (of any kind) are likely to have been diverted at an earlier stage of the criminal justice process. This may also help to explain the low number of fitness to plead hearings held.

Concerns have been raised about the broad and somewhat subjective criteria for fitness to plead. The Law Commission has recently launched a review of the current test for determining fitness to plead (as well as the insanity defence), 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 Disability Discrimination Act 2005 and the inclusion agenda

Recent years have seen an increasing emphasis upon inclusion as a goal of public policy with respect to people with disabilities, including learning disabilities. In 2001 in England, the Department of Health set out a 'New Strategy for Learning Disability' in its white paper, *Valuing People*. This document makes the inclusion of people with learning disabilities as full and active members of wider society a central and explicit aim. In Wales, the Welsh Assembly Government issued a new Statement on Policy and Practice for Adults with a Learning Disability in 2007; a fundamental principle of this statement is that: 'All people with a learning disability are full citizens, equal in status and value to other citizens of the same age'.

The principle of inclusion of people with disabilities in society was given legislative force by the 2005 revision of the 1995 Disability Discrimination Act (DDA). The DDA 1995 made it unlawful for public services to discriminate against people with disabilities. The 2005 DDA took this further, by introducing the Disability Equality Duty (DED). The DED requires statutory authorities actively 'to promote equality of opportunity between disabled persons and other persons' and 'to eliminate discrimination', as part of their mainstream work (section 49A of the 1995 DDA, inserted by section 3 of the 2005 Act). Thus authorities must work to ensure that discrimination does not occur: for example, by making adjustments to existing service provision and ensuring that future provision is accessible to people with disabilities. The DDA 1995 defines a disabled person as someone who has 'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities' (section 1(1)). This definition is sufficiently broad to encompass learning, developmental or behavioural disorders that tend not to be classed as disabilities, such as autism, attention deficit hyperactive disorder (ADHD), speech and language difficulties, and dyslexia.

Under the DDA 1995 (as amended by the 2005 Act), HM Courts Service – as a public body – has a duty to eliminate unlawful discrimination on the basis of disability, and to promote equality. This applies to staff within the service as well as to members of the public who come into the criminal and other courts in any capacity, including as defendants. It follows from this that, by law, disabled defendants should be provided with the practical assistance and facilities they require to participate fully in court proceedings. This principle is given expression in the Ministry of Justice's Disability Equality Scheme 2008-11, and two documents published by HM Courts Service (HMCS) in 2009: Reasonable Adjustments Guidance (2009a) and Disability Advice Factsheets (2009b). The former of the two HMCS documents states that the 'core goal' of the service 'is to make sure that all citizens, regardless of their differing needs, have access to justice', and refers to the responsibility to make adjustments for 'all court users', including defendants, witnesses, professionals, and members of the public attending court as observers.

In theory, the DDA 2005 should be a means of ensuring that a vulnerable defendant's right to a fair trial is not compromised. Whether the Act has, in practice, had this effect is questionable. Nevertheless, alongside the right to a fair trial, and the long-established fitness to plead criteria, the DDA is an important tool, which can be used to improve provision and to promote the inclusion agenda for defendants with learning disabilities and learning difficulties.

It should be noted that the concept of 'inclusion' with respect to defendants with disabilities has implications beyond the question of how their legal and human rights can best be protected. More broadly, the concept of inclusion implies that individuals with disabilities of any kind have the same duties and obligations as their fellow citizens who do not have disabilities. The inclusion agenda thus fosters the presumption that, unless their capacity to participate effectively is severely limited, vulnerable defendants, such as those with learning disabilities should be subject to the full range of disposal options as their non-disabled peers, for example from no further action being taken by the police against a vulnerable suspect through to charge and prosecution in the courts. The issue of diversion away from the criminal justice system is a somewhat complex one, and is addressed in Chapter 3. Finally, the inclusion agenda can be said to extend not just to learning and other disabilities, but also to individuals – including suspects and defendants – with mental health problems (see, for example, Royal College of Psychiatrists, 2009).

2. Support for vulnerable adult defendants

This chapter looks at the availability of help and support for vulnerable adult defendants. First, it considers the potential of liaison and diversion schemes to facilitate access to health and social care services and other support. Secondly, the chapter addresses the more specific issue of how defendants' needs are identified. The third part focuses on the provision of practical help for vulnerable defendants within the courtroom.

Liaison and diversion schemes

Criminal justice liaison and diversion schemes work with the police and in courts to assess defendants and provide information to the courts (and other relevant parties) about their needs; they also refer vulnerable defendants to treatment and support services. The schemes are usually staffed by mental health, and rarely include learning disability, professionals.

The creation of liaison and diversion schemes was stimulated by the 1992 Reed review of health and social services for mentally disordered offenders (Department of Health/Home Office 1992), which called for 'nationwide provision of properly resourced court assessment and diversion schemes'.

Since then, although a number of schemes have been established (over 120 are listed in Nacro's 2009 national directory of schemes), many of the initiatives have developed on a piecemeal basis and with insecure funding. In 2004, a survey by Nacro found that many court areas were not covered by liaison and diversion schemes (Nacro, 2005a); more recently, according to *Improving Health, Supporting Justice* (2009), only one third of magistrates courts have access to such schemes. Nacro defined the work of diversion as:

A process of decision-making, which results in mentally disordered offenders being diverted away from the criminal justice system to the health and social care sectors. (cited in Bradley, 2009: page 15)

The purpose of liaison and diversion schemes was originally to identify people whose imprisonment was not in the public interest because, due to their vulnerability, it was likely to be disproportionately harmful, and because prison was an inappropriate setting for the vulnerable offender. For example, research by David James (James, et al., 2002) showed that timely diversion from the criminal justice system produced better outcomes both in terms of the person's mental health and in reducing the risk of re-offending.

Lord Bradley's report (2009) defines diversion as:

a process whereby people are assessed and their needs identified as early as possible in the offender pathway (including prevention and early intervention), thus informing subsequent decisions about where an individual is best placed to receive treatment, taking into account public safety, safety of the individual and punishment of an offence (Bradley, 2009: 16).

This broader definition could distort the purpose of diversion, as it gives tacit support to the continued use of custody for vulnerable people through its imprecise language about 'where an individual is best placed to receive treatment, taking into account public safety'.

It is true that for many vulnerable offenders, prison can be the best-suited outcome, in view of the nature of their offending and of their vulnerabilities. For these people it is vital that criminal justice agencies provide full access to the quality of support and treatment the person could otherwise receive in the community.

However, current practice too often fails to use alternatives that are less damaging than prison for vulnerable offenders. Diversion, properly implemented, would direct vulnerable offenders to support in the community, improve public health and reduce crime.

It is also notable that although most existing schemes tend to be multi-disciplinary, the 'vast majority ... do not currently have learning disability expertise' (Bradley, 2009: 82). This is despite the Reed review's recommendation that 'court diversion and assessment schemes should develop effective links with local learning disability teams and, where possible, team members should be encouraged to contribute to schemes' (Department of Health/Home Office 1992). Just three of the 64 schemes which responded to Nacro's 2004 survey included learning disability workers (Nacro, 2005a). Interestingly, Nacro's directory of schemes, published in 2009, refers specifically to 'criminal justice mental health liaison and diversion schemes' (Nacro, 2009). Some schemes, however, explicitly include learning disabilities within their remit; one such scheme is based in Norwich, and is described in Box 2.1.

Box 2.1: The Norwich Combined Courts Assessment Scheme

The Norwich combined courts assessment scheme was established in 2003 for the purpose of supporting mentally disordered people on bail, in court, and following disposal. It caters for defendants with mental health issues and those with learning disabilities or learning difficulties.

The scheme is funded by social services but located within the primary care trust. It is primarily staffed by a nurse practitioner with both mental health and learning disabilities expertise. Its main functions are to undertake assessments of defendants and report the findings to the courts and other agencies; to provide practical assistance to defendants and the courts; and to facilitate diversion by linking criminal justice professionals to health and social care services. The scheme provides input, as required, at the point of arrest, during court proceedings, and following conviction. Referrals are received from police officers, court officials, lawyers, probation officers, magistrates and judges, and sometimes from defendants themselves.

If appropriate, the scheme can provide a vulnerable defendant with support through the court process. This might entail explaining court procedures to the defendant, and taking him into an empty courtroom in advance of the first hearing, to explain the lay-out; the nurse practitioner may also sit in the dock with the defendant during proceedings, to provide support and advise the court on the appropriate use of language. The scheme can also help to support witnesses or victims with learning disabilities.

Case study material provided by the Norwich scheme

The Bradley review emphasised the importance of these schemes, noting that they can create a framework which 'could carry many of the functions currently needed to support improvements for people with mental health problems or learning disabilities across the criminal justice system' (2009: 130).¹⁶

The National Delivery Plan (NDP) of the Health and Criminal Justice Programme Board, *Improving Health, Supporting Justice*, published on 17 November 2009 (Department of Health, 2009), which incorporates the full response to Bradley's recommendations, commits to 'promote and stimulate the development of liaison and diversion services', adding that 'over the next five year we expect to see the overall goal of police and court liaison and diversion services in place' (paragraphs 3.7 - 3.12; Bradley recommendations 14 and 28; *Improving Health, Supporting Justice*, 2009). Importantly, Bradley's recommendations state clearly that all police custody suites and all courts 'should have access to liaison and diversion services.'¹⁷

A significant practical development is the recent establishment of the 'mental health courts pilot' in Brighton and Stratford, east London. This is essentially an enhanced liaison and diversion scheme, based on the existing model of domestic violence and drugs courts. The key features of the scheme are briefly described in Box 2.2.

Box 2.2: Mental health courts pilot

The mental health courts pilot was launched in July 2009 at Brighton and Stratford magistrates courts. Both courts already had liaison and diversion schemes focused on higher-end mental health problems; under the pilot, these schemes have been augmented, such that they now provide five-day cover, and defendants with medium to lower-end mental health problems and those with learning disabilities are also supported. The Brighton scheme is staffed by a full-time community psychiatric nurse, with the local forensic psychiatric team on call as required; in Stratford, a psychiatrist helped by a community psychiatric nurse provides most of the cover.

Both schemes involve proactive assessment of mental health problems and learning disabilities. An assessment is undertaken whenever the scheme is alerted that a defendant may be vulnerable – for example, if the police flag up a possible need; if it emerges that a defendant on the court list is already known to health services (the schemes have access to local health records); or if a local agency informs the scheme that one of their clients is due to appear in court. The schemes are in the process of adapting a screening tool for learning disabilities.

Having conducted an initial assessment, the scheme provides a short (one to two-page) report to the court; the court then decides whether and how to proceed with prosecution. The scheme may thereafter have a further role to play, for example in accessing provision if the defendant is released on bail, or contributing to an assessment of fitness to plead. Importantly, if there is a conviction, the scheme can assist the local probation service with the preparation of the pre-sentence report, and the development of an appropriate package of support that could be included as part of a non-custodial disposal.

Information on mental health courts pilot provided by HM Courts Service

Identification of need

One of the most – if not the most – important elements of the work of liaison and diversion schemes is the identification and assessment of defendants' impairments and support needs. Measures for supporting vulnerable defendants, within or outside the criminal justice system, can be put in place only if the existence and nature of their impairments are known.

17. See Bradley (2009) recommendations 14 and 28

Ideally, a defendant's needs are identified by the police prior to or at the point of charge, and information about these will be available to the court in the police or Crown Prosecution Service case papers. Where this occurs, the court can then take action to address the identified needs, or can request a further assessment as necessary. In practice, however, the police frequently struggle to identify suspects' needs – especially learning disabilities or learning difficulties; moreover, even if any vulnerabilities have been observed by the police, this information will not necessarily be passed on to the courts.¹⁸

If the police have not alerted the court to the defendant's vulnerability, the range of other professionals involved in the court process should have opportunities to do so – including defence lawyers; prison officers (who may have observed difficulties if the defendant is on remand); Crown prosecutors (who have a duty to keep the case under continuous review); court clerks; and community or court-based probation officers. Additionally, the magistrates or judge may themselves observe that a defendant is vulnerable.¹⁹ However, learning disabilities and difficulties are largely 'hidden disabilities' with few visual or behavioural clues. Many people with such disabilities try hard to hide their impairments in order to appear competent, to protect themselves, to avoid ridicule, or to enhance their sense of self-esteem. Even if asked directly, especially by people they don't know or in a stressful environment, many people will deny they have difficulties.

Learning disabilities may be masked by other problems such as mental illness or drug or alcohol dependency, or by a heightened state of anxiety associated with court attendance. Thus criminal justice professionals involved in court proceedings should be able to refer for assessment – preferably to a well-staffed liaison and diversion scheme incorporating both mental health and learning disability specialists – any defendant who they believe may be vulnerable.

Identification of defendants support needs are likely to become more difficult if the use of 'virtual courts' is rolled out. Currently, virtual courts are being piloted in London; these entail first hearings being held via secure video link between the police station and magistrates court. While the virtual courts initiative aims to deliver faster and more efficient justice (OCJR, 2009), it can be argued that it inevitably reduces the opportunity for magistrates and others to observe defendants' vulnerabilities at first hearings.

As discussed in the Bradley report (2009), it can be particularly important that the court has access to information on a defendant's needs at the pre-sentence stage. The sentencing decision is often informed by a pre-sentence report (PSR) prepared by a probation officer. The PSR contains information about the offence and the background and circumstances of the offender, and includes recommendations for sentence. Given that probation officers are unlikely to have mental health or learning disability training, their insight into the behaviour of offenders with particular needs can be limited; and they may have difficulty identifying the most appropriate sentencing options for these individuals. It is therefore to be welcomed that the mental health professionals in the mental health courts pilot (see Box 2.2, above) contribute to the preparation of PSRs.

In addition to a PSR, a court can request a psychiatric report at the pre-sentence stage, or indeed at any other stage of the proceedings. However, courts are frequently deterred from making such requests by the associated costs and, particularly, delays; in addition, questions have been raised about the quality and appropriateness of many psychiatric reports (as noted, for example, by Bradley, 2009; see also paragraph 3.6, *Improving Health, Supporting Justice*, 2009). An initiative that sought to overcome these difficulties was the 'South west courts mental health assessment and advice pilot', which covered Crown and magistrates courts in Bath, Bristol and Hampshire. The project involved the establishment of a service level agreement between the courts and a mental health provider, under

18. See Jacobson (2008) for a review of the research in this area.

19. See Nacro (undated) for a discussion of the roles – and requisite skills – of different professionals with respect to mentally disordered defendants.

which the provider delivered screening for mental health problems, full assessments and advice to the courts.²⁰ An evaluation found favourable results including fewer delays in the provision of mental health advice; an increase in the number of defendants identified as having mental health problems; and an improved service for these defendants. The project did not include specialist learning disability workers, but called for assistance from such workers where appropriate (HMCS, 2009c).

Support in the courtroom

When a court case goes ahead following the identification of a defendant's needs, various steps can be taken to maximise his chances of participating effectively in proceedings. (As discussed in Chapter 1, 'effective participation' is generally deemed the key criterion for a fair trial.)

Protection and support for vulnerable witnesses in court has been significantly enhanced over the past ten years. Most notably, Part II of the Youth Justice and Criminal Evidence Act 1999 provides for a range of 'special measures' to assist vulnerable and intimidated witnesses – that is, witnesses who are under 17 or have a mental disorder and/or learning disability, or have a physical disability or disorder. Section 16 of this Act made it explicit that these measures were not designed to cover vulnerable defendants: 'For the purposes of this chapter a witness in criminal proceedings (other than the accused) is eligible for assistance ...'.

The special measures are intended to reduce the stresses associated with the court environment so that the individual can give his best evidence. They include the use of screens so that the defendant does not see the witness (section 23); the provision of evidence via a live television link (s. 24); clearing the public gallery so that evidence can be given in private (s. 25); and the removal of wigs and gowns in court (s. 26). Section 29 of the Act also provides for 'intermediaries' – usually speech and language therapists by profession – to facilitate communication between the court and the witness by playing a role analogous to that of an interpreter.²¹

Courtroom measures for vulnerable defendants

The fact that vulnerable defendants do not have the same statutory entitlement as vulnerable witnesses to the full range of special measures has been a cause of concern. Hoyano (2001), for example, has argued that this asymmetry of provision could contravene the Article 6 right to a fair trial. In a Home Office review of the impact of special measures, Burton et al (2006) found that in some cases special measures were not requested for a vulnerable prosecution witness in the interests of parity of treatment, because the defendant was also vulnerable but was not be entitled to the same support.

Perhaps in response to these concerns, some steps have recently been taken towards the extension of special measures to defendants. Section 47 of the Police and Justice Act 2006 amends the special measures provisions to allow a 'vulnerable accused' aged 18 or over to give evidence to the court by a live television link, where certain conditions are met. Under the provisions of the new Coroners and Justice Act the statutory right to support from an intermediary in court has been extended to vulnerable adult defendants whose ability to give evidence is limited. However, this right to support will extend only to the giving of evidence by the defendant; the defendant will not be entitled to help with communication throughout the trial.

20. In the case of Bristol magistrates' court but not the other courts, the project built on an existing liaison and diversion scheme.
21. See Plotnikoff and Woolfson (2007) for an evaluation of the piloting of intermediaries in six pathfinder areas; see also the CJS guidance manual on intermediaries (CJS, 2005).

Prior to this legislative development, courts have occasionally appointed intermediaries to assist vulnerable defendants; the procedural guidance manual on intermediaries notes that 'in light of the European Court of Human Rights judgment in *SC v UK* it may be appropriate, in certain circumstances, to consider use of an intermediary for defendants with communication needs (CJS, 2005: 7). In a recent High Court ruling, it was established that while the youth court did not have a statutory power to appoint an intermediary, it had a duty to do so under Common Law and the Criminal Procedure Rules 2005²² if this was 'necessary to ensure a young defendant had a fair trial and could participate effectively'.²³

The Lord Chief Justice issued a practice direction in April 2007 which outlines a range of measures that should be adopted by the criminal courts, where appropriate, 'to assist a vulnerable defendant to understand and participate in ... proceedings' (III.30.3). A vulnerable defendant is defined as one who has a mental disorder (according to the 2007 Mental Health Act definition) or 'some other significant impairment of intelligence and social function' (III.30.1). (Child defendants are also defined as vulnerable.) The practice direction does not have the force of law, but is, in effect, a set of guidelines for the judiciary. It goes so far as to recommend that 'the ordinary trial process should, so far as necessary, be adapted' for the purpose of helping a vulnerable defendant understand and participate in the proceedings (III.30.3).

Most of the specific measures recommended by the practice direction (paragraphs III.30.9-III.30.18) are aimed at making the court environment less intimidating for vulnerable defendants and include, for example:

- arranging for the defendant to visit the courtroom before the trial or hearing, so he can familiarise himself with it
- enlisting the support of the police to ensure that the defendant is not, when attending court, exposed to intimidation, vilification or abuse
- 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 his family and/or other supporting adults, and in a place where he can easily communicate with his legal representatives
- removal of robes and wigs in the crown court
- restricting attendance by members of the public, and reporters.

Overall, therefore, there is scope for a variety of measures to be put in place to support vulnerable adult defendants in the courtroom; for some examples of how this can work in practice, see the description of the Liverpool Investigations Support Unit in Box 2.3. However, in terms of statutory provision, there is no parity between vulnerable witnesses and vulnerable defendants.

16 22. Under r.3.10(b) of the Criminal Procedure Rules, the court is required to consider arrangements which facilitate the participation of the defendant.

23. *R (on the application of C) v Sevenoaks Youth Court* (2009), QBD (Admin) 3//11/09.

Box 2.3: Investigations Support Unit, Liverpool

The Investigations Support Unit (ISU) of Liverpool City Council was established in 1997 to help prepare witnesses with learning disabilities for appearing in court, and to help the courts minimise the difficulties they are likely to encounter – for example, by providing advice on the kinds of language or questions that should be avoided in court, and practical adjustments that can be made to the court arrangements.

In addition to supporting witnesses the ISU has provided assistance for five defendants who had various forms of learning disability and additional difficulties including cerebral palsy, hearing loss and mental illness. All the cases involved serious alleged offences, including rape and murder. Measures introduced included:

- the placing of a screen in front of a defendant, to help him to focus on the trial
- provision of a place to sleep for a defendant every lunchtime during the trial
- provision of lip speakers to assist the defendant with hearing loss.

In addition, the ISU team helped to explain key concepts such as ‘plea’ and ‘sentence’ to the defendants. In two of the cases, this helped the defendants to understand the compelling nature and extent of the prosecution evidence and the implications of entering guilty pleas.

The outcomes of the cases were three acquittals, two guilty pleas and one conviction. (One defendant was involved in two separate cases.) Two of the defendants had, prior to the ISU’s involvement, been seen as ‘unfit to plead’ – demonstrating that the provision of appropriate support for defendants with learning disabilities can allow justice to be done where otherwise it might not be. However, resource constraints have meant that the ISU has been unable to continue working with defendants.

Case study material provided by the Liverpool ISU

Communication

For a defendant with learning disabilities or related needs, communication difficulties can be the greatest impediment to effective participation in court proceedings. These problems can be manifest both in a defendant’s limited understanding of what is being said in court by the judge or magistrates, lawyers and others, and in any difficulties he faces in making himself understood. This is illustrated by the comments in Box 2.4 by prisoners with learning disabilities and learning difficulties who were interviewed for the *No One Knows* report *Prisoners’Voices* (Talbot, 2008).

The importance of communication is covered by the practice direction’s recommendations for assisting vulnerable defendants:

At the beginning of the proceedings the court should ensure that what is to take place has been explained to a vulnerable defendant in terms he can understand ...Throughout the trial the court should continue to ensure, by any appropriate means, that the defendant understands what is happening and what has been said by those on the bench, the advocates and witnesses (paragraph III.30.11).

...The court should ensure, so far as practicable, that the trial is conducted in simple, clear language that the defendant can understand and that cross-examination is conducted by questions that are short and clear (III.30.12).

Box 2.4: Responses of prisoners with learning disabilities and learning difficulties to the question: ‘What would have helped in court?’

Over a third of interviewees said that the use of simpler language would have helped:

The judges don't speak English; they say these long words that I have never heard of in my life.

I didn't know what 'remanded' meant. I thought it meant I could come back later.

One fifth said more support in court would have helped, including moral and practical support:

I had a family member with me. They helped by just being there.

I had my foster mum there; she was like an appropriate adult really.

The solicitor told me what was going on, as I couldn't understand half of it.

Around one in ten said they had difficulties expressing themselves and felt rushed:

I am not good at speaking and they don't listen. I needed more time to explain myself.

Two interviewees told how their support needs had not adequately been met:

I explained in the car to my solicitor about my speech, as I have a bad stutter. I didn't give evidence because of that; as if I'm nervous it begins to get worse. I should have given evidence, as my solicitor didn't tell the judge everything that I wanted him to say.

Because I have special needs I can't just send a note to my QC, and so I was stuffed if I didn't agree with what they were saying.

Notwithstanding the obvious importance of tailoring the language used in court to the level of understanding of the defendant, research suggests that lawyers and judges often fail to do so (Murphy et al, forthcoming). It is essential that a defendant fully understands any questions posed to him during cross-examination, and that he has the capacity to answer the questions. Researchers have noted that particular difficulties can arise in the cross-examination of defendants (and witnesses) with learning disabilities, who may be prone to suggestibility and acquiescence²⁴; hence ‘suggestive or leading questions put a learning disabled defendant in an unfair position’ (CSIP, 2007: 20).²⁵

There are certain relatively straightforward steps that can assist communication with people with learning disabilities, as are highlighted in the Care Services Improvement Partnership (CSIP) handbook for criminal justice professionals (2007), for example:

- use of visual aids (drawings, photos, a calendar for dates) and clear, simple, slow, focused language (spoken or written)
- avoidance of jargon
- emphasising key words and use of concrete rather than abstract terms
- breaking large chunks of information into smaller chunks

24. ‘Suggestibility’ can be defined as readiness to accept and act on suggestions by others; ‘acquiescence’ refers to a tendency to agree, passively, with a statement or proposal.

25. See Kebbell et al (2001) for a discussion of the difficulties faced by witnesses with learning disabilities during cross-examination.

- preparing the individual for each new phase of the communication
- being patient and calm while communicating
- use of open-ended rather than closed questions, and avoidance of double-negative and vague questions.

A number of other publications are also available; in particular The Equal Treatment Bench Book, published by the Judicial Studies Board, which includes a section on mental disability, including learning disabilities, and in 2008 was updated to include guidance on specific learning difficulties.

Others, for example, include:

- *Good Practice Guide for Justice Professionals: guidelines for supporting clients and users of the justice system who have dyslexia and other specific learning disabilities* (British Dyslexia Association and DANDA)
- *Autism: a guide for criminal justice professionals* (The National Autistic Society).

Training

Overcoming a defendant's communication difficulties in court is in large part a matter of the discretion, awareness and skills of the professionals involved in the court process. Training for magistrates and judges, and other legal professionals, can help them to develop a greater awareness of how to overcome some of the communication difficulties that defendants experience including when it is necessary to call for specialist help, for example from an intermediary. Some relevant training initiatives have been introduced in recent years: for example, the magistrates' training programme covers the need for understanding 'how vulnerable people and those with special needs can be disadvantaged in the court process and what actions can be taken by the court to address this disadvantage and minimise its effect' (Judicial Studies Board, 2003: 17).

However, it would be unrealistic to expect short training courses to equip magistrates and judges, and other legal professionals, with the requisite skills to engage effectively with all defendants with communication difficulties, in particular people with learning disabilities, and the need to call for specialist help will often remain. Further, many of the existing training initiatives tend to be focussed on the needs of vulnerable witnesses and do not necessarily take account of the needs of vulnerable defendants.

3. Outcomes

This chapter is concerned with ‘outcomes’ of criminal proceedings, in terms of possible diversion away from the criminal justice system; disposals under the Mental Health Act 1983; remand decisions; and sentencing. With respect to sentencing, the focus is on community sentencing only, since the issue of custodial sentencing of defendants with learning disabilities has largely been covered by other parts of the Prison Reform Trust’s *No One Knows* programme (Talbot, 2008).

Diversion away from the criminal justice system

As noted in the previous chapter, the term ‘diversion’ does not solely imply a vulnerable defendant’s diversion away from the criminal justice system; but it is this narrower sense of ‘diversion away from’ that is under discussion here. Home Office policy, as set out in circulars 66/90 and 12/95 (Home Office, 1990; Home Office/Department of Health 1995), is that the diversion of mentally disordered offenders into health or social care should be considered as alternatives to prosecution and punishment by the criminal justice system. Existing policy on diversion tends to focus on mental health problems; and some forms of diversion, such as diversion into treatment under the Mental Health Act 1983, are clearly most applicable to defendants with mental health needs. However, defendants with learning disabilities can also be diverted from the criminal justice system.

Diversion can occur at any stage of the criminal justice process from pre-arrest to post-conviction. For example, a suspect who voluntarily engages with support services in the community, following the discontinuance of his case, can be said to have been diverted; as can an offender who, having been convicted of an offence, is compulsorily admitted for treatment under a Mental Health Act hospital order (see below for more on hospital orders).

The emergence of the inclusion agenda with respect to people with disabilities (see Chapter 1) arguably forces a rethink of the policy emphasis on diversion in the Home Office circulars of the 1990s. To the extent that inclusion is seen as a valid aim of criminal justice policy, there may be a presumption in favour of suspects with learning disabilities and mental health problems, where possible, being subject to the full range of disposal options as their non-disabled peers, for example from no further action being taken by the police through to charge and prosecution in the courts – on the grounds that one aspect of being ‘included’ in society is being held to account for wrongful actions. Another way of viewing this is that the concept of ‘inclusion’ brings duties as well as rights – including the duty to abide by the law; and people with disabilities who do not abide by the law can expect to be subjected to the same due process, with the necessary support, as anyone else (Talbot, 2008: 72).

From the point of view of the individual suspect, diversion away from the criminal justice system may bring certain benefits, but it also carries risks – and not just in the abstract sense that one is being ‘excluded’ from the wider society of which the criminal justice system is an integral part. Most obviously, where a suspect is diverted prior to appearing in court, he will be denied the opportunity to assert his innocence; and he might even find himself subjected to compulsory mental health treatment addressing criminal behaviour that has not been proven. Conversely, in the view of many healthcare professionals, the process of criminal prosecution can be beneficial for offenders with mild learning disabilities in that it can help to advance their understanding of the impact of offending behaviour and to motivate behavioural change (Morgan and Boer, 2006). However, whether a custodial disposal is appropriate for vulnerable offenders raises a number of concerns, not least the

availability of specialist treatment and support from qualified staff; awareness training for prison staff, and the extent to which prisons are compliant with their duties under the Disability Discrimination Act, see for example Talbot (2008).

Thus the decision to divert a mentally disordered suspect away from the criminal justice system is unlikely to be straightforward, but will involve many different considerations. The following factors may be taken into account in any such decision:

- the nature and severity of the individual's learning disabilities: particularly, whether or not they are so severe as to render it impossible for the suspect to participate effectively in court proceedings and to be held responsible for his actions
- the nature and seriousness of the (alleged) offence, and any associated risk to the public (in cases of low-level offending, for example, informal diversion at the point of arrest is a relatively straightforward option)
- the potential benefits and risks for the suspect (in terms of general welfare and his capacity to address his offending behaviour) associated with the available criminal justice and alternative disposals.

Mental Health Act disposals

Part III of the Mental Health Act (MHA) 1983, as amended by the Mental Health Act 2007,²⁶ allows mentally disordered defendants to be diverted from the criminal justice system into compulsory treatment by the healthcare system either before or after conviction. As noted in Chapter 1, the 2007 Act defines mental disorder as 'any disorder or disability of the mind' (section 1(2)). It is specified, however, that for many of the provisions of the Act, including the Part III provisions discussed here, a person with learning disabilities should not be considered mentally disordered unless the 'disability is associated with abnormally aggressive or seriously irresponsible conduct on his part' (s. 2(2)). Learning disability is defined in the Act as 'a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning' (s.2(3)).

The key disposals under the Mental Health Act 1983 for mentally disordered defendants are set out in Box 3.1.

Box 3.1: Key disposals for mentally disordered defendants, Mental Health Act 1983

- 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 (section 37).²⁷ 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 was charged. A hospital order can be for up to six months' duration in the first instance, but it can be renewed; thus, unlike most criminal justice disposals, it is essentially indeterminate.
- Under a guardianship order, the defendant is placed under the responsibility of a local authority or a person approved by the local authority (s. 37). 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.
- 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 (s. 38).
- 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' (s.41). The order places limits on the individual's discharge from hospital.

Remand decisions

When a defendant appears in court for the first time following charge, the magistrates must decide whether to remand him on bail or in custody, unless the case is dealt with at the first hearing (or is discontinued). The court has a duty to reconsider its initial decision to remand on bail or in custody at each subsequent stage of the proceedings. Like all defendants, those who have learning disabilities or other needs have a right to bail unless one or more of various specified exceptions to bail apply. The major exceptions are where there are substantial grounds for believing that the defendant, if released on bail, would fail to surrender to custody, commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice.

There are other exceptions that are likely to come into consideration when the defendant is vulnerable. Notably, a remand in custody is permissible if the court believes the defendant needs to be detained for his own protection from harm, including self-harm. Additionally, a defendant can be remanded if an assessment of his mental capacity is required but would be impossible to complete if the individual were at liberty. As noted by Nacro (undated), concerns such as a defendant's homelessness or the instability of his lifestyle may also be considered in a remand decision. Although these factors are not in themselves grounds for refusing bail, they may be deemed to enhance the risk that the defendant will subsequently fail to appear in court, or the risk of harm (to self or others) that the defendant poses. More generally, Bradley has commented critically, magistrates may be inclined to view prison as 'a speedy and reliable "place of safety" for vulnerable individuals presenting at court' (2009: 61). It has also been observed that, due to the difficulties courts face in obtaining full and accurate information about defendants' needs, there is significant over-use of custodial remand for the purpose of facilitating psychiatric assessments (see Rickford and Edgar, 2005).

27. This requirement for appropriate and available treatment further restricts the applicability of the hospital order provision to defendants with learning disabilities, since many such disabilities may not be amenable to treatment.

The Mental Health Act 1983 includes provisions for remanding a mentally disordered defendant in hospital, as an alternative to custody – either for a report on his mental condition to be prepared (section 35), or for treatment pending trial or sentence (s. 36; only the crown court can remand for treatment). It has been argued that, in practice, limited availability of hospital places has resulted in numbers of mentally disordered defendants being inappropriately remanded to custody, since ‘prisons are one of the few institutions that cannot turn their service-users away when resources are stretched’ (Player, 2007: 420).

When a defendant is granted bail, there may be conditions attached to this such as residence at ‘approved premises’. Approved premises provide supported and supervised accommodation and may be considered suitable for vulnerable defendants who might otherwise be remanded in custody. However, there is evidence that the provision of mental health services at approved premises is inadequate (as noted by Bradley, 2009), and hence the extent to which they provide a realistic alternative to custodial remand is probably limited at present.

Community sentences

A vulnerable adult defendant who is convicted of an offence, and is not diverted from the criminal justice system at this stage through a Mental Health Act disposal, faces the same range of possible disposals as any other adult offender. These include the community order, which can be passed for an offence which is not so serious as to make custody unavoidable, but merits a more severe disposal than, for example, a fine or discharge.

A community order is a generic community-based penalty, to which one or more of up to twelve conditions or requirements can be attached. The sentence, which can be passed by both the magistrates courts and crown court, was created by section 177 of the Criminal Justice Act 2003, and is intended to be a more flexible sentencing tool than the pre-existing community penalties. The conditions that can be attached to a community order are the following:

- unpaid work
- activity (including education, training)
- programme (group or individual programmes tackling the causes of the offending behaviour)
- prohibited activity
- curfew
- exclusion (from a specified area or areas)
- residence at a specified place
- mental health treatment
- drug rehabilitation
- alcohol treatment
- supervision (involving regular appointments with a probation officer)
- attendance centre (for 18 to 24-year-olds; addressing offending behaviour in a group setting).

The range of conditions that can be attached to a community order provides scope for addressing the specific needs of vulnerable defendants. For an offender with mental health problems that may be responsive to treatment, a mental health treatment requirement (MHTR) could stipulate residential or non-residential treatment under the direction of a psychiatrist or chartered psychologist. An activity requirement could entail the offender’s participation in a basic skills or other educational course at a specified place, which might be appropriate if the individual has learning disabilities or difficulties and the course is tailored to his needs.

Clearly, if a court is to identify appropriate and effective requirements for a community order, it needs good information both about the individual offender's needs and about the availability of local services. One element of the mental health courts pilot (described in Box 2.2 in the previous chapter) is that its staff contribute to the preparation of pre-sentence reports, and in so doing help to develop holistic, tailored packages of support and supervision that can be attached, where appropriate, to community orders.

There are, however, limitations to the application of certain kinds of community order requirement to vulnerable defendants. For example, a 'programme' requirement entails the offender's participation in a specified programme targeting his offending behaviour or the problems underlying that behaviour. The court cannot make this requirement unless it is satisfied that the programme is suitable for the offender; but most programmes (including those based in prison as well as the community) are inaccessible to offenders with learning disabilities and many with learning difficulties because of the complexity of the issues addressed and the level of participation required of attendees (Talbot, 2007).²⁸ In some cases, mental health problems may also preclude participation in offending behaviour programmes.

The mental health treatment requirement has to date been infrequently used: a review by the National Audit Office of 302 orders found that in only 6% of cases was this requirement included, and in all these cases the requirement involved the incorporation of existing treatment within the order, rather than the establishment of new treatment (National Audit Office, 2008). The infrequent use of the mental health treatment requirement may stem from sentencers' and probation officers' lack of understanding of how to implement it, their lack of awareness of offenders' mental health needs, and the narrow criteria for including the requirement in an order (the offender's mental health condition should require treatment but must not warrant a hospital or guardianship order under the Mental Health Act) (Seymour and Rutherford, 2008).

Bradley (2009) concludes from a discussion of the apparent problems associated with the mental health treatment requirement that sentencers and probation staff are in need of clear guidance on its use and availability. (See Bradley recommendations 31, 32 and 33 (2009) and paragraph 3.6, *Improving Health, Supporting Justice*, 2009.)

28. This is true, for example, of the standard version of the Sexual Offenders Treatment Programme (SOTP). An adapted version of SOTP exists in a small number of prisons and in even fewer areas in the community; but this is designed for offenders with IQs of between 65 and 80, and thus excludes many people with learning disabilities (Beech et al, undated).

4. Vulnerable adult defendants: conclusion & recommendations

There is a general recognition in the law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part. This is reflected in the right to a fair trial enshrined in Article 6 of the European Convention of Human Rights, and the case law that supports it. The requirement for effective participation is reflected also in the criteria used to determine 'fitness to plead', namely that the defendant can plead with understanding, can follow the proceedings, knows a juror can be challenged, can question the evidence, and can instruct counsel.

The implications of the principle of effective participation are that criminal prosecution may be deemed inappropriate for a defendant with learning disabilities, mental health problems or other needs. If, on the other hand, prosecution does proceed notwithstanding the defendant's needs, the court can take various practical steps to assist his participation in the proceedings. If the defendant is subsequently convicted, the court has various options for addressing the defendant's needs through the type of (criminal justice or non-criminal justice) disposal it selects.

These processes will only work well, however, if there is adequate provision of services for vulnerable defendants across, and beyond, the criminal justice system, and if the policy framework fully supports these services. The review of provision over the preceding chapters of this report suggests that this is not necessarily the case. Particular areas of concern include local agencies' lack of capacity for screening and assessing defendants' needs – reflecting, in part, the wider problem of courts' limited access to liaison and diversion schemes. Other issues are that vulnerable defendants are not afforded the same assistance as vulnerable witnesses in court; and that, in both policy and practice, the needs of defendants with mental health problems tend to be prioritised over the needs of those with learning disabilities.

Below, seven recommendations are outlined for improving provision for vulnerable adult defendants. The recommendations are not aimed at securing favourable treatment for these defendants; the focus is on fair and proportionate treatment. The overall aims are, first, to ensure that, wherever possible, defendants can participate effectively in court proceedings, thus allowing justice to be done; and, secondly, to ensure that the defendants' needs are adequately addressed both within and outside the criminal justice system, thus reducing risks of future offending as well as protecting the individual's rights and welfare.

The recommendations should contribute to the development of criminal justice policy and practice that is more inclusive than it hitherto has been. In this context, there are three key dimensions to the concept of 'inclusion':

- First, individuals who have learning disabilities, mental health problems or other disabilities should be held accountable for their actions as are other members of society.
- Secondly, this accountability extends to a presumption that they will be subject to the full range of disposal options as their non-disabled peers provided that their needs are not so severe as to render them unfit to plead and/or unable to participate effectively in court proceedings; and provided also that prosecution is in the public interest.

- Thirdly, when they are prosecuted, the criminal justice process should be adapted and appropriate support made available so as to make it possible for them to participate effectively.

Where these principles are followed, vulnerable adult defendants will receive the same fair and proportionate treatment as their non-disabled peers. But this will not be achieved unless and until the range of criminal justice agencies and health and social care services work together to achieve these common goals. The concept of a more inclusive criminal justice process should, moreover, be understood to incorporate vulnerable victims, witnesses and defendants alike.

The seven recommendations are:

1. There should be a review of the policy framework for supporting vulnerable adult defendants, with the aims of:
 - o developing clearer principles for determining the circumstances under which the criminal prosecution of a defendant should and should not be continued
 - o revising the fitness to plead criteria
 - o establishing parity in statutory support for vulnerable witnesses and vulnerable defendants
 - o ensuring that policy responses to 'mentally disordered' defendants take into account specific concerns relating to learning disability as well as mental health problems.
2. Every court should have access to a local liaison and diversion scheme. All liaison and diversion schemes should have input from, or at a minimum direct access to, learning disability specialists, and should perform the following functions:
 - o screening and assessment/referral for assessment of defendants' needs
 - o facilitate access to health and social care services (alongside or as an alternative to criminal prosecution, as appropriate)
 - o advise courts on measures for supporting vulnerable defendants in the courtroom
 - o contribute to the development and implementation of court disposals.
3. Improved systems for screening and assessing defendants' needs should be introduced. These systems should be implemented by liaison and diversion schemes (as above) and entail:
 - o screening when any party raises a concern about a defendant, at any stage in the court process
 - o referral for timely, full assessments (including psychiatric assessments) as required
 - o systematic reporting of screening/assessment findings to the courts, including in pre-sentence reports.
4. Judges and magistrates should receive training on the range of impairments (including learning disabilities) that defendants may experience, the implications of these impairments for the criminal justice process, and methods by which vulnerable defendants' participation in court proceedings can be enhanced.

5. HM Courts Service should ensure that all its provision complies with the Disability Discrimination Act, such that courts are fully accessible to vulnerable defendants (as well as to all other court users who are vulnerable), and these defendants receive the practical support and assistance they require in order to participate effectively in proceedings. A review of HM Courts Service compliance with the Disability Discrimination Act should be undertaken.
6. In order to minimise the use of custodial remand for vulnerable defendants, community healthcare and other support services for defendants on bail, and provision for hospital remands, should be extended. Improved access to psychiatric and other assessments (see recommendation 3) should also help to reduce custodial remands of vulnerable defendants.
7. There should be greater and more flexible use of the community order in sentencing vulnerable defendants,²⁹ ensuring full compliance with the Disability Discrimination Act and particularly the Disability Equality Duty. This can be achieved by making 'activity' and 'programme' requirements fully accessible to offenders with learning disabilities and mental health needs, and broadening the scope of the mental health treatment requirement.

29. See also Talbot, 2008, pages 72-73.

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PART II: child defendants

Summary

Main points

- In England and Wales, the age of criminal responsibility is 10; this means that only children aged 10 and over can be found guilty of committing an offence. In most other European jurisdictions, the age of criminal responsibility is 14 to 15. The UN Committee on the Rights of the Child has stated that an age of criminal responsibility below 12 is 'not acceptable'.
- The principle of *doli incapax*, under which children aged under 14 had partial exemption from criminal liability on the grounds that they did not fully understand the difference between right and wrong, was abolished in 1998.
- All children who appear in the criminal courts are vulnerable because of their young age and developmental immaturity. Many of these children are doubly vulnerable: there are high levels of mental health problems, learning disabilities, learning difficulties, and communication difficulties among children who appear before the courts; large numbers of children within the youth justice system have also experienced abuse, and many have been in care.
- A review of the youth justice system should be conducted, with a particular focus on the needs and rights of child defendants, and the aim of developing a welfare-based approach to addressing offending by children within which the interests of the child will be paramount, and the particular vulnerabilities of child defendants are effectively addressed.
- Screening of child defendants to identify possible impairments and support needs is not routinely carried out. Where children are screened and/or assessed, this generally does not include for learning disabilities and communication difficulties. Where assessments are lacking or inadequate, sentencers cannot tailor disposals to defendants needs.
- Within both the youth and crown court, proceedings and the physical structure of courtrooms can be modified to facilitate the engagement of child defendants, and to minimise their sense of intimidation and distress.
- Despite the extension of courtroom assistance for child defendants over the past decade, child defendants do not have the same statutory rights to help and support as child witnesses.
- Criminal justice professionals who work with children, including crown court judges, district judges, magistrates and lawyers, have access to little, if any, formal training on child welfare and development, mental health problems, learning disabilities and speech and language difficulties. There is no system of accreditation for criminal lawyers who work with children.

In England and Wales, the youth justice system deals with children aged between 10 and 17 who have offended or are alleged to have offended. The age of criminal responsibility – 10 years – is considerably younger in this jurisdiction than it is in most others. In most other European jurisdictions, for example, the age of criminal responsibility is 14 to 15 years. The low age of criminal responsibility in England and Wales conflicts with the UN Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the 'Beijing Rules'); and the UN Committee on the Rights of the Child has urged this jurisdiction to raise the age.

Most criminal cases involving children are dealt with by the youth court, which is a specialised form of magistrates court. Under certain circumstances, such as where the alleged offence is very serious, or where the co-defendants are adults, children can appear in adult magistrates courts and the crown court.

Many children who appear in court find the experience extremely stressful and confusing. International research into the experiences of child defendants has found the following to be common problems across jurisdictions:

- extremely limited and often misleading knowledge of criminal courts
- failure to separate the defence lawyer's function from court authority
- tendency to think of legal rights as 'conditional' – that is, that they can be withdrawn
- widespread assumption that, once charged, a defendant must prove his or her innocence of a crime
- failure to consider long-term consequences such that, for example, young defendants may not foresee the consequences of waiving legal rights.

The difficulties encountered by child defendants are often compounded by mental health problems, learning disabilities and difficulties, and communication difficulties. Needs relating to, or following from, experiences of abuse are also common among children in the youth justice system. Thus children who offend are often doubly vulnerable: that is, they are disadvantaged within the youth justice system not only by virtue of their young age and developmental immaturity, but also because they have mental health, psychological, emotional or other needs. At present, however, there is inadequate screening and assessment of the needs of children who enter the youth justice system. Child defendants are not routinely screened and the assessments carried out by youth offending teams, using the structured Asset assessment tool, do not involve screening for learning disabilities, learning difficulties or communication needs. Thus sentencers frequently pass sentence without the information they require if they are to tailor the disposal to the needs of the defendant, which in turn may place the child at risk of not complying, or being unable to comply, with the requirements of his sentence.

The past decade has seen the establishment of a variety of initiatives aimed at supporting child defendants in the courtroom. In 2000, the then Lord Chief Justice issued a crown court practice direction which aimed to maximise the capacity of child defendants to participate effectively, and to minimise their sense of intimidation and distress. Among other issues, it emphasised that proceedings should be explained to defendants; that trials should be conducted in a language that the defendants could understand; and that courtrooms should be arranged so that all participants are on the same level. These principles were extended to the youth court by *A Good Practice Guide for the Youth Court*, issued jointly by the Home Office and Lord Chancellor's Department in 2001. More recent developments include statutory provision for child defendants to give evidence via a live television link.

However, youth justice practitioners and campaigners have continued to argue that there is insufficient support for child defendants within the courtroom. A particularly contentious issue is the perceived asymmetry between support for child witnesses and that for child defendants. A Home Office proposal to develop a 'young defendants' pack' for all child defendants, containing comprehensive information about court procedures and their legal rights, appears to have been shelved. Another concern is that little specialist training is available for criminal justice professionals who work with child defendants.

In short, policy responses to children who are alleged to have offended can be described as ambiguous. On the one hand, as children – and, very often, evidently the most vulnerable children in society – they are deemed to be in need of extensive help and protection. On the other hand, as children who are alleged to have broken the law, they are held accountable for their actions through the criminal justice process, which means they are subject to an adversarial system that prioritises the finding of guilt or

innocence and sentencing for a particular offence. Although the welfare of the child must, by law, be considered in sentencing, it is not the prime consideration of the court, or of those professionals involved with the court system.

Many who work in the field of youth justice are convinced that the adversarial court system of England and Wales is inappropriate as a means of addressing the wrongdoing of children, and that children who commit offences should be dealt with through a welfare-based approach. A welfare-based approach to offending by children does not imply that the harms caused by the offending should be overlooked, but seeks to address harmful behaviour by responding to the child's welfare needs – on the assumption that these needs are likely to be at the heart of the offending behaviour. This approach may entail removing many children from the ambit of the formal justice system by raising the age of criminal responsibility. It also means ensuring that all children who are alleged to have offended have access to the range of health and social care services they require if their welfare is to be safeguarded – whether they are formally prosecuted or not. And with respect to those who are prosecuted, it entails recognising fully the range of difficulties that they are likely to face throughout the court process, and taking steps to address them.

Ten recommendations which aim to promote a welfare-based approach to tackling wrongdoing by children, and to improve provision for those children who have to appear before the courts, are outlined below.

1. A government-led review should be established to examine the effectiveness of the youth justice system and consult on the needs and rights of child defendants.* The aim of the review would be to develop proposals for a welfare-based system of addressing offending by children; that is, a system within which:
 - o the interests of the child are treated as paramount
 - o all children who are alleged to have offended, whether or not they are formally prosecuted, have access to the health and social care services they require in order that their welfare is safeguarded
 - o where children are prosecuted, their needs are addressed throughout the justice process, thereby ensuring that their legal and human rights are protected
 - o it is recognised that children within the justice system are often doubly vulnerable – by virtue of their young age and problems relating to mental health, learning disabilities or difficulties, or other needs.
2. The age of criminal responsibility in England and Wales should be reviewed with a view to raising it at least to the UN Committee on the Rights of the Child recommended minimum of 12 years and preferably to the European norm of 14 years. Meanwhile the principle of *doli incapax* (the presumption that children aged from 10 to 14 lack the understanding to be criminally responsible) should be re-established, and the use of imprisonment for those aged under 14 should be abolished in favour of welfare disposals.
3. The current structure for hearing serious cases involving child defendants in the crown court should be reformed, through the establishment of a new form of youth court constituted by a judge of an appropriate level and magistrates, or a middle tier court allowing for trial by jury of serious youth crime, under the direction of a crown court judge. The new form or tier of youth court should also have jurisdiction for fitness to plead hearings.
4. There should be partial integration of the family and criminal courts, to permit a more flexible and holistic response to child defendants - for example, including the transfer of cases from the criminal to the family jurisdiction.

* This recommendation echoes that of the Bradley Review that 'The Government should undertake a review to examine the potential for early intervention and diversion for children and young people with mental health problems or learning disabilities who have offended or are at risk of offending, with the aim of bringing forward appropriate recommendations which are consistent with this wider review' (Bradley, 2009: 33).

5. All courts should have access to liaison and diversion schemes which will:
 - o undertake screening for mental health problems, learning disabilities and communication difficulties of all children arrested by the police
 - o facilitate subsequent full assessment of children with identified needs, and all children charged with very serious offences – this assessment should encompass psychological and psychiatric components, and the full range of risk factors relating to health and social circumstances; it should also link to YOT assessments
 - o facilitate, as appropriate, diversion out of the youth justice system and into health and social care; and access to mainstream health and social care services
 - o assist the development of bail support packages.
6. There should be parity in the treatment of child witnesses and child defendants. All child defendants should automatically be assumed to be ‘vulnerable’, and should be entitled to the same support and assistance in the courtroom as child witnesses.
7. HM Courts Service should ensure that all its provision complies with the Disability Discrimination Act, such that courts are fully accessible to child defendants with learning disabilities, learning difficulties and other support needs, and that these defendants receive the practical support and assistance they require in order to participate effectively in proceedings. A review of HM Courts Service compliance with the Disability Discrimination Act should be undertaken.
8. The government commitment to developing a young defendants’ pack should be revived and implemented. The pack should be fully accessible to all child defendants and provide clear, factual information about the various components of the criminal justice process, including what happens at court, and the rights and responsibilities of defendants within that process. As part of implementation of the pack, systems should be established for distributing it and working through the material with child defendants.
9. Training should be undertaken by all professionals working with child defendants – including the judiciary (in both the youth and crown court), lawyers, courts and Crown Prosecution Service staff, and police officers. This training should:
 - o have a child development focus, and encompass the welfare, mental health, learning and communication needs of child defendants – in relation to needs assessment, implications for legal and human rights, and appropriateness and availability of interventions
 - o be delivered in partnership settings where possible, or through multi-agency conferences and seminars, while other elements should be tailored to particular professional groups
 - o incorporate a system of accreditation for defence lawyers representing children, and a clear and consistent set of requirements for Criminal Records Bureau checks for legal practitioners and others working with child defendants.
10. There should be legislative change to introduce a higher custody threshold for children to ensure that custody is reserved for serious, violent offenders. Pending new legislation, and building on the Sentencing Guidelines Council guideline on sentencing youths, there should be further clarification of the custody threshold for children to ensure that the use of custody is generally reserved for serious, violent offenders; close monitoring of sentencing practice should be undertaken to ensure that the custody threshold is consistently applied. A clearer and more stringent definition of ‘persistent’ offending should be developed; and narrower criteria should be established for the imposition of custody for a breach of a community order or licence conditions.

5. Child defendants in court

This chapter sets the broad context for the subsequent discussion of provision, and gaps in provision, for child defendants.³⁰ It discusses the particular needs and vulnerability of children, the components of the criminal courts system as it applies to child defendants, and the age of criminal responsibility and related issues.

Profile of child defendants

This report on provision is informed by the presumption that all children in the youth justice system are vulnerable by virtue of their young age and developmental immaturity. Many are, in fact, doubly vulnerable: that is, they are disadvantaged also because they experience a range of impairments and emotional difficulties. It is well established that there are high levels of mental health problems, communication difficulties, learning disabilities and learning difficulties among children who come into contact with the youth justice system.

Mental health problems

On the basis of an international literature review, Hagell (2002), concludes that rates of mental health problems are at least three times higher among young people in the youth justice system than within the general population of young people:

Rates of mental health problems in the general population of adolescents have been estimated at 13% for girls and 10% for boys (11-15 years). Research suggests that prevalence of mental health problems for young people in contact with the criminal justice system range from 25 to 81%, being highest for those in custody. We concluded that a conservative estimate based on the figures in the literature would indicate the rates of mental health problems to be at least three times as high for those within the criminal justice system as within the general population. The most common disorders for both the normal population and the population of young offenders were conduct disorders, emotional disorders and attention disorders. Substance misuse is also a particular problem. (Hagell, 2002).

More recently, the prevalence of emotional and mental health needs among children in the youth justice system was assessed in the course of joint Healthcare Commission and HM Inspectorate of Probation inspections of youth offending teams (YOTs). A 2006 Healthcare Commission report notes that the 2004/5 inspection of 29 YOTs found 44% of children to have emotional or mental health needs. A subsequent inspection found 43% of children on community orders to have emotional and mental health needs (2009).

Learning disabilities and difficulties

A review in 2002 by HM Inspectorate of Prisons and the Office for Standards in Education of almost 6,000 boys screened on admission to 11 custodial establishments found that:

- 4% had attainment at pre-entry level (i.e. lower than would be expected of a 7-year-old) in numeracy, and 4% had pre-entry level attainment in literacy
- 38% had entry level attainment (i.e. the level expected of a 7-year-old) in numeracy, and 31% had entry level attainment in literacy.

30. This review of provision for child defendants raises a wide range of complex issues relating to the administration of youth justice that cannot be addressed in any depth in these pages. For a more detailed examination of these issues, readers are directed to Ashford, Chard and Redhouse's volume on youth justice law, legal practice and procedure (2006).

More recently, an assessment of young offenders in England and Wales by Harrington and Bailey (2005) found that 23% had IQs of under 70 ('extremely low') and 36% had IQs of 70-79.³¹

And in 2006 the Youth Justice Board (YJB) reported that:

- 25% of young offenders had special educational needs identified, 19% of whom had a Local Education Authority statement of special educational needs
- 46% were rated as under-achieving at school (YJB, 2006).

Communication difficulties

A number of research studies have demonstrated high numbers of children in the youth justice system with communication difficulties (RCSLT, 2008). One recent study showed that over 60% of children in the criminal justice system have a communication disability and, of this group, around half have poor or very poor communication skills (Bryan, Freer and Furlong, 2007).

In his review of services for children with speech, language and communication needs, John Bercow notes the high prevalence of these problems among children and young people who offend and argues for better responses to such needs across the youth justice system (Bercow, 2008).³²

Children in care

It has long been recognized that children who are or have been in care are over-represented among the offender population. Research commissioned by the Youth Justice Board found that 41% of children on custodial sentences had been 'held in care', while 17% were on the child protection register (Hazel et al, 2002). A more recent review found that 22% of children had been living in care at the time of their arrest and a further 6% were on the child protection register (Glover and Hibbert, 2009).

Experiences of abuse

Needs relating to, or following from, experiences of abuse are also common among children in the youth justice system; research shows that two in five girls in custody and a quarter of boys reported suffering violence at home; one in three girls and one in 20 boys in prison report sexual abuse, and half the girls in prison have been paid for sex (PRT, June 2009a).

Children and the courts

The youth court deals with almost all criminal cases in which the defendants are aged between 10 and 17. This court is a specialised form of magistrates court, in which – as in all magistrates courts – cases are heard either by magistrates or by a district judge.

The atmosphere and physical structure of the youth court are intended to be less formal than those of adult magistrates courts. The general public does not have access to the youth court, and while journalists are allowed to attend and report on proceedings, the reporting of defendants' names – or any details that could identify the defendants or other parties – is not permitted in most cases.

In certain circumstances, a case involving a defendant under the age of 18 will be heard in the crown court, rather than the youth court, although it is noted in a consultation guideline of the Sentencing Guidelines Council that: 'There is a clear principle (established both in statute and in domestic and European case law) that cases involving young offenders should be tried and sentenced in the youth court wherever possible' (SGC 2009a: paragraph 12.1).

31. Harrington and Bailey (2005) note that standardised IQ measures, such as those used in their study, are criticised for their limited capacity to differentiate between individuals with intrinsic learning difficulties and individuals with low IQ scores reflecting a lack of education.

32. As part of the Departments' of Health, and Children, Schools and Families 'Better Communication Action Plan', *Sentence Trouble*, was recently published for professionals and practitioners who work with young offenders (The Communication Trust, 2009; see also www.sentencetrouble.info)

The circumstances under which a child defendant can appear in the crown court are:

- the defendant is charged with homicide
- the defendant is charged with certain firearm offences
- the defendant is jointly charged with an adult who is to be tried in the crown court
- the magistrates decline jurisdiction on the grounds that the defendant is charged with a 'grave crime' and, if convicted, is likely to be sentenced to a period of custody of two years or more. 'Grave crimes' include any offence that, in the case of an adult, carries a sentence of at least 14 years' imprisonment, and offences of sexual assault.

In addition to the above, a case may be committed to the crown court for trial or sentence where the defendant (if convicted) is likely to be deemed 'dangerous' and to receive a sentence of detention for public protection or an extended sentence (under the dangerousness provisions of Chapter 5 of the Criminal Justice Act 2003).

Questions have been raised about the appropriateness of prosecuting children in the crown court, even under the limited circumstances set out above, because of the high level of formality and complexity associated with crown court procedures, and the stresses associated with the presence of the public in court. In 2008 the UN Committee on the Rights of the Child, in 'Concluding Observations' with regard to implementation of the UN Convention on the Rights of the Child (UNCRC) in the UK, recommended that: 'Children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts, irrespective of the gravity of the crime they are charged with' (UN, 2008: paragraph 78).

In his review of the criminal courts, Lord Justice Auld (2001) recommended that all grave cases against young defendants should be heard by a youth court constituted by a judge of an appropriate level and at least two magistrates, unless there are adult co-defendants in the case; see Box 5.1 for details. This recommendation was subsequently not accepted by the government. O'Neill (2009) suggests that a case can be made for establishing a middle tier of court which could be tailored to the needs of child defendants but would allow for the trial by jury of serious youth crime, under the direction of a crown court judge.

Box 5.1: Auld report recommendations (2001; paragraph 211)

- All cases involving young defendants who are presently committed to the crown court for trial or for sentence should in future be put before the youth court consisting, as appropriate, of a High Court Judge, Circuit Judge or Recorder sitting with at least two experienced magistrates and exercising the full jurisdiction of the present crown court for this purpose.
- The only possible exception should be those cases in which the young defendant is charged jointly with an adult and it is considered necessary in the interests of justice for them to be tried together.
- The youth court so constituted should be entitled, save where it considers that public interest demands otherwise, to hear such cases in private, as in the youth court exercising its present jurisdiction.

Non-criminal cases relating to child welfare, such as care proceedings, are dealt with by magistrates or district judges sitting in the family proceedings court. This court was established by the Children Act 1989, which split the existing Juvenile Court into two separate jurisdictions of family and youth

justice. At present, the youth court cannot refer a child to the family proceedings court, even when serious questions about the child's welfare are raised. Some commentators have called for integration between the family proceedings and youth court to ensure that welfare concerns are directly addressed, wherever necessary, during criminal proceedings (see, for example, Michael Sieff Foundation, 2002 and 2009; Royal College of Psychiatrists, 2006). An integrated, holistic and more flexible approach to prosecuting children would, it is argued, rightly take into account the fact that many child defendants tend to be 'children in need', in accordance with the Children Act 1989 definition of such children as those who are 'unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for [them] of services by a local authority' (section 17(10)(a)).

The age of criminal responsibility

In England and Wales, the age of criminal responsibility is 10; this means that a child aged under 10 cannot be found guilty of committing any offence. Until 1998, children aged under 14 had a partial exemption from criminal liability under the principle of *doli incapax*, according to which it was presumed that these children did not have a full understanding of the difference between right and wrong. Hence a child could be convicted of an offence only if the court was satisfied that he understood the act he had committed was seriously wrong – and did not view it as simply mischievous or naughty. Section 34 of the Crime and Disorder Act 1998 abolished the principle of *doli incapax*, on the grounds that it was 'contrary to common sense'. It was time, the Home Office asserted in its White Paper which preceded the Crime and Disorder Act, to 'stop making excuses for youth crime. Children above the age of criminal responsibility are generally mature enough to be accountable for their actions and the law should recognise this' (Home Office, 1997).

In most other jurisdictions, the age of criminal responsibility is considerably higher than ten: in most European countries, for example, it is 14 to 15 years. The relatively low age of responsibility in England and Wales has provoked, and continues to provoke, much concern among academics, practitioners and children's charities. It conflicts with the UN Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the 'Beijing Rules') (1985), which state that:

The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

In England and Wales, the ages at which children acquire different rights and responsibilities vary widely – as shown in Box 5.2.

Box 5.2: Ages at which legal rights and responsibilities are acquired

Vote in local or national elections	18
Buy cigarettes or alcohol	18
Leave home/get married (without parental consent)	18
Serve on a jury	18
Drive a car on the road	17
Leave home/get married (with parental consent)	16
Leave school	16
Have sexual intercourse	16
Get a part-time job (with some restrictions)	13
Be convicted of a criminal offence	10

A direction to make the age of criminal responsibility at least 12 is contained in the 'General Comment' on juvenile justice issued by the UN Committee in 2007:

A minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MAC [minimum age of criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level (UN, 2007: paragraph 32).

In its 'Concluding Observations' issued in 2008, the UN urges the United Kingdom to raise its age of criminal responsibility in line with this comment (UN, 2008: paragraph 78a).

A substantial report on child defendants by the Royal College of Psychiatrists (RCP, 2006) examines, in detail, many of the key issues relating to the age of criminal responsibility in England and Wales and the complex needs and particular vulnerability of children caught up in the justice system. The report notes that it is extremely difficult to set a definitive age of criminal responsibility, given that the processes of intellectual, emotional, social and physical development of children are highly complex, multi-faceted and uneven. An enormously wide range of factors – both environmental (such as experiences of abuse and neglect) and biological (such as genetic and neuro-cognitive deficits), and the interaction between them – can have an impact on these different aspects of development (see also, for example, Vizard, 2009).

The RCP report concludes, based on the available evidence on child development, that 'the age of criminal responsibility in England and Wales is too low by a considerable degree', and recommends that a government-led review of the issue be initiated. Recommendations from a 2009 conference on child defendants (Michael Sieff Foundation, 2009) include, similarly, a call for a royal commission or other review to be undertaken of how children are dealt with in the criminal justice system, which would include consideration of the current age of criminal responsibility.

Two further issues that are closely related to considerations of the age of criminal responsibility are, first, fitness to plead and, secondly, diminished responsibility. With regard to the former, the principle that an individual who stands trial should be 'fit to plead' applies to child defendants as it does to adults. There is, however, limited scope for addressing fitness to plead with respect to child defendants since there is no specific procedure for fitness to plead to be determined in the youth court (or magistrates courts more generally).³³ It has also been argued that fitness to plead is an adult concept that is not necessarily appropriate for children; in particular, because it centres on the issue of comprehension. Hence the 'capacity test', as established by the Mental Capacity Act 2005, or the concept of 'adjudicative competence', as applied in the United States, may be more appropriate

33. Sikand (2009) notes that there are two main options for defence advocates if they believe a child defendant may be unfit to plead. First, they can make representations to the Youth Court to decline jurisdiction on the grounds that fitness to plead should be addressed in the Crown Court (this is only possible if the offence is a grave crime and carries a sentence of 14 years or more for an adult). Secondly, under case law and relevant statutes, it is possible for the Youth Court to adjourn for a medical report if there has been a summary trial of an imprisonable offence and the court is satisfied that the accused did the act or omission, but thinks there should be an inquiry into his mental condition before the disposal is determined.

for child defendants (Vizard, 2009)³⁴ - options that are not currently available in the youth justice system. In practice (again as also tends to be true of adult defendants), formal assessments of fitness to plead tend to be undertaken only with respect to those children who are most obviously disturbed or have relatively serious learning disabilities (Royal College of Psychiatrists, 2006).

The issue of diminished responsibility, as a partial defence to murder, has come to the fore most recently in a Law Commission review of the law on homicide. Among other proposals, the Law Commission (2006) argued for a redefinition of diminished responsibility partial defence for murder which could be available to a child or young person under 18 on the grounds of 'developmental immaturity'. Some of the Law Commission's proposed amendments to diminished responsibility were incorporated in the Coroners and Justice Act 2009, however, the proposal on developmental immaturity has not, to date, been included (Toulson, 2009). The Standing Committee for Youth Justice has argued strongly in support of the Law Commission's proposal on developmental immaturity, pointing out that:

An adult of 40 years with the emotional maturity of a 10 year old ... can claim diminished responsibility if they are diagnosed as having a 'recognised medical condition', yet a 10 year old without such a recognised condition cannot succeed with the plea as their development has not been arrested, it is simply ongoing. The fact that children develop consequential reasoning as they grow older is disregarded and in this way, more is expected of children than adults (SCYJ, 2009).

6. The vulnerability of child defendants

This chapter considers the difficulties and disadvantages that child defendants may face when they appear in court. Some of the implications of these difficulties and disadvantages are then considered: namely, the importance of screening for and identifying young defendants' needs; and the scope for diverting child defendants out of the youth justice system and providing support services within the youth justice system.

The difficulties faced by child defendants

For many children, appearing in court as a defendant will be a stressful and confusing experience. It can be argued that experiences of court should be inherently demanding, since it is desirable that the defendant views the occasion as a serious event that potentially has significant repercussions for him as an individual. However, a key question is whether the degree of difficulty encountered by the child defendant is so great as to undermine, or make impossible, his proper understanding and effective participation in the process – which, as has been discussed in Part I of this report, is generally seen as critical to the individual's exercise of his right to a fair trial and, thus, to the delivery of justice.

Over the past decade, a number of measures have been introduced which are intended to reduce the stresses and complexities of court processes for child defendants and thereby enhance their capacity to understand and engage in proceedings. These measures will be discussed in the next chapter; here, the focus is on the kinds of difficulties that child defendants typically face.

Plotnikoff and Woolfson (2002) summarise the findings of international research into the experiences of child defendants, which point to the following as common problems across jurisdictions:

- extremely limited and often misleading knowledge of criminal courts
- failure to separate the defence lawyer's function from court authority
- tendency to think of legal rights as 'conditional' – that is, that they can be withdrawn
- widespread assumption that, once charged, a defendant must prove their innocence of a crime
- failure to consider long-term consequences such that, for example, young defendants may not foresee the consequences of waiving legal rights.

Plotnikoff and Woolfson also conducted interviews about court processes with child defendants and youth justice practitioners. Many of the child respondents described their behaviour in ways that graphically illustrated their active disengagement from the court process: 'At one extreme, young people told us of getting drunk or taking drugs in order to 'get through' a hearing ... Others spoke of being bored and not listening in court, or simply wanting to get court over with.' (2002: 26-7)

Practitioners spoke about young people being 'less than observers at their own trial' and 'almost completely detached from the court process', and feeling that 'court is something done to them and over which they have no control' (Plotnikoff and Woolfson, 2002: 26-7).³⁵ In a different study (Hazel et al, 2002), young offenders who were interviewed spoke of failing to relate at all to court proceedings, which typically passed in a blur; they talked also about their lack of understanding of the proceedings and the language used; about feeling isolated, confused and marginalised in court; and described sentencing as the most traumatic time – during which, at times, they could not even understand what the sentencer was saying.³⁶

35. See, also, later research by Plotnikoff and Woolfson (2009), which looked at the experiences of child witnesses and found that many of them did not understand some of the questions put to them (49% of the sample), and generally found the experience of court stressful.

36. For more on children's sense of alienation from court processes, see also the discussion in Chapter 8, below, of some of the difficulties associated with the policy emphasis on 'engagement' with child defendants.

If most child defendants find court processes confusing and difficult to understand, it can be assumed that these difficulties are compounded for the substantial numbers who – as discussed in the previous chapter – have mental health or emotional problems, or cognitive impairments of one kind or another. A small-scale study of speech and language needs among clients of one youth offending team found that eight of the 19 in the sample had severe communication difficulties, and found also that respondents had particular difficulties understanding the language of the courtroom (Crew and Ellis, 2008).

Identification of need

A clear implication of the high level of need among child defendants is that there should be routine screening of all these individuals in order to identify problems that are likely to be an impediment to their effective participation in court proceedings. Where impairments are identified, and depending on their nature and severity, appropriate steps can then be taken to support the individual in court, or to divert him out of the youth justice system.

Screening and assessment of child defendants is not, at present, routinely carried out. Youth offending teams conduct assessments of children using the structured assessment tool known as Asset.³⁷ However, not all children who appear in court will have been through a full Asset assessment prior to their appearance; and Asset does not involve screening for learning disabilities, learning difficulties or communication difficulties. In its thematic inspection of youth courts, the HM Inspectorate of Court Administration found that:

There are only ad hoc procedures in place to identify young people who have learning difficulties. Inspectors found that there is a reliance on other agencies, such as the defence or youth offending teams (YOTs), to inform the court if a young defendant has learning difficulties, but no clear process or procedure to ensure that this has been done. Hence, such difficulties often only come to light on the day or during the hearing [or] ... might not come to the attention of the court at all (HMICA, 2007: 12).

The HMICA report goes on to recommend that HM Courts Service work with other agencies to ensure that appropriate facilitation and adjustments are made to the court process for young people with learning difficulties by:

- *facilitating early identification in the court process of such young people, and*
- *ensuring that court staff have the knowledge and understanding to respond appropriately (2007: 13).*

In November 2009 HM Courts Service (HMCS) published a short guide³⁸ for HMCS staff entitled, *Young people with learning disabilities and learning difficulties in the criminal courts*. Introducing the guide HMCS notes ‘the importance of identifying young defendants with learning difficulties or disabilities at an early stage’, which ‘will enable the courts to take measures where possible to meet their needs.’ The guide itself notes that it is not ‘solely the responsibility of court staff’ to ‘identify young people with learning disabilities or difficulties’ and that ‘all the people concerned in a young person’s case should be working together to ensure they receive a fair hearing.’

The recognition that there should be ‘early identification’ of needs raises the question of at what stage in the justice process screening or assessment should be undertaken, and by whom. According to a submission by the Standing Committee for Youth Justice, screening should be carried out at the initial stages of the criminal justice process:

37. Asset is described by the YJB as a ‘structured assessment tool’, and is used to inform YOTs’ development of plans for working with children – including those on community and custodial sentences and on final warnings, and those awaiting sentence. Asset ‘aims to look at the young person’s offence or offences and identify a multitude of factors or circumstances – ranging from lack of educational attainment to mental health problems – which may have contributed to such behaviour’; it also seeks to ‘highlight any particular needs or difficulties the young person has, so that these may also be addressed’ (<http://www.yjb.gov.uk/en-gb/practitioners/Assessment/Asset.htm>).

38. The Guide is A5 in size and 12 pages long; Annex A gives information on the Consolidated Criminal Practice Direction; Annex B describes common specific learning difficulties and on the final page number of organisations are listed that can provide further information about learning disabilities and learning difficulties.

[S]entencers should be aware that by the time a young person arrives in court, any lack of capacity or emotional immaturity are likely to have already affected decisions made at earlier points in the pathway. For example suspects with learning disabilities in particular are likely to struggle with police questioning and cautions with the result that they may incriminate themselves even if they are innocent (SCYJ in Justice Committee report, 2009).

Hence, for example, pilot youth justice liaison and diversion schemes that are being rolled out by the Department of Health and Sainsbury Centre for Mental Health (SCMH) undertake systematic screening of children in police custody, at the pre-charge stage (see Box 6.1 for a description of progress made to date by three of the pilots³⁹). These schemes are aiming ultimately to encompass screening of all children in police custody. Early, routine screening of this kind can be combined with a system of more detailed assessment of certain categories of child defendant, as is recommended by the Royal College of Psychiatrists (2006). The RCP argues that there should be a mandatory assessment of all children facing serious charges and also, possibly, 'children who show patterns of escalating recidivism from petty crime to much more serious offences'. These assessments should incorporate 'psychiatric, psychological and social work components, to give an opinion on the child's mental state, fitness to plead and diminished responsibility, to look at the welfare needs of the child and also to inform sentencing' (2006: 8).

Box 6.1: Youth justice liaison and diversion pilots (YJLD)

Scheme A has a triage system in place that quickly screens child suspects for support needs and possible further assessment according to their level of need. 20 to 30 young people are being diverted per month. All triage workers have been trained to complete the SQIFA (the Youth Justice Board's (YJB) mental health screening questionnaire), which is routinely completed on all children diverted to triage. The forensic consultant attached to the youth offending team (YOT) has commented that the mental health specialist in the YJLD team is picking up cases that the Child and Adolescent Mental Health Service would not have accessed before and at a much earlier stage (for example children with ADHD, conduct disorders, early signs of mental ill health). The next stage for this scheme is to develop its provision for informing Crown Prosecution Service decision-making and to extend its provision into the courts.

Scheme B is staffed by a family therapist and a sessional worker with learning disability expertise. The police have agreed that all children who have committed an offence of gravity 1 or 2 (that is, less serious offences according to the YJB's 8-point ranking of offence seriousness) will be diverted to attend the YOT with no further action being taken as long as they make contact with YJLD workers for their initial appointment. These children and their families, with consent, will have their support needs assessed with follow-up support offered or handholding into local services. One worker will also attend court one day a week to raise awareness in courts and to pick up referrals that may have been missed.

Scheme C employs a mental health practitioner to act as the YJLD worker. Referrals have come from a range of stakeholders and the practitioner has completed partnership work with schools, local disability teams, child protection teams and substance misuse teams, among others, to provide wraparound support for some of the children she has screened. The practitioner has identified learning disabilities and raised awareness of this (as well as speech and language difficulties) among police custody staff and other youth justice stakeholders. She has worked with the bail support worker in her area to write health and social circumstances reports outlining packages of multi-agency care for the court.

Information provided by Sainsbury Centre for Mental Health and the Department of Health, 2009

39. See also www.scmh.org.uk/news/2009_youth_justice_schemes.aspx.

In addition to the question of the timing of screening and assessment, various more practical, but equally important, issues must also be addressed. These relate to the development of appropriate screening and assessment tools;⁴⁰ the availability of staff with the necessary expertise to carry out the processes; and the implementation of systems of information exchange to ensure that assessment results are fed through to relevant agencies both within and outside the youth justice system. Moreover, as has already emerged from the SCMH diversion pilots (see Box 6.1), there is a need for cultural change within the police and other youth justice stakeholders, if they are to adapt their operational procedures in order to facilitate routine, timely assessment.

Liaison and diversion schemes

As noted above, one of the aims of screening and assessment of child defendants is to identify those who should be diverted away from the youth justice system and into appropriate welfare and/or healthcare services. Child suspects, like adults, can be diverted at various stages of the justice process – through formal and informal mechanisms. Prior to charge, for example, the police may opt to issue a reprimand or final warning if the suspect admits the offence; additionally, the Criminal Justice and Immigration Act 2008 (section 48 and schedule 9) has introduced the additional pre-court disposal of the youth conditional caution; these are initially to be piloted for 16 and 17-year-olds only.

If the child is evidently suffering from a mental disorder, an admission to hospital (either on a compulsory or voluntary basis) may be arranged, after which prosecution can be discontinued at the discretion of the police or Crown Prosecution Service. At any point in the youth justice process – depending on the seriousness of the offending and nature and severity of the child's needs – community-based mental health treatment or social care could be arranged as an alternative to prosecution. And, as for adults, mental health disposals under Part III of the Mental Health Act 1983 are an option after conviction for mentally disordered young offenders (Nacro, 2005b).⁴¹ These disposals include a hospital order under section 37 of the Act; but it should be noted that a guardianship order is available only for a young person who is aged 16 or older (see Box 3.1, in Chapter 3, for an outline of the key Mental Health Act disposals for mentally disordered defendants).

The national policy that the prosecution of 'mentally disordered offenders' should be avoided, unless public interest demands it, applies to children as it does to adults. With children, however, possible rationales for diversion are much broader than they are for adults, in two main respects.

First, the principal aim of the youth justice system, as set out in section 37(1) of the Crime and Disorder Act 1988, is to prevent offending (see Chapter 8, for more on the legislative framework). This emphasis on prevention within youth justice legislation arguably encourages the use of alternatives to prosecution where these are believed to offer better chances of rehabilitation. The second rationale relates to the high level of need among child defendants. The needs and vulnerabilities of child defendants cannot always be described in terms of 'mental disorder' of the kind that would justify diversion in the case of an adult; and some of these needs may be a function of young age and immaturity more than any other factor. Nevertheless, they may – as already discussed – significantly limit a child's capacity to participate effectively in court proceedings and thereby exercise his right to a fair trial. A related consideration is the risk of adding to an already needy child's vulnerability by putting him through the experience of prosecution.

Often utilising arguments based on the above two rationales, children's justice practitioners and charitable organisations have frequently argued for a realignment of the youth justice system such

40. See, for example, Bailey and Tarbuck (2006) and Bailey et al (2006) on the development of mental health screening tools for young offenders.

41. As noted in Part I of this report, the Mental Health Act 2007 definition of 'mental disorder' is 'any disorder or disability of the mind' (section 1(2)). However, learning disabilities are excluded from this definition for certain provisions of the Mental Health Act 1983, including those relating to disposals for mentally disordered offenders, unless they are 'associated with abnormally aggressive or seriously irresponsible conduct on his part' (section 2(2)).

that it is focussed more on children's needs and welfare, and less on formal prosecution and consequent punishment (see, for example, RCP, 2006; proceedings of 2002 and 2009 Michael Sieff Foundation conferences on child defendants). From this perspective, such realignment should encompass a greater preparedness on the part of the police, Crown Prosecution Service (CPS) and courts to divert defendants away from the youth justice system and into treatment and support. As with vulnerable adults, however, a balance must be struck between offering appropriate help for those in need and ensuring that individuals, where possible, are held accountable for their actions in a meaningful way (and, where applicable, in a way that supports public protection):

Any psychological treatment or psychotherapeutic intervention with young delinquents is, after all, partly focused on helping the young person to learn (often for the first time) that there are consequences for them of behaving illegally and that better choices need to be made. Whatever alternative legal provision may or may not be decided upon by the government for juveniles facing criminal charges, the mental health and emotional and social development of these children will not be helped if an entirely therapeutic approach is taken, 'glossing over' the serious consequences of the offending behaviour (RCP, 2006: 56).

In other words, dealing with children outside the youth justice system does not necessarily mean that their offending behaviour is treated in a less serious way than it would be within the system; rather, diversion away from youth justice is seen to provide alternative but more age-appropriate methods of addressing the consequences of offending.

The provision of treatment and support for child defendants does not solely entail removing them from the youth justice system. The importance of providing access to health, social care and other services within the justice system has been highlighted by commentators – who have also tended to note that existing provision, especially of mental health and other health services, tends to be inadequate. For example, a recent Healthcare Commission inspection of youth offending teams (YOTs) found inadequate provision of healthcare to YOTs; the inspection also found that liaison between health workers and court staff was generally limited (Healthcare Commission, 2009). The low level of secure psychiatric provision for under-18s (Ireland 2009) and inadequacy of psychiatric care for children within and leaving the secure estate (Young Minds submission in Justice Committee report, 2009) have also been noted.

Part of the background to the establishment of youth justice liaison and diversion pilots by the Sainsbury Centre for Mental Health (see Box 6.1) was recognition that many vulnerable children within the youth justice system are unable to access mainstream health and social care provision. Reasons for this include the belated identification of the children's needs; the complexity of these needs, meaning that they do not fit neatly within the remit of particular services; reluctance on the part of the children and their families to approach statutory services; and funding problems. The SCMH pilots aim to help fill the gaps in provision within the youth justice system – as well as facilitating diversion out of the system – by putting in place structures for close liaison with the range of relevant support services.

It is hoped that the government's forthcoming strategy to promote the health and well-being of children in contact with the youth justice system, *Healthier Children, Safer Communities*, will address concerns raised in this chapter. According to the recently published National Delivery Plan (NDP) of the Health and Criminal Justice Programme Board, *Improving Health, Supporting Justice* (November, 2009), the children's strategy 'sets out the government's wider vision for improving the health and wellbeing of children and young people in contact with the youth justice system. It will ensure that

their needs are recognised early and that access to health and other services vital to their wellbeing is improved.' In particular, the NDP notes that the government will 'give explicit further consideration to the potential for early intervention and diversion for children and young people with mental health problems or learning disabilities, who have offended or are at risk of offending.'

7. The operation of the courts

The focus of this chapter is what goes on in court. The first part of the chapter examines the availability of support within the courtroom for child defendants. This is followed by a discussion of training for professionals who work with child defendants, and a brief look at the issue of reporting of cases involving children.

Support in the courtroom

Part of the context for the provision of support in the courtroom is the recognition that in order to exercise his right to a fair trial, a child defendant must be able to participate effectively in proceedings. This principle is articulated in the UN 'Beijing Rules' on juvenile justice, in which it is stated that: 'the proceedings ... shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely' (UN, 1985: paragraph 14.2).

The past decade has seen the emergence of a variety of initiatives aimed at supporting child defendants in the courtroom. An important catalyst in these developments was the 1999 judgement of the European Court of Human Rights in relation to the trial of the defendants in the Bulger Case. In its ruling on *T and V v UK*,⁴² the European court concluded that the crown court proceedings against the two 11-year-old defendants had breached their right to a fair trial. Although efforts had been taken to modify the court process – for example, hearing times were shortened, and the procedures were explained to the two boys – the formality and ritual of the court, in combination with the intense public scrutiny of the case, and the boys' disturbed emotional state, were deemed to compromise severely their capacity to understand and participate in the proceedings.

In a direct response to this judgment, in 2000, the then Lord Chief Justice issued a crown court practice direction on *The Trial of Children and Young Persons in the Crown Court*. This aimed to maximise the capacity of child defendants to participate effectively, and to minimise their sense of intimidation and distress. Among other issues, the practice direction emphasised that proceedings should be explained to defendants (paragraph 11); that trials should be conducted in a language that the defendants could understand (paragraph 11); and that courtrooms should be arranged so that all participants are on the same level (paragraph 9).

A parallel but related development was the implementation of the youth court demonstration project, by the Home Office, from 1998 to 2000. This was undertaken as part of an effort to 'change the culture of the youth court', in line with reforms proposed by the Home Office white paper *No More Excuses: a New Approach to Tackling Youth Crime in England and Wales* (1997). The specific aims of the demonstration project included improving the capacity of magistrates to 'engage with' defendants, and changing the layout of courtrooms to facilitate engagement and create a more 'open and responsive' atmosphere.⁴³

The results of the demonstration project, together with key elements of the crown court practice guidance, fed into a good practice guide for the youth court issued jointly by the Home Office and Lord Chancellor's Department in 2001. This extends the principles embodied in the crown court practice guidance to the youth court, and includes guidance on changing the court environment so as to 'make changes to foster better communication without compromising the security and authority

42. (1999) 30 EHRR 121

43. See Allen et al (2000) for an evaluation of the Youth Court Demonstration Project.

of the court' (Home Office and Lord Chancellor's Department, 2001: 10). Implementation of the good practice guide was evaluated through a thematic inspection of youth courts by HM Inspectorate of Court Administration in 2006. This found that, overall, progress had been made towards a 'culture of engagement' with child defendants and their families. The inspection also found that 'good communication in the courtroom depends more on the person communicating than it does on the courtroom layout' but that, nevertheless, 'the retention of a slightly raised bench in some courtrooms, combined with a semi-formal layout has worked to good effect' in terms of facilitating active participation of all parties and balancing 'informality, security and respect for the court process'. (HMICA, 2007: 1).

More recent developments with respect to child defendants include, in 2006, the amendment of the 'special measures' provision of the Youth Justice and Criminal Evidence Act 1999 to permit child defendants to give evidence via a live television link.⁴⁴ Under the provisions of the new Coroners and Justice Act, the statutory right to support from an intermediary in giving evidence has been extended to child defendants, as to vulnerable adult defendants, whose level of intellectual ability or social functioning limits their ability to give evidence.⁴⁵ (See pages 15-16, for discussion of the existing occasional use of intermediaries to support defendants.) It should also be noted that the provisions of the crown court practice direction on child defendants have, since 2007, been incorporated within the consolidated criminal practice direction on the treatment of 'vulnerable defendants' - that is, child and vulnerable adult defendants - in the crown court and magistrates courts (Lord Chief Justice, 2007). (For more on this practice direction, including some of the specific measures it sets out, see page 16.)

Limitations of support for child defendants

Notwithstanding the developments outlined above, youth justice practitioners and children's charities have continued to maintain that there is insufficient support for child defendants within the courtroom. Some elements of the practice direction have challenging practical implications; for example, O'Neill (2009) notes the difficulty, in the crown court, of ensuring that all child defendants can sit with their families or social workers if there are several co-defendants in a case; and the problem of trials dragging on too long if short sitting hours are adhered to.

More fundamentally, a particularly contentious issue is the perceived asymmetry between support for child witnesses and that for child defendants (replicating concerns in relation to vulnerable adult defendants and witnesses). Although courts have had the discretion to apply witnesses' 'special measures' to child defendants (Plotnikoff and Woolfson, 2002) – and, as noted above, statutory provision in relation to live links and intermediaries is being extended to vulnerable defendants – this asymmetry remains a cause of concern:

It is anomalous and unacceptable that children appearing as witnesses are automatically considered to be vulnerable within the Youth Justice and Criminal Evidence Act 1999 [which provides for 'special measures' to assist vulnerable witnesses, including child witnesses], and yet no such assumption of vulnerability exists for child defendants (RCP, 2006: 55).

The appropriateness of the good practice guide's emphasis on 'engagement' with child defendants has been questioned by some commentators. While, as noted above, HMICA (2007) reported quite positively on progress towards greater engagement within the youth court, research into attitudes of crown and youth court sentencers found somewhat mixed views about the overall value – and purpose – of engagement (YJB, 2009a).

44. As applies also to vulnerable adult defendants (see Part 1 of this report), section 47 of the Police and Justice Act 2006 allows a child defendant to give evidence via a live link if his ability to give oral evidence is compromised by his level of intellectual ability or social functioning; and his ability to participate would be improved by giving evidence over a live link; and it is in the interests of justice for him to do so.

45. As with adults, the right to support from an intermediary will extend only to the giving of evidence by the defendant.

Many child defendants who were interviewed by Plotnikoff and Woolfson (2002) evidently struggled to express themselves in court, or even believed that they were not allowed to express themselves - despite this being an important element of 'engagement'. (See interview excerpts in Box 7.1.) Some practitioners interviewed by Plotnikoff and Woolfson argued that 'engagement' in the courtroom can be counter-productive, since it places additional pressure on defendants. Practitioners also spoke of the tension between, on the one hand, creating an appropriately disciplined and serious atmosphere within the courtroom and, on the other hand, reducing the level of formality in the effort to encourage defendants to engage. It also emerged from the interviews that there is a need for more training for magistrates, to enable them to communicate and engage with defendants more effectively (see discussion of training, below). Given the high levels of - often unidentified - learning disabilities, mental health problems, communication difficulties and emotional needs among children who appear in court, efforts simply to tailor the language used in the courtroom to the age of the defendant is unlikely to guarantee effective two-way communication.

**Box 7.1: Defendants' comments on speaking in court
(from interviews conducted by Plotnikoff and Woolfson, 2002)**

It's better to take it than to say something.

It's best to say nothing even if you are asked.

I have not been told I can say anything. I don't know whether it's allowed.

You cannot talk in court. Even if you have something really important to say, speaking is against the rules.

I thought I had no right to speak in court except to the solicitor. The solicitor told me to say if there was anything I didn't understand. There were things, but I was too scared to say so in court.

No-one said you could ask a question. Because I was told to say 'No comment' at the police station, I thought I couldn't say anything at court.

You can't speak, only to answer yes or no.

You want to talk and you can't. I wanted to speak because I hadn't done [the offence] but I was told to sit down when I tried to stand up. There should be a time for us to speak. Trying to interrupt is too difficult.

Young defendants' pack

In 2002, the Lord Chief Justice endorsed a recommendation by the previous year's Michael Sieff Foundation conference that a 'young defendants pack' be developed to provide defendants - in advance of their court appearances - with information about court procedures and their rights as defendants.⁴⁶ The Youth Justice Board thereafter co-funded Plotnikoff and Woolfson to undertake a scoping study on the development of such a pack.

46. The concept of a young defendants' pack was based on a pack for young witnesses first published by the NSPCC in 1998 and now updated and published by the Ministry of Justice. This comprises several booklets designed for different age groups and a DVD, and is distributed by Witness Care Units, police officers, defence solicitors and young witness 'supporters'.

The scoping study concluded that the pack should bring together factual information covering all stages of the youth justice process including, in relation to going to court:

- the importance of obtaining legal advice before the first court appearance
- the consequences of the plea
- bail supervision and support available from YOTs on a voluntary basis
- going to court (covering the youth court, magistrates court and crown court) including an explanation of roles, layout and procedures; the defendant's rights; appropriate behaviour and dealing with stress; advice that if you do not understand something you should say so; and guidance about speaking in court
- reports for the court
- court orders (Plotnikoff and Woolfson, 2002: 51-2).

The Home Office stated its intention to produce a young defendants pack among the proposals contained in *Youth Justice, the Next Steps*, which is a companion document to the government's 'Every Child Matters' programme:

We propose to develop a young defendants' pack to help young defendants and their carers understand and participate in the court process. This would entail assigning youth offending team (YOT) officers or other professionals to prepare young defendants and their carers for court hearings and to follow cases through the system, emphasising the rights and responsibilities of the young defendant in court (Home Office, 2003: 5-6).

At the time of writing, however, work on the young defendants' pack does not appear to be under way;⁴⁷ although HM Courts Service has recently produced a very short information leaflet for children and young people attending court, entitled *You have to go to court - what do you do?*⁴⁸ The failure of government, to date, to follow through its commitment to developing a young defendants' pack has been described by the NSPCC as 'inexcusable' (2007: 12).

Training

The need for specialist training of magistrates sitting in the youth court, and especially training on communication and engagement with child defendants, emerged from the Home Office youth court demonstration project (Allen et al, 2000), and was subsequently asserted in the good practice guide (Home Office/Lord Chancellor's Department, 2001). The Judicial Studies Board thus developed a youth training package for magistrates, and specified a minimum initial training requirement - comprising six hours plus additional observation, reading and visits - before any magistrate can sit in the youth court. Continuation training and training for youth court chairs is also provided (JSB, 2006). Box 7.2 shows extracts from the outline of course contents on the Judicial Studies Board website - the omission of content relating to child welfare, child development and health is noteworthy. Specialist training is also provided for district judges sitting in the youth court. Magistrates and district judges interviewed for the YJB study of youth sentencing reported having attended two-day training courses prior to taking up their youth court roles (YJB, 2009a).

47. The Prison Reform Trust has been informed by the Ministry of Justice/Department for Children, Schools and Families Joint Youth Justice Unit that there are, at present, no plans to produce the young defendants' pack because of funding constraints.

52 48. This is available at <http://www.hmcourts-service.gov.uk/cms/14824.htm>. The leaflet is available in various languages and a podcast version has been developed for those who have difficulty reading; however, no easy read version has been produced. There is anecdotal evidence that youth justice practitioners feel that the leaflet is inadequate because it is very brief and covers only basic information.

Box 7.2: Youth court training for magistrates

Objectives of induction training

Outline the aims and key principles of the youth justice system; identify the roles of parent or guardians, the youth offending team (YOT) and local authorities in the youth justice system; list the procedures relating to remands, jurisdiction and sentencing in the youth court; describe the powers relating to remands, jurisdiction and sentencing in the youth court.

Objectives of consolidation training

By the end of the course delegates will be able to demonstrate: the use of a structured decision-making process in relation to: the procedures and powers of the youth court; knowledge in all key areas against which they will be appraised.

Aims of chairmanship training

To prepare youth magistrates to take the chair in the youth court so that by the end of the course delegates will be able to demonstrate an ability to effectively manage judicial decision making in the youth court by: encouragement of colleagues to make effective contributions; managing court proceedings using different but appropriate communication skills; and engaging with young people and their families.

Involvement of students (chairmanship training)

One of the key sessions is to allow delegates to practice engagement with young people. It is strongly recommended that young people be invited to undertake the role of the defendant during the engagement exercises.

Source: Judicial Studies Board website: magistrate and legal advisor training, 2009

There is less formal training for crown court judges dealing with youth cases than for magistrates and district judges. A system for selection and specialist training of these crown court judges was proposed by the Home Office in its *Next Steps* document on youth justice (2003); however, this has not yet been implemented. Crown court judges in the YJB sentencing study 'had received little, if any, formal training in relation to sentencing young people' (YJB, 2009a: 28).

There is limited specialist training available, and no system of accreditation, for barristers and solicitors who work with children. The report of the Royal College of Psychiatrists notes that this contrasts sharply with the training provision for family lawyers, and asserts that:

The lack of training for criminal defence solicitors in child development and other matters is particularly worrying, since it should be the child's defence solicitor who asks for mental health and other assessments and who should act on any perceived welfare needs of the accused child. [Additionally,] [e]thical issues may be raised when defence solicitors or barristers, untrained in work with children, interview vulnerable and disturbed children and young people without an understanding of their developmental needs and their human rights in relation to those needs (2006: 68).

The RCP report strongly argues the case for interdisciplinary training for all professionals working with child defendants – including judges, magistrates, lawyers, courts and Crown Prosecution Service staff, and police officers. This training would have a child development focus, and encompass the welfare and mental health needs of child defendants and needs assessments, as well as the range of relevant legal issues. Such training should also encompass the prevalence of learning disabilities and

difficulties, speech and language difficulties and emotional problems among children; the identification of these problems by specialist staff; and implications for offending and for responses to interventions.

Reporting

One of the elements of the Home Office white paper *No More Excuses*, which in 1997 set out proposals for reforming the youth justice system, was an emphasis on making the youth court 'more open'. It was argued that reporting restrictions in the youth court focused on:

protecting the identity of young offenders at the expense of the interests of victims and the community. Justice is best served in an open court where the criminal process can be scrutinised and the offender cannot hide behind a cloak of anonymity (Home Office, 1997, paragraph 9.7).

To this end, as part of the Home Office youth court demonstration project, the local press was encouraged to attend hearings, and the lifting of reporting restrictions by magistrates in appropriate cases⁴⁹ was facilitated. The report on the demonstration project observes that this emphasis on reporting was somewhat problematic, in that there appeared to be a tension between creating a more informal courtroom atmosphere in which there was greater engagement with defendants, and 'opening up' the court to the press (Allen et al, 2000). Nevertheless, reporting of youth court proceedings was further encouraged in the youth court good practice guide (Home Office/Lord Chancellor's Department, 2001). Little evidence of greater reporting of the youth court was found by the subsequent HMICA inspection: 'There is little proactive communication between youth courts and the media, and requests for reporting restrictions to be lifted are rare' (2007: 2). Inspectors found that within the youth justice community generally, there was a sense that media reporting of youth cases was likely to be negative and thus damaging to public confidence.

In 2008, the Home Office again sought to promote the reporting of youth court cases through its *Youth Crime Action Plan*. Paragraph 4.19 of the plan sets out the intention to: 'Explore with the judiciary and magistrates how far their use of discretion to remove reporting restrictions for convicted 16 and 17 year olds can be encouraged, to improve the transparency of the youth justice system'.⁵⁰ This proposal was specified as a cause of concern by the UN Committee on the Rights of the Child (2008: paragraph 77g). The right of children to privacy is asserted in the UN Convention on the Rights of the Child; and, in the UN's 'General Comment' on juvenile justice (2007), this is taken to encompass children's right to privacy throughout criminal proceedings:

The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed (UN Committee on the Rights of the Child, 2007: paragraph 66).

8. Sentencing child defendants

This chapter looks at the principles that, according to statute, should underlie the sentencing of child defendants, and at the more specific issues of community and custodial sentencing. The final part of the chapter addresses the different, but related, subject of custodial remands of children.⁵¹

Purposes and principles of sentencing child defendants

Underlying all sentencing decisions that are made with respect to child defendants – as applies, equally, to adult defendants – is the imperative to link the severity of the sentence to the seriousness of the offence. Proportionality in sentencing is a long-established principle in sentencing law in England and Wales, and was reaffirmed in the Criminal Justice Act 2003 which set out a statutory definition of offence ‘seriousness’ as a function of both the harm caused by the offence and the culpability of the offender (section 143(1)).

As well as being proportionate, sentences that are passed on child defendants are, by law, expected to fulfil certain other objectives. Section 37(1) of the Crime and Disorder Act 1998 defines the prevention of offending by children and young persons as the ‘principal aim of the youth justice system’; under section 37(2), ‘all persons and bodies carrying out functions in relation to the youth justice system’ – and hence sentencers – have the duty ‘to have regard to that aim’. Section 44 of the Children and Young Persons Act 1933, requires ‘Every court in dealing with a child or young person who is brought before it, either as . . . an offender or otherwise, shall have regard to the welfare of the child or young person.’

These two purposes of sentencing – to prevent offending and the welfare of the child – are highlighted in Section 9(1) of the Criminal Justice and Immigration Act 2008, which sets them out as matters to which the ‘court must have regard’ in dealing with an offender aged under 18. Section 9 of the Act adds to the principal aim of the youth justice system by including the prevention of re-offending, thus the principal aim is revised ‘to prevent offending (or re-offending) by persons under 18’. Further, Section 9 introduces a third consideration to which the court ‘must have regard’ in sentencing, namely, ‘the purposes of sentencing’ which are defined as:

- a) the punishment of offenders,
- b) the reform and rehabilitation of offenders,
- c) the protection of the public, and
- d) the making of reparation by offenders to persons affected by their offences

These four purposes match those that were established for adults by the Criminal Justice Act 2003, except that the adult purposes include an additional one: ‘the reduction of crime (including its reduction by deterrence)’ (s.142(1)(b)). Partly because children generally offend opportunistically rather than with a degree of pre-meditation, deterrence is deemed to be less relevant to child than it is to adult offending.

However, section 9 of the Criminal Justice and Immigration Act 2008 is not being implemented alongside other provisions of the Act, including the new community sentence for under 18 year olds, the youth rehabilitation order (see Community sentences, below), which are due to be brought into effect on 30 November 2009.

51. A question that is not addressed here is whether there is differential treatment of girls and black and minority ethnic child defendants by the courts. For discussions of this issue, the reader is directed to the submissions to the House of Commons Justice Committee on the draft sentencing guideline (Justice Committee, 2009).

This does not affect the 'prevention of offending' and 'welfare' purposes of sentencing, as these are already established in statute, or the principle of proportionality; but it means that other purposes of sentencing, including the prevention of re-offending, are not clarified. Children's charity Barnardo's have expressed a strong concern that this leaves it open to the courts to pass sentence with the aim of deterrence - which, Barnardo's argue, is entirely inappropriate in the case of children: 'Research findings are unequivocal - the harsh sentencing of one child will not deter another from going out and committing the same crime' (Barnardo's, 2009).

A number of children's charities have expressed concern about the purposes and principles for sentencing children, noting that these have 'no clear order of prioritisation which can of course be confusing for sentencers and could be used to justify almost every sentencing approach' (Sally Ireland in Justice Report, 2009; see also the Nacro submission in the same report). Sentencers interviewed by the Youth Justice Board observed that striking a balance between sentencing purposes was not always a clear cut matter... [and] that the different themes (e.g. welfare and punishment) did not necessarily sit comfortable together' (YJB, 2009a:30).

At the time of writing, the Sentencing Guidelines Council has just published an 'overarching principles' guideline on the sentencing of offenders aged under 18. The guideline aims to promote consistency in sentencing and to clarify the grounds on which sentencing decisions should be made. The first section of the guideline sets out the principles of youth sentencing; whether this will make it easier for sentencers to balance the sometimes competing expectations of the sentencing process remains to be seen. In addition to setting out the principles of sentencing, the guideline asserts that there should be a more 'individualistic' approach to the sentencing of children compared to the sentencing of adults; and that young people will generally be sentenced less severely than adults. The guideline also refers to the range of factors that are often associated with offending by children, including looked after status, low educational attainment, experiences of abuse, and misuse of drugs, and notes that 'any response to criminal activity amongst young people will need to recognise the presence of such factors if it is to be effective' (SGC, 2009a: 7).

For a sentence to be appropriate not only to the seriousness of the offence but also to the particular needs, circumstances and predisposition of the individual child, the court requires a great deal of information on which to make the sentencing decision. When a custodial or community sentence is under consideration, the defendant's youth offending team is required to provide the court with a pre-sentence report (PSR). A PSR is usually informed by the results of the defendant's Asset assessment, and should include details about both the offence and the offender, including the offender's likelihood of re-offending and his suitability for potential sentences. A psychological or psychiatric report can also be requested at the pre-sentence stage, but such requests are rare (RCP, 2006). PSRs are frequently said to be of variable quality (Royal College of Speech and Language Therapists and Prison Reform Trust, 2009), and have been criticised for containing inadequate information about offenders – particularly their health problems and experiences of abuse and disadvantage (Healthcare Commission, 2009; Glover and Hibbert, 2009).

Community sentences

A range of non-custodial disposals for children are available to the courts. These include fines, the conditional and absolute discharge, the referral order (primarily for children with no previous convictions who plead guilty to an offence) and reparation order (available for any 10 to 17-year-old who has been convicted). Under Part 1 of the Criminal Justice and Immigration Act 2008, a new generic community sentence, the youth rehabilitation order (YRO),⁵² is replacing nine pre-existing community sentences including the supervision order, drug treatment and testing order and action plan order. As set out in section 1(1) of the Criminal Justice and Immigration Act, a variety of requirements can be attached to a YRO, including:

- activity
- mental health treatment
- drug testing
- supervision
- unpaid work (for 16 to 17-year-olds)
- attendance centre
- intensive supervision and surveillance
- intensive fostering.

Courts will be required to consider making a YRO with a high intensity requirement (the bottom two of the above requirements) before giving a custodial sentence, and if they decide that custody is still warranted, to explain why a YRO with a high intensity requirement is not appropriate.

To support the implementation of the YRO, the YJB has developed a new model for the work of youth offending teams (YOTs) known as the 'scaled approach'. This is intended to ensure that the nature and intensity of a YOT's work with a given individual matches that individual's assessed likelihood of re-offending and risk of causing serious harm to others. Under the scaled approach, the YOT is expected to determine the appropriate level of intervention for the individual as 'standard', 'enhanced' or 'intensive'. This intervention level should then inform sentence proposals made to the court in the PSR, and the interventions subsequently provided during the YOT's management of the order (whether this is a YRO, referral order, or the community element of a custodial sentence) (YJB, 2009b).

A number of criticisms have been made of the proposed scaled approach, including by organisations which gave evidence on 'sentencing youths' to the House of Commons Justice Committee. It is argued, for example, that the focus on matching levels of intervention to risks of re-offending could encourage YOTs to propose sentences that are disproportionate to offence seriousness. It is also suggested that there is a potential for the most disadvantaged children to be 'set up to fail' by court orders containing multiple and demanding requirements. As argued in the submission by the Standing Committee for Youth Justice (SCYJ):

young people suffering the most disadvantage, with the least parental or adult support, who experience reduced educational and other opportunities, will — as a direct consequence of the scaled approach — be subject to higher, and more intrusive, levels of criminal justice intervention. There is, implicit in the approach, a risk of discrimination against the most deprived children (SCYJ in Justice Committee, 2009).

52. The YRO is due to be implemented on 30 November 2009.

The SCYJ also notes that the Asset scoring process to determine risk of re-offending is known to be unreliable, meaning that it is inappropriate – and arguably a violation of children’s rights – to use Asset scores to determine levels of intervention. Some criticisms of the ‘scaled approach’ are linked to pre-existing concerns about what is perceived to be the over-use of custody for breach of community sentences and other orders. Nacro, for example, observes that almost one in four of custodial penalties passed on under-18s in the year 2007-8 were for breach of a statutory order (in Justice Committee report, 2009; see also Glover and Hibbert, 2009).

Custodial sentences

A child who is sentenced to custody will be accommodated in a secure children’s home, secure training centre or young offender institution, depending on his age, level of vulnerability and various other factors. Over a period of about ten years from the early 1990s, a series of Acts of Parliament steadily increased the powers of the courts to impose custodial sentences on children. Today, the main custodial sentence available for children, which can be passed by both the youth court and crown court, is the detention and training order (DTO); this was established by the Crime and Disorder Act 1998 (sections 73-79). This sentence can be given to 12 to 17-year-olds, and is between four and 24 months in length. The first half of the sentence is served in custody and the second half in the community, under supervision of the youth offending team. As with all custodial sentences, it can be imposed only if the offence is ‘so serious that neither a community sentence nor a fine alone can be justified’ (Criminal Justice Act, 2003, section 152(2)). If the offender is aged between 12 and 14, another condition for imposing a DTO, introduced by section 100(2)(a) of the Powers of Criminal Courts (Sentencing) Act 2000, is that the offender must be ‘persistent’; however, as discussed below, there is no clear definition of ‘persistence’.

Children aged 10 to 17 who have committed the most serious offences can be sentenced - by the crown court only – to:

- detention for life, for murder (under section 90 of the Powers of Criminal Courts (Sentencing) Act 2000)
- long-term detention for ‘grave crimes’ other than murder (under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000)
- detention for public protection or an extended sentence of detention for public protection for a ‘specified’ violent or sexual offence, and where the offender is deemed ‘dangerous’ (under sections 226 and 228 of the Criminal Justice Act 2003).

The number of custodial sentences passed on children almost doubled from around 4,000 in 1992 to around 7,500 ten years later; notably, during this period there was a fall in levels of detected crime by children and young people (Nacro, 2005c). Since then the numbers sentenced to custody have stabilised at around 7,000; and in the year 2007/8 a total of 6,853 children received custodial sentences – down from 7,097 the year before (SGC, 2009b). The number of children in the secure estate has fluctuated between about 2,600 and 3,200 (including remands) between 2000 and 2009; but the last three years have seen a downward trend – from 2,922 as of June 2006 to 2,666 as of June 2009.⁵³

Following the approximately ten-year period of expansion in statutory provision for custodial sentencing of children (from the early 1990s), there has been a degree of policy shift over the last few years, with elements of youth justice policy seeking to minimise the number of children sentenced to

custody. The YJB Strategy for the Secure Estate, published in 2005, asserted that: 'In the case of children and young people, custody should be used particularly sparingly because of their dependent, developing and vulnerable status', and committed the YJB to 'developing community-based alternatives in which sentencers have sufficient confidence that their proportionate use of custody for children and young people progressively falls and the average daily number in custody is reduced' (YJB, 2005: 8). The establishment of the YRO – particularly as the intensive fostering and intensive supervision and surveillance components enhance its potential to be a genuine alternative to custody – should, in theory at least, help the YJB to meet this commitment. The well-established principle that custody should be used only as the 'last resort' in the sentencing of a child or young person is reiterated in the draft guidelines of the Sentencing Guidelines Council (SGC, 2009a).

Notwithstanding the evidence of a policy shift away from custodial and towards community sentencing for children, this shift has not always been reflected in sentencing practice - or, indeed, in the wider, generally more punitive, youth justice policy agenda. As discussed by Solomon and Garside (2008), the YJB has been setting targets for reducing the number of children in custody since it began to commission secure accommodation in 2001, but these targets have been successively modified. The latest YJB corporate plan, for 2008-2011 (YJB, 2008), does not refer to its previous targets, or include any specific future targets, for reducing use of custody. Youth justice practitioners and children's charities remain highly concerned about what is perceived to be excessive custodial sentencing of children in England and Wales. It is widely observed that this jurisdiction – reflecting, in part, its low age of criminal responsibility – has many more children in custody than any other western European country.⁵⁴ In 2008 the UN Committee for the Rights of the Child noted that 'the number of children deprived of liberty [in the UK] is high, which indicates that detention is not always applied as a measure of last resort' (UN, 2008: paragraph 77c).

A report by Barnardo's on 12 to 14-year-olds in custody argues strongly that 'Parliament's clear intention of making custody for such young children genuinely a last resort is not reflected in sentencing practice', and that the custody thresholds lack clarity and are inconsistently applied (Glover and Hibbert, 2009: 4). A particular issue highlighted by this report is that there is no legislative definition of 'persistence', meaning that children are sometimes deemed to be persistent offenders – and thereby eligible for custody – on insufficient grounds. The sentencing guideline seeks to elaborate the concept of persistence, but this approach has been subject to criticism (Justice Committee, 2009). The Barnardo's report also argues that children are being sentenced to custody for offences that are not 'serious': the researchers found that in 28% of the 214 custodial cases they examined, the child had not committed a serious or violent index offence, according to the Youth Justice Board's own definition of seriousness (Glover and Hibbert, 2009).

According to the Ministry of Justice, 'violent offences includes the offences of violence against the person, robbery and sexual offences... non-violent offences includes the offences of burglary, theft and handling stolen goods, fraud and forgery, drugs offences and all other summary and indictable offences'. In 2006, 62% of juveniles aged 10-17 sentenced to immediate custody were sentenced for non-violent offences. In 2007, this figure was 61%. Using the same definition of a violent offence, in 2007-8, 50% of the average child custody population was in prison for non-violent offences (YJB, 2009c).

54. See data presented by the Council of Europe (2009).

Custodial remands

Like adult defendants, children who appear in court have a right to be released on bail unless one or more statutory exceptions to the right to bail apply. The grounds for refusing bail are generally the same for child as for adult defendants, and relate primarily to risks of committing further offences, failing to surrender to custody, or obstructing the course of justice; additionally, a child defendant can be refused bail for his own welfare. If bail is refused, the kind of remand that is imposed by the court depends on the age, gender and vulnerability of the defendant:

- 10 to 11-year-old defendant: remand to local authority accommodation. The local authority can apply to hold the child in secure accommodation, with or without conditions, if certain strict criteria are met.
- 12 to 16-year-old female defendant, 12 to 14-year-old male defendant or 15 to 16-year-old male defendant who is deemed 'vulnerable': remand to local authority accommodation, with or without conditions. The court may specify that the accommodation must be secure (i.e. a secure children's home or secure training centre), in which case this is known as a 'court-ordered secure remand'.
- 15 to 16-year-old non-vulnerable male defendant or any 17-year-old defendant: remand to custody (young offender institution).

Under the Mental Health Act 1983, a child defendant who appears to have a mental disorder can also be remanded to hospital where this will facilitate the preparation of a psychiatric report (section 35); and the crown – but not the youth – court can remand a child defendant to hospital for treatment (section 36).

The number of children imprisoned on remand (both remand in custody and court-ordered secure remand) has increased by 41% since 2000. In 2000-2001 an average of 429 under 18 year olds were in custody on remand at any one time, compared to 606 in 2007-2008 (YJB unpublished data; PRT, 2009). At any given time, around 20% of all children in custody – or around 600 children - are on remand. A report on remands of children by the Prison Reform Trust (Gibbs and Hickson, 2009b) considers the appropriateness of many remand decisions by the courts – pointing out that as many as three-quarters of children who received custodial remands in 2007, and whose cases were dealt with in magistrates courts, were subsequently either acquitted (24%) or received non-custodial sentences (51%).⁵⁵ The necessity of detaining many of the children who were either ultimately deemed not-guilty or whose offences did not merit a custodial sentence can be questioned.

A reason for over-use of custodial remands may lie in magistrates' lack of confidence that child defendants will be effectively supervised while on bail (see, for example, comments of John Drew in Justice Committee, 2009). One element of the youth justice liaison and diversion pilots being rolled out by the Department of Health and the Sainsbury Centre for Mental Health is liaison between those who conduct the pre-charge screening/assessment and bail support workers, when there is a risk of custodial remand, so that appropriate bail support packages can be put into place. (See Box 6.1, chapter 6.)

9. Child defendants: conclusion and recommendations

The review of provision for child defendants over the preceding chapters of this report highlights the ambiguity of policy responses to these individuals. On the one hand, as children – and, very often, evidently the most vulnerable children in society – they are deemed to be in need of extensive help and protection. On the other hand, as children who are alleged to have broken the law, they are held accountable for their actions through the criminal justice process, which means they are subject to an adversarial system that prioritises the finding of guilt or innocence and sentencing for a particular offence. Although the welfare of the child is a consideration in sentencing, it is not the prime consideration of the court, or of those professionals involved with the court system.

These contradictory imperatives arise, to some extent, with respect to all defendants – not just those who are children. It is in the nature of the criminal justice system that those caught up within it may be offered certain forms of help at the same time as they face being penalised for any crimes of which they are convicted. But this is thrown into sharpest relief when it comes to child defendants – as is clear, most of all, from the principles that judges and magistrates have to apply in passing sentence. As discussed in the previous chapter, these principles bring the aim of ‘punishment’ together with the obligation to ‘have regard to the welfare of the child’, as well as various other objectives.

While the ambiguity of the child defendant’s position is in some sense inevitable, many who work in the field of youth justice are convinced that the adversarial court system of England and Wales is inappropriate as a means of addressing the wrong doing of children, and that children who commit offences should be dealt with through a welfare-based approach. A welfare-based approach to offending by children does not imply that the harms caused by the offending should be overlooked, but seeks to address harmful behaviour by responding to the child’s welfare needs – on the assumption that these needs are likely to be at the heart of the offending behaviour. The interests of the child are thus treated as paramount, in line with article 3.1 of the UN Convention on the Rights of the Child which states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (UN, 1989).

The adoption of a welfare approach to child offending may entail removing many children from the ambit of the formal justice system by raising the age of criminal responsibility. It also means ensuring that all children who are alleged to have offended have access to the range of health and social care services they require if their welfare is to be safeguarded – whether they are formally prosecuted or not. And with respect to those who are prosecuted, it entails recognising fully the range of difficulties that they are likely to face throughout the court process, and taking steps to address them. Critically, the welfare approach is informed by the understanding that children who offend are often doubly vulnerable: that is, many are disadvantaged within the youth justice system not only by virtue of their young age and developmental immaturity, but also because they have mental health problems, communication difficulties, learning disabilities and difficulties, and related needs. A further important consideration is that many children who come into contact with the youth justice system have suffered physical or sexual abuse and at some point in their lives have been held in the care of a local authority.

From this perspective (and as is equally true of measures to support vulnerable adult defendants), the provision of practical help for children in court helps, rather than hinders, the process of holding them to account for their actions, and ultimately enhances the delivery of justice: 'We are not undermining the evidence against them merely by ensuring that they are treated in a way which preserves their rights as well as enables the investigation to be pursued' (O'Neill, 2009).

Ten recommendations for improving provision for child defendants – which incorporate both practical initiatives and the broader policy framework – are outlined below. However, while the shortcomings of existing provision, which have been highlighted over the course of this report, demonstrate the need for policy and practical initiatives of this kind, it is important not to underestimate the political sensitivities associated with reform of youth justice policy and practice. Over the past 15 to 20 years, an increasingly punitive climate of political and public debate about crime, and particularly crime committed by children, has fed into legislative changes framed as 'tough' responses to youth offending. Although there are strands of policy development that are more progressive in nature – for example, the recent efforts to strengthen and promote community alternatives to custodial sentencing of children – there is little doubt that most policy and practical initiatives of the kind outlined below will struggle to attract political support.

On the other hand, public opinion about the sentencing of children is more nuanced than the political rhetoric suggests. For example, although serious violent crime attracts a punitive response, a public opinion survey commissioned by the Prison Reform Trust revealed that most people feel custody is not an effective way of dealing with non-violent offences by young people (Prison Reform Trust, 2008).

1. A government-led review should be established to examine the effectiveness of the youth justice system and consult on the needs and rights of child defendants.⁵⁶ The aim of the review would be to develop proposals for a welfare-based system of addressing offending by children; that is, a system within which:
 - o the interests of the child are treated as paramount
 - o all children who are alleged to have offended, whether or not they are formally prosecuted, have access to the health and social care services they require in order that their welfare is safeguarded
 - o where children are prosecuted, their needs are addressed throughout the justice process, thereby ensuring that their legal and human rights are protected
 - o it is recognised that children within the justice system are often doubly vulnerable – by virtue of their young age and problems relating to mental health, learning disabilities or difficulties, or other needs.
2. The age of criminal responsibility in England and Wales should be reviewed with a view to raising it at least to the UN Committee on the Rights of the Child recommended minimum of 12 years and preferably to the European norm of 14 years. Meanwhile the principle of *doli incapax* (the presumption that children aged from 10 to 14 lack the understanding to be criminally responsible) should be re-established, and the use of imprisonment for those aged under 14 should be abolished in favour of welfare disposals.
3. The current structure for hearing serious cases involving child defendants in the crown court should be reformed, through the establishment of a new form of youth court constituted by a judge of an appropriate level and magistrates, or a middle tier court allowing for trial by jury of serious youth crime, under the direction of a crown court judge. The new form or tier of youth court should also have jurisdiction for fitness to plead hearings.
4. There should be partial integration of the family and criminal courts, to permit a more flexible and holistic response to child defendants - for example, including the transfer of cases from the criminal to the family jurisdiction.

56. This recommendation echoes that of the Bradley Review that 'The Government should undertake a review to examine the potential for early intervention and diversion for children and young people with mental health problems or learning disabilities who have offended or are at risk of offending, with the aim of bringing forward appropriate recommendations which are consistent with this wider review' (Bradley, 2009: 33).

5. All courts should have access to liaison and diversion schemes which will:
 - o undertake screening for mental health problems, learning disabilities and communication difficulties of all children arrested by the police
 - o facilitate subsequent full assessment of children with identified needs, and all children charged with very serious offences – this assessment should encompass psychological and psychiatric components, and the full range of risk factors relating to health and social circumstances; it should also link to YOT assessments
 - o facilitate, as appropriate, diversion out of the youth justice system and into health and social care; and access to mainstream health and social care services
 - o assist the development of bail support packages.
6. There should be parity in the treatment of child witnesses and child defendants. All child defendants should automatically be assumed to be 'vulnerable', and should be entitled to the same support and assistance in the courtroom as child witnesses.
7. HM Courts Service should ensure that all its provision complies with the Disability Discrimination Act, such that courts are fully accessible to child defendants with learning disabilities, learning difficulties and other support needs, and that these defendants receive the practical support and assistance they require in order to participate effectively in proceedings. A review of HM Courts Service compliance with the Disability Discrimination Act should be undertaken.
8. The government commitment to developing a young defendants' pack should be revived and implemented. The pack should be fully accessible to all child defendants and provide clear, factual information about the various components of the criminal justice process, including what happens at court, and the rights and responsibilities of defendants within that process. As part of implementation of the pack, systems should be established for distributing it and working through the material with child defendants.
9. Training should be undertaken by all professionals working with child defendants – including the judiciary (in both the youth and crown court), lawyers, courts and Crown Prosecution Service staff, and police officers. This training should:
 - o have a child development focus, and encompass the welfare, mental health, learning and communication needs of child defendants – in relation to needs assessment, implications for legal and human rights, and appropriateness and availability of interventions;
 - o be delivered in partnership settings where possible, or through multi-agency conferences and seminars, while other elements should be tailored to particular professional groups;
 - o incorporate a system of accreditation for defence lawyers representing children, and a clear and consistent set of requirements for Criminal Records Bureau checks for legal practitioners and others working with child defendants.
10. There should be legislative change to introduce a higher custody threshold for children to ensure that custody is reserved for serious, violent offenders. Pending new legislation, and building on the Sentencing Guidelines Council guideline on 'sentencing youths', there should be further clarification of the custody threshold for children to ensure that the use of custody is generally reserved for serious, violent offenders; close monitoring of sentencing practice should be undertaken to ensure that the custody threshold is consistently applied. A clearer and more stringent definition of 'persistent' offending should be developed; and narrower criteria should be established for the imposition of custody for a breach of a community order or licence conditions.

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APPENDIX

Some common characteristics of people with learning disabilities, learning difficulties and people on the autistic spectrum.

Learning disabilities

People with learning disabilities, also referred to as intellectual disabilities, are likely to have limited language ability, comprehension and communication skills, which might mean they have difficulty understanding and responding to questions; they may have difficulty recalling information and take longer to process information; they may be acquiescent and suggestible (Clare, 2003) and, under pressure, may try to appease other people (Home Office Research Findings, 44).

Most people with learning disabilities have greater health needs than the rest of the population: they are more likely to experience mental illness and are more prone to chronic health problems, epilepsy, and physical and sensory disabilities (Department of Health, 2001; Rickford and Edgar, 2005). Further, the health needs of people with learning disabilities are often not adequately addressed.

People with learning disabilities living in private households are much more likely to live in areas characterized by high levels of social deprivation; they are also much more likely to experience material and social hardship than people with learning disabilities in supported accommodation services (Emerson and Hatton, 2008).

Learning difficulties

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

Dyslexia is a developmental difficulty that is characterised by phonological deficits, the skill that underlies the acquisition of literacy; it occurs regardless of intelligence levels. People with dyslexia often have 'unexpected' difficulties in learning to read and write and read hesitantly; they may misread certain words, which makes understanding difficult; they may have difficulty with sequencing, for example getting dates in order; they may have poor organisation and time management skills and difficulties organising their thoughts clearly. The number, type and characteristics of dyslexia vary from one dyslexic person to another and individuals can be mildly, moderately or severely affected. The incidence of dyslexia in the general population is 10%, with 6% being slightly affected and 4% having more severe difficulties; in every school classroom two to three children will be affected.

Dyspraxia causes difficulties in coordination and those affected often have poor handwriting and motor control. Dyscalculia refers to difficulties with maths. 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, restlessness and hyperactivity, as well as inattentiveness, and often prevent children from learning and socialising well.

Characteristics associated with attention deficit disorder include failing to pay close attention to detail, failure to finish tasks or to sustain attention in activities, seeming not to listen to what is said, not following through instructions, being disorganized about tasks and activities, easily distracted, and

forgetful in the course of daily activities. Characteristics associated with hyperactivity and impulsivity include: fidgeting with hands or feet, blurting out answers before the questions have been completed, failure to wait in line or not waiting turns in group situations, interrupting or intruding on others, for example butting into the conversations of others, and talking excessively without appropriate response to social restraint.

About 1.7% of the UK population, mostly children, have ADD or ADHD. Boys are more likely to be affected.

Many individuals with specific learning difficulties have characteristics in all the areas of difficulty, which means that assessing their specific needs is very important for planning help and support. 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.

Autism Spectrum Disorder

Autism Spectrum Disorder (ASD) is the term used to describe a range of lifelong neurodevelopmental conditions affecting social understanding and behaviour, communication and functioning. Additionally, such individuals commonly show a rigid, repetitive or restricted repertoire of behaviours or intense narrow interests. Often these will be in subjects or topics where they may be exceptionally knowledgeable and may sometimes get them into trouble, such as computer hacking.

Superficially good language may mask underlying difficulties of comprehension together with an instinctive inability to understand how other people think and act. This leads to inappropriate responses in social situations, which are commonly misinterpreted as rudeness, contrariness or worse. Consequently they may have great difficulty in maintaining social relationships, especially with peers or those in authority. Their apparently odd social demeanor and interaction with others may also place them at risk of being bullied.

Individuals with these conditions are of all levels of intelligence and functioning but it is those with Asperger syndrome who may be at higher risk of entering the criminal justice system. They may be suggestible or respond literally to rules or to questions. Other medical conditions related to anxiety, depression and attention deficit type or mood disorders are also much more common in these individuals.

Together, people with learning disabilities or difficulties and people on the autistic spectrum represent some of the most vulnerable people in the offender population.

Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children

The subject of this report is the treatment of vulnerable defendants within the criminal courts of England and Wales. The report is in two parts: Part I is concerned with vulnerable adult defendants, and particularly those with learning disabilities; Part II is about child defendants - that is, defendants aged between 10 and 17. The report assesses existing provision for these two groups of vulnerable defendant, and identifies gaps in provision. In addition, the report presents a number of far reaching recommendations.

Fundamental to this report is the concern that vulnerable adult and child defendants are able to participate effectively in the court proceedings to which they are subject, and that their right to a fair trial is not compromised due to their young age and developmental immaturity or because their support needs are not met.

Experiences of court:

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 just felt sick. You go backwards and forwards. In court the psychology woman said I was like a kid. I can talk to people and I like people around but I don't think they realised that I couldn't read and write very well. They said I had learning difficulties.

I am not good at speaking and they don't listen. I needed more time to explain myself.

I sat behind the glass and there were three ladies sitting there. I didn't know what 'remanded' meant. I thought it meant I could come back later.

The judges don't speak English; they say these long words that I have never heard of in my life.

(Quotes from *Prisoners'Voices*, Prison Reform Trust, 2008)



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