

# Fair Access to Justice?

support for vulnerable defendants in the criminal courts

A PRT briefing paper by Jenny Talbot



## Vulnerable defendants - the facts

- Over 60% of children who offend have communication difficulties and, of this group, around half have poor or very poor communication skills
- Around a quarter of children who offend have an IQ of less than 70
- 7% of adult prisoners have an IQ of less than 70 and a further 25% have an IQ between 70-79; it is generally acknowledged that between 5 and 10% of the adult offender population has a learning disability
- 43% of children on community orders have emotional and health needs, and the prevalence amongst children in custody is higher
- 39% of adult offenders under supervision in one probation area had a current mental illness, and 49% had a past/lifetime mental illness
- 75% of adult prisoners have a dual diagnosis (mental health problems combined with alcohol or drug misuse).

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## Summary and recommendations

### Summary

High numbers of defendants have particular support needs which, if left unmet, can affect their ability to participate effectively in court proceedings and compromise their right to a fair trial, as protected by Article 6, European Convention on Human Rights.

The current arrangements for special measures to support individuals rendered vulnerable by court proceedings are inequitable. Vulnerable witnesses are, by statute, able to access certain support (special measures), such as an intermediary, whereas vulnerable defendants do not have statutory protection and must rely on the discretion of the individual court and on the common law.

The Advocacy Training Council (2011) recognises that the handling and questioning of vulnerable people in court, in order to achieve best evidence, is a specialist skill; however, there is a lack of clarity concerning the provision and availability of intermediaries for defendants.

While intermediaries appointed to support vulnerable witnesses are registered and subject to a stringent selection, training and accreditation process, and quality assurance, regulation and monitoring procedures, intermediaries for defendants are neither registered nor regulated. The practice of 'registered' and 'non-registered' intermediaries – potentially in the same trial and paid different fees – is anomalous.

Intermediaries should be introduced into the statutory provision of special measures for vulnerable defendants. These special measures, together with other reasonable adjustments, should be made available, according to personal need, to enhance the capacity of the vulnerable defendant to participate effectively in court proceedings, to assist in their preparation for the trial process and to help ensure fitness to plead. In turn, this will help to ensure access to justice for both the victim and the defendant.

### Recommendations

#### Support for vulnerable defendants:

- 1 Special measures available to vulnerable witnesses and vulnerable defendants should be equitable in law (see also The Bradley Report, Department of Health, 2009:61); in particular:
  - a. Child defendants and vulnerable adult defendants should have access to Registered Intermediaries (or their equivalent) to prepare for and during court proceedings, according to personal need.
- 2 Responsibility for ensuring that special measures and other reasonable adjustments are made for vulnerable defendants, according to personal need, should be clarified; the particular role of the judiciary, court staff and defence lawyers in fulfilling that responsibility should be specified.

- 3 An integral part of liaison and diversion services/criminal justice liaison services should be to facilitate special measures and other reasonable adjustments for vulnerable defendants, according to personal need, and to provide guidance to members of the judiciary and criminal justice staff on how particular impairments and disabilities can manifest themselves in court proceedings.
- 4 The use of special measures and other reasonable adjustments for vulnerable defendants should be monitored, reviewed and reported on. For England, this should be an integral part of the reporting arrangements for the National Liaison and Diversion Development Network; for Wales, this should be an integral part of the forthcoming Policy Implementation Guidance.

#### **Intermediaries:**

- 5 All intermediaries should be registered and subject to the same stringent recruitment, training, quality assurance, professional standards and monitoring procedures. There should be one register of intermediaries for all vulnerable people – witnesses, victims and defendants – in the criminal justice system.

#### **Information sharing:**

- 6 Routine and systematic procedures should be in place to ensure that liaison and diversion services/criminal justice liaison services provide the courts with relevant information concerning an individual defendant's particular impairments and support needs; this should include when an Appropriate Adult has been called to support a vulnerable adult or 17 year old at the police station.

#### **Information and training:**

- 7 Information on how particular impairments and disabilities can manifest themselves during court proceedings, and ways in which special measures and other reasonable adjustments can help ensure the defendant is able to participate effectively in court proceedings, should be routinely available for members of the judiciary, court staff and defence and prosecution lawyers.
- 8 Legal professionals and practitioners who undertake criminal work, members of the judiciary and liaison and diversion staff should be required to participate in awareness training in mental health problems, learning disabilities and other learning, developmental and behavioural disorders such as autism, attention deficit hyperactive disorder, communication difficulties and dyslexia.
- 9 See also the Advocacy Training Council recommendation concerning training which states:

*The time has come for the Bar to draw upon expertise available from medical, psychiatric, psychological and other disciplines. The key elements of training should be three-fold:*

- *how to identify witnesses and defendants who may be vulnerable*
- *how to consider and obtain measures in terms of procedure*
- *how to make adjustments in practice* (Advocacy Training Council, 2011).

### **Appropriate adults<sup>1</sup>:**

- 10 The anomalous position of 17 year olds should be changed; Appropriate Adults should be available for all 17 year olds.
- 11 There should be statutory provision of Appropriate Adults for vulnerable adult suspects and timely access to such support.

## **Introduction**

This briefing paper has been prepared for criminal justice, healthcare and legal professionals and practitioners, members of the judiciary, and local government directors of adult and children's services and lead members in England and Wales. It will be of particular use to those working in liaison and diversion services in England and criminal justice liaison services in Wales; magistrates; defence lawyers and court staff.

All defendants who come before the criminal courts have, in law, the right to a fair trial. Defendants should be able to enter a plea and to participate effectively in court proceedings. For certain defendants, such as children and adults with particular disabilities, court proceedings can be especially challenging, so rendering the individual 'vulnerable'. In these instances certain support or special measures can be made available to assist the vulnerable defendant, so helping to ensure their effective participation in court proceedings and right to a fair trial. However, the availability of special measures for defendants is problematic for two main reasons:

- there is no routine or systematic procedure for identifying the particular support needs of defendants
- there are few special measures available, in statute, for defendants in need of such support.

This briefing paper sets out the legal framework governing the treatment of defendants in court, the availability of special measures for defendants and of intermediaries, in particular, and the lack of parity between vulnerable defendants and vulnerable witnesses. The role of the newly developing liaison and diversion services is also considered as it relates to identifying and supporting vulnerable defendants, and clear recommendations are made.

## **Legal framework**

Three aspects of the legal framework governing the treatment of defendants are briefly covered. These are: the right to a fair trial, fitness to plead and the Equalities Act. Mental Health Act provisions are also relevant to this section and these are considered elsewhere in the Prison Reform Trust publication, *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (Jacobson with Talbot, 2009).

## Right to a fair trial

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

- to be informed properly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him
- to have adequate time and facilities for the preparation of his defence
- 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
- 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
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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

*...effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witness and, if represented, to explain to his own lawyers his version of events, point out any statement with which he disagrees and make them aware of any facts which should be put forward in his defence* (*S v UK*, 2004).

## Fitness to plead

Any individual who stands trial is further required to be 'capable of contributing to the whole process of his or her trial, starting with entering a plea' (British Psychological Society, 2006:68). The main criteria used in determining fitness to plead date from the 1836 case of *R v Pritchard*, and are:

- capacity to plead with understanding
- ability to follow the proceedings
- knowing that a juror can be challenged



- ability to question the evidence
- ability to instruct counsel.

Concerns, however, have been raised about the broad and somewhat subjective criteria for fitness to plead. In 2008 the Law Commission launched a review of the current test, noting that the legal principles date back to 1836 when *'the science of psychiatry was in its infancy'* and that *'the application of these antiquated rules is becoming increasingly difficult and artificial'* (Law Commission, 2008). The review was followed, in 2010, by a consultation paper *'Unfitness to Plead'* in which the Law Commission noted that the 'Pritchard' criteria are:

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

(Law Commission, consultation paper 197, 2010).

One of the provisional proposals suggested by the consultation (provisional proposal 5) recognises the role that special measures and other reasonable adjustments can play in enhancing the decision making capacity of the defendant to undergo a trial and enter a plea (fitness to plead). The findings of the Law Commission consultation remain forthcoming.

### **Equalities Act, 2010**

Recent years have seen an increasing emphasis upon inclusion as a goal of public policy with respect to people with disabilities. Under equality law authorities must work to ensure that discrimination against disabled people does not occur, for example, by making 'reasonable adjustments'<sup>2</sup> to existing service provision and ensuring that future provision is accessible to people with disabilities.

Public authorities subject to the public sector equality duty must have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity between people who share a protected equality characteristic and those who do not. The law states that advancing opportunity includes taking steps to take account of people's disabilities. Authorities must therefore consider what they can do actively to advance the opportunities of disabled people as well as what they can do to ensure they are not discriminated against.

It follows from this that defendants with disabilities should be provided with the practical assistance and facilities they require to participate effectively in court proceedings. This will help to ensure that people with disabilities are not discriminated against and are afforded the same opportunity as people without disabilities to engage in court proceedings.

A disabled person is described 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*' (Disability Discrimination Act 1995). This definition is sufficiently broad to encompass mental health problems and learning, developmental or behavioural disorders such as autism, attention deficit hyperactive disorder (ADHD), communication difficulties, and dyslexia.

## The use of special measures in court

The use of special measures in court is intended to reduce the stresses associated with the court environment so that the individual can give his or her best evidence. While protection and support for vulnerable witnesses<sup>3</sup> in court has been significantly enhanced, most notably by the provisions contained in Part II of the Youth Justice and Criminal Evidence (YJCE) Act 1999, section 16 of this Act makes it explicit that these measures are not designed to include defendants.

The special measures available for vulnerable witnesses include the use of screens so that the defendant does not see the witness; the provision of evidence via a live television link; clearing the public gallery so that evidence can be given in private; the removal of wigs and gowns in court, and the provision of intermediaries.

In 2006, in an amendment to the special measures provisions of the YJCE Act 1999, section 47 of the Police and Justice Act allows child and vulnerable adult defendants to give evidence via a live link.

The lack of parity between support for vulnerable witnesses and vulnerable defendants is of particular concern, prompting the Royal College of Psychiatrists to say:

*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.* (Royal College of Psychiatrists, 2006: 55).

More recently, Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system recommended that:

*Immediate consideration should be given to extending to vulnerable defendants the provisions currently available to vulnerable witnesses.* (Bradley Report, Department of Health, 2009).

Although progress in supporting child defendants in the court room has been made in recent years, as evidenced through a thematic inspection of youth courts by HM Inspectorate of Court Administration (HMICA, 2007), many youth justice practitioners and children's charities maintain that support provided remains inadequate. These concerns are evidenced, in part, by a recent joint inspection and report by HMI Probation, HMI Court Administration and HM Crown Prosecution Service Inspectorate, *Not making enough difference* (2011), which found that:



- *YOT<sup>4</sup> court workers were not... engaging sufficiently with young people and their parents/carers or helping them to understand what was happening*
- *[Although] HMCS<sup>5</sup> staff were confident that the YOT or defence solicitors would notify the court about any special needs the young person had...[inspectors] did not see any mechanisms in place to assess the needs of young people appearing in court for the first time, for example, young people with learning difficulties that could impact on their ability to understand what was happening in court*
- *The maturity of the young person in relation to their ability to understand the seriousness of the offence and its consequences... was not addressed sufficiently*
- *Performance systems and data were not sophisticated or used to improve practice. Agencies were responding to problems individually rather than working together. This was particularly the case for assessing and managing vulnerability in the court setting. (HMIP, HMICA, HMCPSI, 2011).*

Despite the lack of legislation, arrangements can be made to assist vulnerable defendants in accordance with various guidance, most notably the Consolidated Criminal Practice Direction<sup>6</sup>. The Lord Chief Justice issued a practice direction in 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.’ Most of the specific measures recommended are aimed at making the court environment less intimidating, such as the removal of wigs and gowns, allowing the defendant to sit with members of his family, and familiarisation visits to the courtroom before the trial or hearing. While helpful, the guidance is not sufficiently far reaching and can be confusing for the defendant. For example, in discussions with offenders with learning disabilities<sup>7</sup> the point was made that if the judge isn’t wearing a wig, ‘how do you know who he is?’; while a court familiarisation visit, which had been conducted – quite reasonably when the court wasn’t sitting – was of limited use because on the day of the trial, ‘the court was full of people; they just walked in off the street and they just look at you’.

Guidance for HM Courts and Tribunals Service staff<sup>8</sup> states that:

*The overriding principle... is that all possible steps should be taken to assist a vulnerable defendant to understand and participate in [court] proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends.*

The judiciary can use their inherent discretion to ensure appropriate support is made available to defendants to facilitate their effective participation in court proceedings and to uphold the individual’s right to a fair trial, and case law is being used to support the use of special measures for defendants. However, in terms of statutory provision, there is no parity between vulnerable witnesses and vulnerable defendants.

## Vulnerability and the experience of vulnerable defendants

Defendants can be made vulnerable by court proceedings due to their young age and developmental immaturity, i.e. child defendants, or because of particular disabilities, such as learning disabilities, mental health needs and communication difficulties. Guidance for HMCTS staff defines 'vulnerable' thus:

*A defendant may be considered 'vulnerable' when they are young and overtly immature or when they have a mental disorder within the meaning of the Mental Health Act 1983, or some other significant impairment of intelligence and social function such as to inhibit their understanding of, and participation in [court] proceedings.*

High numbers of children and adults who offend have particular support needs, which, if left unmet, might affect their ability to participate effectively in court proceedings and to receive a fair trial. Conditions likely to make support in court necessary include mental health problems, learning disabilities (and low levels of IQ), and other learning, developmental and behavioural disorders such as autism, attention deficit hyperactive disorder, communication difficulties and dyslexia. Prevalence studies demonstrate that:

- Over 60% of children who offend have communication difficulties and, of this group, around half have poor or very poor communication skills (Bryan, Freer and Furlong, 2007)
- Around a quarter of children who offend have an IQ of less than 70 (Harrington and Bailey et al, 2005)
- 7% of adult prisoners have an IQ of less than 70 and a further 25% have an IQ between 70-79 (Mottram, 2007); it is generally acknowledged that between 5 and 10% of the adult offender population has a learning disability
- 43% of children on community orders have emotional and health needs (Healthcare Commission, 2009), and the prevalence amongst children in custody is higher (Chitsabesan et al, 2006)
- 39% of adult offenders under supervision in one probation area had a current mental illness, and 49% had a past/lifetime mental illness (Brooker et al 2011)
- 75% of adult prisoners have a dual diagnosis (mental health problems combined with alcohol or drug misuse) (Offender Health Research Network, 2009).

How such conditions manifest themselves in court is significant. For example, people with very low IQs and those with learning disabilities are likely to have limited language ability, comprehension and communication skills. This means they are likely to have difficulty understanding certain words and in understanding and responding to questions; they may have difficulty recalling information and take longer to process information; they may be acquiescent and suggestible and, under pressure, may try to appease other people (Clare, 2003; Home Office Research Findings, 44; Talbot, 2008).

In their recent report, *Raising the Bar*, the Advocacy Training Council recognises that:

*The handling and questioning of vulnerable witnesses, victims and defendants is a specialist skill, and should be recognised as such by practitioners, judges, training providers and regulators* (Advocacy Training Council, 2011).

The Prison Reform Trust has undertaken extensive research on the experiences of offenders with learning disabilities and difficulties in the criminal justice system<sup>9</sup>. Of particular relevance, the research showed that:

- Around two-thirds experienced difficulties in verbal comprehension skills, including difficulties understanding certain words and in expressing themselves
- Around a fifth said they didn't understand what was going on in court or what was happening to them; while some didn't understand why they were in court or what they had done wrong (Talbot, 2008).

The use of language in court was a particular problem:

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

*The solicitor came to talk to me but used big words and I found it difficult to understand.*

This, in turn, frequently led to problems in understanding and in following court proceedings:

*I didn't understand really; I pleaded guilty straight away. I didn't know what he meant when he said 'custodial'.*

*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.*

Some defendants talked specifically about the difficulties they experienced in responding to questions:

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

While others spoke more generally about not knowing what was going on in court or who they might ask for help:

*I didn't know what was going on and there's no one to explain things to you. They tell you to read things and in court you can't just ask for help. The judge thinks you can read and write just because you can speak English.*

*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'?*<sup>10</sup>

In the absence of routine screening of defendants to identify their particular support needs, it is difficult to be precise about the number that would benefit from special measures and other reasonable adjustments. However, the wealth of data concerning offenders with impairments and disabilities demonstrate the high numbers being dealt with by the criminal courts on a daily basis. How many of this group are unable to participate effectively in court proceedings and are not receiving a fair trial, is more difficult to gauge. In their report, following an enquiry into the human rights of adults with learning disabilities, the Joint Committee on Human Rights said:

*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 (JCHR, March 2008).*

More recently, the Human Rights Review 2012 identified 'concerns about the treatment of children in the justice system which suggest that breaches of Article 6 may be occurring.' The review showed that:

*The age of 10 for criminal responsibility in England and Wales is lower than international guidelines<sup>11</sup>. Children with learning or communication difficulties may not receive sufficient 'special measures', or adaptations to court procedure to ensure a fair trial.*

*Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity (EHRC, 2012).*

## **Special measures: the role of an intermediary**

The role of an intermediary is to facilitate two-way communication between the vulnerable individual and other participants in the legal process, and to ensure that their communication is as complete, accurate and coherent as possible.

Guidance for HMCTS staff<sup>12</sup> further describes the role thus:

*Intermediaries carry out a range of functions to assist the courts and criminal justice practitioners including:*

- *Conducting an initial, pre-trial assessment to evaluate the communication abilities and need(s) of the witness/defendant*
- *Providing advice, guidance and information to the courts and criminal justice practitioners on how to achieve the best evidence from the witness/defendant. This may include, but is not limited to, what types of questions should be avoided, what*

*types of question formulations are likely to get the most accurate response, how long the witness/defendant will need to answer a question and when they will require breaks in questioning*

- *Intermediaries may also directly assist in the questioning process by asking criminal justice practitioners to rephrase questions the witness/defendant does not understand, rephrase questions themselves if necessary (without changing their substantive meaning) and communicating their subsequent answers.*

The guidance further notes examples of individuals who might require an intermediary, which includes:

*... very young children, stroke patients, individuals with learning difficulties, etc; in other words, people who might otherwise be denied access to justice, because of their inability to communicate clearly and engage with court proceedings.*

Intermediaries are available for vulnerable witnesses under provisions contained in the Youth Justice and Criminal Evidence Act 1999. However, vulnerable defendants are excluded from this provision. More recently section 104 of the Coroners and Justice Act 2009 made provision for a vulnerable defendant to give their oral evidence in court with the assistance of an intermediary, however, this provision has not been implemented.

### **Registered Intermediaries for vulnerable witnesses<sup>13</sup>**

In establishing the role of the intermediary the Ministry of Justice wanted to ensure they were adequately trained and professionally accountable. Intermediaries for witnesses are therefore registered and are referred to as 'Registered Intermediaries'.

To become a Registered Intermediary applicants must undertake training, comprising an interactive, six-module course, at graduate level; successfully complete a rigorous assessment and accreditation process, and demonstrate their understanding of the role of intermediary. The training element is in excess of five days and applicants must pass an examination before entering the register. Due to the nature of the work, Registered Intermediaries must further demonstrate their suitability to support vulnerable people by undertaking an enhanced Criminal Records Bureau check.

As with other professional bodies, and to ensure professional standards, Registered Intermediaries must comply with a code of practice and a code of ethics, which is overseen by the Witness Intermediary Scheme Intermediaries Registration Board. The Witness Intermediary Scheme Quality Assurance Board undertakes quality assurance, regulation and monitoring of the professional standards of Registered Intermediaries and, should problems occur, there exists a formal complaints and investigation procedure, with the option to remove a Registered Intermediary from the register if necessary.

Registered Intermediaries for vulnerable witnesses in court are normally applied for by the Crown Prosecution Service and are provided through the Witness Intermediary Scheme, currently administered on behalf of the Ministry of Justice by the National Policing

Improvement Agency (NPIA). The Witness Intermediary Scheme operates a national database of Registered Intermediaries and provides a 'matching service' to find the most appropriate Registered Intermediary to support the particular needs of the individual witness.

### **Non-registered intermediaries for defendants**

While there is no statutory provision for the use of intermediaries for defendants, judges have used their inherent discretion to safeguard the rights of vulnerable defendants by appointing intermediaries. In *C v Sevenoaks Youth Court* (2009)<sup>14</sup> the Divisional Court held that it was wrong to deprive a defendant of the assistance of an intermediary. This is the first reported case on the point although judges had already been making orders to allow for the use of an intermediary for a defendant in the crown court. Citing this particular case, the Crown Prosecution Service website notes that the appointment of the intermediary was:

*...not made pursuant to a special measures direction under the Youth Justice and Criminal Evidence Act 1999, but is part of the court's duty to take such steps as are necessary to ensure that a youth has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for trial* (Crown Prosecution Service, October 2011<sup>15</sup>).

It seems clear that the Court of Appeal considers the use of intermediaries for defendants an important tool in ensuring effective participation in the trial process. For example, in the case of *R v Walls* (2011)<sup>16</sup>, Lord Justice Thomas said:

*There are available to those with learning disabilities in this age, facilities that can assist. Consideration can now be given to the use of an intermediary under the court's inherent powers as described in the Sevenoaks case, pending the bringing into force of s.33BA (3) and (4) of the Youth and Criminal Evidence Act 1999 (added by the Coroners and Justice Act 2009). Plainly consideration should be given to the use of these powers or other ways in which the characteristics of a defendant evident from a psychological or psychiatric report can be accommodated with the trial process so that his limitations can be understood by the jury, before a court takes the very significant step of embarking on a trial of fitness to plead* (*R v Walls*, 2011).

In a separate case, *R v Great Yarmouth Youth Court* (2011)<sup>17</sup>, Mr Justice Mitting quashed an earlier decision by the court to refuse to allow a defendant to have the benefit of a Registered Intermediary and directed that the decision be 'taken again afresh'. The defendant was a boy with ADHD, who had 'a sensible and careful report', which stated that the defendant 'would benefit from having access to a registered intermediary while providing his evidence to the court to enable him to give his best evidence and receive a fair trial.'

In reaching his decision Mr Justice Mitting said:

*It seems to me that without those precautions [the involvement of a Registered Intermediary] being taken, the risk that this claimant would not receive a fair trial would be real. There is no argument of cost as far as I know. The only factor in play is the ability of*



*the claimant to receive a fair trial. The reasons given by the justices for rejecting the assistance of a registered intermediary are, in my view, inadequate<sup>18</sup>. The inadequacy amounts to irrationality (R v Great Yarmouth Youth Court, 2011).*

### **Registered intermediaries and non-registered intermediaries**

Access to Registered Intermediaries, via the Witness Intermediary Scheme, is generally restricted to applications for vulnerable witnesses only. Guidance from the Ministry of Justice states:

*Where the judiciary grant the use of an intermediary for a defendant in the interests of a fair trial, non-registered intermediaries should be used. Guidance has been provided to HMCTS<sup>19</sup> staff at an operational level regarding non-registered intermediaries for vulnerable defendants and RIs [Registered Intermediaries] for vulnerable defence and prosecution witnesses. Provision of non-registered intermediaries is not the responsibility of the WIS [Witness Intermediary Service], the Ministry of Justice or the NPIA [National Police Improvement Agency].<sup>20</sup>*

A non-registered intermediary is any individual – professionally trained or otherwise – who has not been recruited, trained or accredited by the Ministry of Justice as a Registered Intermediary operating within the Witness Intermediary Scheme. However, how the services of a non-registered intermediary can be secured is unclear. Guidance issued by the Ministry of Justice<sup>21</sup>, which suggests that non-registered intermediaries can be sourced from the National Appropriate Adult Network and the Royal College of Speech and Language Therapists, is misleading and unhelpful.

There are no national standards for non-registered intermediaries or quality assurance to ensure that vulnerable defendants receive the same standard of service and degree of protection as vulnerable witnesses can expect from Registered Intermediaries.

### **Obtaining a non-registered intermediary for a vulnerable defendant**

There exists guidance for HMCTS staff on the use of registered and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses (undated), which, hitherto, has not been routinely available for defence lawyers and others concerned with the provision of intermediaries for defendants. The guidance is helpful in that it provides detailed information about when and how a non-registered intermediary can be obtained for a vulnerable defendant, and this is repeated, in part, below:

*A defence application for the appointment of an intermediary during court proceedings may be made verbally to the bench. The bench will consider the oral application before deciding whether or not the defendant requires the services of an intermediary, and whether that is for the duration of the trial or part of the trial when the defendant gives evidence as a witness or any other stage of the court proceeding (Paragraph 2.4; HMCTS, undated).*

Concerning the appointment of a non-registered intermediary:

*The court should appoint a non-registered intermediary. Once proceedings have reached the court stage, it is the responsibility of the court to commission and source an appropriate non-registered intermediary on the basis of the defendants' communication abilities and needs.*

*This person should normally be a professional in the field of facilitating communication with vulnerable people (for example a speech and language therapist or a psychologist).*

*The Ministry of Justice and the NPIA are unable to provide any assistance in obtaining the services of a non-registered intermediary.*

*A non-registered intermediary may be accessed through a professional organisation.* (Paragraph 3.1; HMCTS, undated).

And the Guidance provides a 'non-exhaustive' list of organisations that may be able to help. However, a check of the organisations listed, in May 2012, showed that only three might be able to assist in providing a non-registered intermediary and none of them routinely did so.

Concerning the training and experience of non-registered intermediaries:

*...non-registered intermediaries may not have been trained or have experience in the procedures and protocols of the criminal courts, therefore it is advised that arrangements are made for them to be briefed on the matter. This is normally undertaken by the defence lawyer.*

Concerning payment for non-registered intermediaries:

*...payment for the services of a non-registered intermediary may be higher than that of a Registered Intermediary as the non-registered intermediary will be appointed on a private and unregulated basis.*

*It is the responsibility of the court to make the necessary arrangements to administer payment for the services of a non-registered intermediary.*

(Paragraph 3.1; HMCTS, undated).

HMCTS guidance goes on to provide information about a provisional finance protocol, which will remain in place until section 104 of the Coroners and Justice Act 2009 is implemented and this is shown at Appendix 1.

## **Liaison and diversion services (England) and criminal justice liaison services (Wales)**

The establishment of liaison and diversion services to provide support for vulnerable suspects and defendants was recommended by the Reed Review (1992). However, services have been patchy and the focus of support has tended towards court provision for people with mental health problems. More recently, renewed attention has been given to extending the role of services to include people with learning disabilities and in ensuring access to provision, nationwide, at the police station and in court.

Due to the devolution of healthcare to the Welsh Government, arrangements for liaison and diversion services for England and Wales are slightly different:

- England: typically liaison and diversion services are court based and around one-third of courts have routine access to provision. Following Lord Bradley's review and recommendation that all police stations and courts should have access to liaison and diversion services (Bradley Report, Department of Health, 2009), the government made a commitment, and an investment of £50 million, to establish liaison and diversion services – accessible to all police stations and courts – across England by 2014.
- Wales: although there has been no similar investment in Wales, criminal justice liaison services are currently available across 90% of courts and, while availability at police stations is patchy, there is a drive towards increased service provision in police custody.

A major role for liaison and diversion services in England and criminal justice liaison services in Wales is to assist police custody and court staff in identifying suspects and defendants with possible mental health problems, learning disabilities and other impairments, and their particular support needs. While some of these individuals will be diverted away from criminal justice and into, for example, healthcare for treatment and care, it is expected that many will continue through the criminal justice system, with the appropriate support.

However, recognising when an individual has particular support needs can be problematic. For example, learning and other developmental disabilities and difficulties are largely 'hidden' with few visual or behavioural clues. Further, many people with such impairments try hard to hide their difficulties for fear of ridicule and to appear the same as everyone else; even when asked directly, especially by people they don't know or in a stressful environment, they may deny they have any support needs.

It is important, therefore, that liaison and diversion/criminal justice liaison staff have access to, and are trained in the use of, properly validated screening tools, which should be embedded within service provision and be used routinely and systematically. Staff should have timely access to specialist services and clear referral routes, and undertake disability awareness training.

Although liaison and diversion/criminal justice liaison services remain at an early stage of development it is reasonable to expect that, following identification of certain conditions, staff in these services will play a key role in informing criminal justice staff, defence lawyers and members of the judiciary about the particular needs of individual defendants and in helping to facilitate appropriate support.

It is important, therefore, that liaison and diversion/criminal justice liaison staff are conversant with the legal obligations and guidance that will help to facilitate such support, and these include:

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

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

Prior to appearing in court, defendants will have passed through police custody. On arrival into police custody, a requirement of the Police and Criminal Evidence Act is that an Appropriate Adult (AA) should be called if the suspect is either under 17 years of age or is an adult who the custody sergeant considers to be 'mentally disordered or otherwise mentally vulnerable'. The responsibility for calling an AA rests with the custody sergeant.

The role of an AA is different to that of an intermediary; see Appendix 2 for a description of the role and responsibilities of an AA. The role of an intermediary is described at page 12.

While the focus of this briefing paper concerns defendants, there are implications for court proceedings that relate directly to the role and presence of an AA at the police station. These are:

- In calling an AA for an adult suspect the custody sergeant is demonstrating his/her concern about the individual's 'vulnerability' within the context of criminal justice. However, there is no routine procedure to ensure that this information – that an AA has been called – is made available to the court
- If an AA is not called for a vulnerable adult suspect, evidence gained during the police interview may be considered inadmissible in court

- While there is a statutory entitlement to an AA for children and vulnerable adults, the statutory provision of AAs is made available only for children. This means that services for vulnerable adults are inconsistent and, at worst, non-existent
- The position concerning 17 year olds is anomalous; children under the age of 17 are entitled to support from an AA, as are vulnerable adults. However, while in law still a child, a 17 year old is not automatically entitled to the support of an AA. Although in theory a ‘vulnerable’ 17 year old is entitled to the same protection afforded to children and vulnerable adults, in practice the police rarely identify vulnerability in 17 year olds. On occasions when the police do identify vulnerability in a 17 year old, it is often unclear which agency will provide an AA and whether children’s or adult services should be involved.

## Recommendations

### Support for vulnerable defendants:

- 1 Special measures available to vulnerable witnesses and vulnerable defendants should be equitable in law (see also The Bradley Report, Department of Health, 2009:61); in particular:
  - a. Child defendants and vulnerable adult defendants should have access to Registered Intermediaries (or their equivalent) to prepare for and during court proceedings, according to personal need.
- 2 Responsibility for ensuring that special measures and other reasonable adjustments are made for vulnerable defendants, according to personal need, should be clarified; the particular role of the judiciary, court staff and defence lawyers in fulfilling that responsibility should be specified.
- 3 An integral part of liaison and diversion services/criminal justice liaison services should be to facilitate special measures and other reasonable adjustments for vulnerable defendants, according to personal need, and to provide guidance to members of the judiciary and criminal justice staff on how particular impairments and disabilities can manifest themselves in court proceedings.
- 4 The use of special measures and other reasonable adjustments for vulnerable defendants should be monitored, reviewed and reported on. For England, this should be an integral part of the reporting arrangements for the National Liaison and Diversion Development Network; for Wales, this should be an integral part of the forthcoming Policy Implementation Guidance.

### Intermediaries:

- 5 All intermediaries should be registered and subject to the same stringent recruitment, training, quality assurance, professional standards and monitoring procedures. There should be one register of intermediaries for all vulnerable people – witnesses, victims and defendants – in the criminal justice system.

### **Information sharing:**

- 6 Routine and systematic procedures should be in place to ensure that liaison and diversion services/criminal justice liaison services provide the courts with relevant information concerning an individual defendant's particular impairments and support needs; this should include when an Appropriate Adult has been called to support a vulnerable adult or 17 year old at the police station.

### **Information and training:**

- 7 Information on how particular impairments and disabilities can manifest themselves during court proceedings, and ways in which special measures and other reasonable adjustments can help ensure the defendant is able to participate effectively in court proceedings, should be routinely available for members of the judiciary, court staff and defence and prosecution lawyers.
- 8 Legal professionals and practitioners who undertake criminal work, members of the judiciary and liaison and diversion staff should be required to participate in awareness training in mental health problems, learning disabilities and other learning, developmental and behavioural disorders such as autism, attention deficit hyperactive disorder, communication difficulties and dyslexia.

- 9 See also the Advocacy Training Council recommendation concerning training which states:

*The time has come for the Bar to draw upon expertise available from medical, psychiatric, psychological and other disciplines. The key elements of training should be three-fold:*

- *how to identify witnesses and defendants who may be vulnerable*
- *how to consider and obtain measures in terms of procedure*
- *how to make adjustments in practice* (Advocacy Training Council, 2011).

### **Appropriate adults:**

- 10 The anomalous position of 17 year olds should be changed; Appropriate Adults should be available for all 17 year olds.
- 11 There should be statutory provision of Appropriate Adults for vulnerable adult suspects and timely access to such support.



## Appendix 1

### Provisional HMCTS Defendant Intermediary Finance Protocol

The following is an extract from 'Guidance for HMCTS staff on the use of registered and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses' (undated), paragraph 7.1:

*With regard to the mandatory pre-trial assessment required to be conducted on the defendant by an intermediary, the defence lawyer should make a prior authority application for the costs of this to the Legal Services Commission. Should this be rejected, HMCTS may then consider meeting these costs.*

*Until Section 104 of the Coroners and Justice Act 2009 is implemented, HMCTS is required to fund the payment of intermediaries, during court proceedings, from its existing budget.*

*In the absence of a specific statutory provision the courts are not able to make payments for intermediaries from central funds, therefore HMCTS has agreed the following approach until such processes have been formalised;*

*HMCTS will meet the costs of intermediaries for defendants and either the police or CPS (at the investigation and trial stages respectively of a case) will meet the costs of intermediaries for victims or prosecution witnesses.*

*In order to minimise the bureaucracy it has been agreed that payment will be made by local courts from their existing allocations.*

*Non-registered intermediaries should complete a payment form authorised by either the Court Associate or Legal Advisor (Magistrates Court) or Court Clerk (Crown Court). Payment should be made using the Non-Invoice Payment (NIPA) process.*

*A specific Natural Account Code has been created in order to separately identify this expenditure and monitor the financial pressure that this may create.*

*Regional Heads of Finance have been notified of this arrangement and any queries should be addressed through your Area and Regional Finance teams.*

## Appendix 2



### GUIDE FOR APPROPRIATE ADULTS

#### Your role as an appropriate adult

Appropriate adults are called to the police station as an important safeguard, providing independent support to detainees who are:

- aged under 17, or
- maybe mentally disordered or mentally vulnerable

You are not simply an observer. Your role is to assist the detainee to ensure that they understand what is happening at the police station during the interview and investigative stages. In particular you should:

- support, advise and assist the detainee
- ensure that the police act fairly and respect the rights of the detainee
- help communication between the detainee, the police and others

You are not there to provide the detainee with legal advice.

#### Key information

The way in which police investigate offences is governed by the Police and Criminal Evidence Act 1984 (PACE).

The **PACE Codes of Practice** set out the powers, responsibilities and procedures of the police in more detail. Copies are available at the police station.

The Custody Officer is responsible for the care and welfare of the detainee and must ensure that the investigation is conducted quickly and fairly.

#### Rights of the detainee

The Custody Officer must tell the detainee, in your presence, that they have the following rights:

- The right to have someone informed of their arrest.
- The right to independent legal advice free of charge.
- The right to consult the PACE Codes of Practice.

These rights can be exercised at any time while the detainee is in custody. In exceptional circumstances some or all of these rights may be delayed.

The custody officer must give the detainee a written notice of these rights and other entitlements which explain how the detainee should be looked after.

The detainee (if under 17 or mentally vulnerable) must be advised of the duties of the appropriate adult and told that they may speak to the appropriate adult in private at any time.

#### Your rights as an appropriate adult

You must be present when:

- the custody officer informs the detainee of their rights and entitlements. If this is carried out before you arrive it must be repeated in your presence.
- when the detainee is cautioned. If the caution is given before you arrive it must be repeated in your presence.

In your role you also have a right to:

- be told why the detainee is being held.
- inspect the written record of the detainee's period in detention (the custody record) at any time, and have a copy of that record.
- see a copy of the Notice of Rights and Entitlements.
- see a copy of the PACE Codes of Practice.

## **Interviews**

You must be present when the police interview the detainee. You should:

- ensure that the detainee understands the caution that is given by the police at the start of the interview.
- intervene if you feel it is necessary to help the detainee communicate effectively with the police, or if you feel that the police questioning is confusing, repetitive or oppressive.
- ask for a break in the interview if you feel the detainee needs to rest or if you feel that they need legal advice or you want to talk to them in private.
- be present when the detainee is asked to agree and/or sign any documentation.

If you have any queries or complaints about the conduct of an interview you should speak to the Custody Officer immediately.

## **Other procedures**

You are also required to be present for the following procedures:

- Subject to strictly limited exceptions, during any search of the detainee involving the removal of more than outer clothing or intimate searches.
- During any form of identification procedure, involving the participation of the suspect including the taking of DNA samples.
- During any process involving the fingerprinting, photographing of the detainee or when a sample or footwear impression is taken from them.

If you are available at the time you are also entitled to be present:

- when the police review whether there is a need to keep a person in detention.
- when a decision to authorise extended detention to 36 hours is made by a senior police officer.
- when the detainee is formally charged.

## **Legal Advice**

Even if the detainee refuses legal advice you have the right to request that a solicitor be called. The Custody Officer must call the solicitor but the detainee cannot be forced to see them when they arrive.

You are not entitled to be present during private legal consultations between the detainee and their legal representative.

You may assist the communication between the detainee and their legal representative if they request your support. However you should make sure that the detainee understands that you are not covered by 'legal privilege'. This means that, in exceptional circumstances, you could be questioned as a witness by the police, or in court, about what was discussed.

Legal advice for certain (usually minor) offences is normally only provided over the telephone. However, if the detainee is eligible for assistance from an appropriate adult, the legal advisor should attend the police station in person.

## **Further Information**

This leaflet was produced by the Home Office in consultation with the National Appropriate Adult Network (NAAN).

It is designed for parents, carers, relatives or friends who might be called to act as an appropriate adult for someone they know. It aims to give you a quick overview of your role and responsibilities.

It is strongly advisable that people acting as an appropriate adult in a professional capacity, whether as a volunteer or paid worker, should be trained. Further information about this and about all aspects of the appropriate adult role can be obtained from the National Appropriate Adult Network [www.appropriateadult.org.uk](http://www.appropriateadult.org.uk)

## Endnotes

- <sup>1</sup> Appropriate adults provide support for child and vulnerable adult suspects at the police station; see page 18 and Appendix 2.
- <sup>2</sup> The purpose of the duty to make reasonable adjustments is to enable people with disabilities to have the same access to services as people without disabilities.
- <sup>3</sup> Defined by the Act as being: under-18; suffering from a mental disorder within the meaning of the Mental Health Act 1983; otherwise having a significant impairment of intelligence and social functioning; having a physical disability or suffering from a physical disorder.
- <sup>4</sup> Youth Offending Team.
- <sup>5</sup> Her Majesty's Court Service.
- <sup>6</sup> [www.justice.gov.uk/courts/procedure-rules/criminal/pd\\_consolidated](http://www.justice.gov.uk/courts/procedure-rules/criminal/pd_consolidated)
- <sup>7</sup> As part of the Prison Reform Trust's *No One Knows* programme, a group of offenders with learning disabilities was recruited to advise the Prison Reform Trust's work in this area. The group, known as the Working for Justice Group, is supported by KeyRing Living Support Networks.
- <sup>8</sup> *Guidance for HMCTS staff on the use of registered and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses*; HMCTS, undated.
- <sup>9</sup> See [www.prisonreformtrust.org.uk/nok](http://www.prisonreformtrust.org.uk/nok)
- <sup>10</sup> Quotes taken from *Prisoners Voices: experiences of the criminal justice system by prisoners with learning disabilities and difficulties* (Talbot, 2008).
- <sup>11</sup> The UN Committee on the Rights of the Child has stated that setting the age of criminal responsibility below 12 years is 'not acceptable' (UN document CRC/C/GC/10). In Scotland the age of criminal responsibility is 12 years; in China, Russia and Germany it is 14 years, and in France and Brazil it is 18 years (Bromley Briefings Factfile, Prison Reform Trust, June 2012).
- <sup>12</sup> *Guidance for HMCTS staff on the use of registered and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses*; HMCTS, undated.
- <sup>13</sup> Note: while Registered Intermediaries can be appointed to support vulnerable victims and witnesses during police investigations, this briefing is concerned with the appointment of intermediaries in court proceedings.
- <sup>14</sup> *C v Sevenoaks Youth Court* (2009) EWHC 3088 (Admin)
- <sup>15</sup> [www.cps.gov.uk/legal/l\\_to\\_o/mentally\\_disordered\\_offenders/](http://www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders/)
- <sup>16</sup> *R v Walls*, 2011, EWCA Crim 443
- <sup>17</sup> *R v Great Yarmouth Youth Court* (2011), EWHC 2059 (Admin).
- <sup>18</sup> The justices concluded that the report from the psychiatrist did '*not show [the claimant] to have any greater difficulties in this [the ability to communicate his evidence in court] than many other youths who appear before the court*'.
- <sup>19</sup> HM Courts and Tribunals Service.
- <sup>20</sup> Email correspondence between the Ministry of Justice and the Prison Reform Trust, July 2011.
- <sup>21</sup> Email correspondence between the Ministry of Justice and the Prison Reform Trust, June 2011.

Full references are available upon request; contact [jenny.talbot@prisonreformtrust.org.uk](mailto:jenny.talbot@prisonreformtrust.org.uk)



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Prison Reform Trust, 15 Northburgh Street, London EC1V 0JR

Tel: 020 7251 5070

Fax: 020 7251 5076

[www.prisonreformtrust.org.uk](http://www.prisonreformtrust.org.uk)