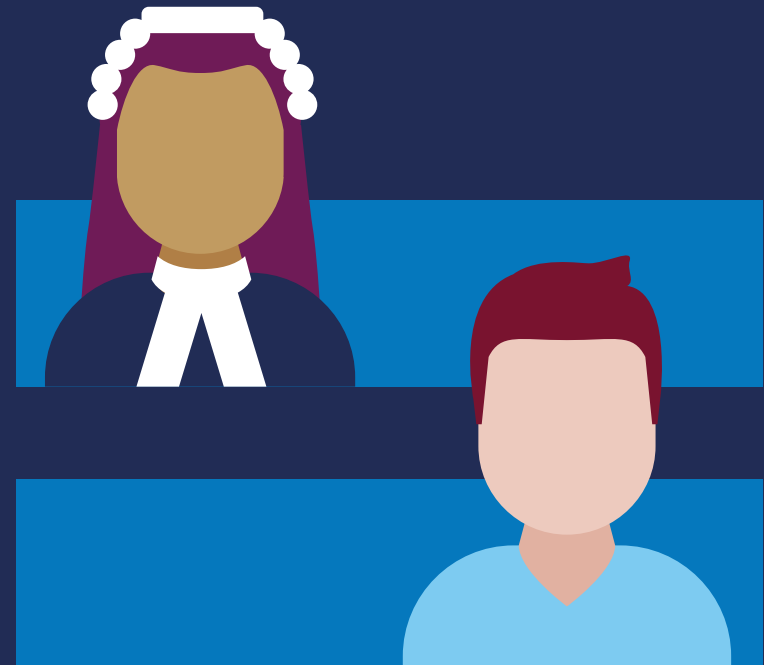


Findings and recommendations

Inclusive justice: a system designed for all

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“
Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.

” Equal Treatment Bench Book 2018, Guidance for Judges and Magistrates for England and Wales

Foreword

The criminal justice system is a complex environment

A maze of processes and procedures woven with complicated language means that few people understand how to find their way through. For those who are disabled or have mental health conditions, it can be especially difficult.

Although this inquiry was completed before the coronavirus pandemic took hold in the UK, it is as relevant and important as ever, if not more so. The world we live in has been fundamentally altered in just a few months. Workplaces, vital services and society around us have had to adjust and the criminal justice system is adapting rapidly to deal with the challenges of coronavirus.

“ Reform of the criminal justice system has long been a priority. The landscape has temporarily but significantly changed, with the rapid expansion of fully virtual hearings and a debate on full jury video trials. Our look at how the remote aspects of the system operated before coronavirus is therefore of critical relevance. Current practice needs to be studied carefully and evaluated to ensure the system builds on lessons learnt. We are publishing the findings of our inquiry to inform further decision-making at this extraordinary time.

”

Our inquiry focused on the pre-trial phase, where important decisions are made about adjustments. We heard from charities, intermediaries and organisations that large numbers of people with cognitive impairments, mental health conditions and neuro-diverse conditions pass through the system. These individuals may display and read body language in a different way to others, may find it hard to understand questions, or be overly compliant and suggestible. As well as looking at how they can participate, we looked at the opportunities and risks arising from the increase in modernisation, including video hearings. Technology can assist and empower disabled people, but professionals must ensure it is used appropriately and does not isolate them. Our justice system simply will not work unless you can understand what is happening to you if you are accused of a crime, and unless you can participate effectively in proceedings.

Recent legislative reforms have rightly sought to improve the participation and experience of disabled victims and witnesses. It has been 10 years since the Equality Act 2010 came into force, 11 years since the UK ratified the UN Convention on the Rights of Persons with Disabilities and 25 years since the enactment of the Disability Discrimination Act 1995. Our inquiry has identified findings that make it clear that our criminal justice system needs to do more for disabled people who are accused of a crime. We need simple and straightforward processes, designed to be inclusive for all. Everyone in the country has the right to a fair trial and that includes disabled defendants.

Criminal justice agencies currently face unprecedented challenges. The overriding concern is to protect public health, but our most fundamental values of equality and access to justice must also remain at the fore and be central to decision making. We know that coronavirus has affected everyone in Britain in many ways. Getting the criminal justice system operating again may well impact people differently too. Now is the time to look at how disabled people are affected, and to design a criminal justice system that works for everyone.

Helen Mahy

Helen Mahy CBE

Commissioner for the
Equality and Human
Rights Commission



About this inquiry

Inquiries are a way for us to find out more about an issue of equality, diversity or human rights

We are Britain's equality regulator and a national human rights institution. In Scotland, we share our human rights mandate with the Scottish Human Rights Commission and we are grateful to them for their agreement under section 7 of the Equality Act 2006 to include human rights aspects of our inquiry in Scotland.

We conducted this inquiry under section 16 of the Equality Act 2006. Based on our findings we can make recommendations for change and improvement in policy, practice or legislation.

We looked at the experiences of adult defendants or accused people¹ with a cognitive impairment, mental health condition and / or neuro-diverse condition² in the criminal justice system. These are often called 'hidden disabilities' as an impairment and / or need for adjustments may not be immediately apparent. There is little government data about the prevalence of this group within the criminal justice system, but the evidence suggests it is significant. For example, it is estimated that around 40% of people detained in police custody have

a mental health condition.³ Between 5% and 10% of the prison population has a learning disability⁴ and almost half of the male prison population has some degree of traumatic brain injury.⁵ The impact of impairments can fluctuate or impairments may be masked by the effects of alcohol and / or drug abuse. A person may have more than one impairment – for example, people with autism are more likely to have attention deficit hyperactivity disorder (ADHD), anxiety, depression, or other mental health conditions.⁶

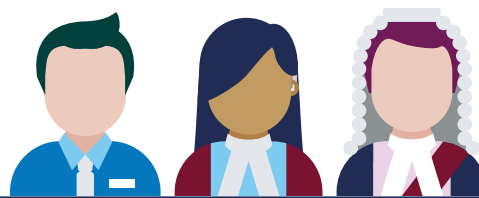
¹Defendants in England and Wales, and accused person/people in Scotland. ²These would include but are not limited to autism, attention deficit hyperactivity disorder, acquired brain injury, depression and anxiety. ³NICE (2017), Mental health of adults in contact with the criminal justice system. ⁴Prison Reform Trust (2012), Fair access to justice? ⁵The Disabilities Trust Foundation (2015), The association between neuropsychological performance and self-reported traumatic brain injury in a sample of adult male prisoners in the UK. ⁶Lai M.C. (2019), Prevalence of co-occurring mental health diagnoses in the autism population, *Lancet Psychiatry* 6, 819-829.



Having a cognitive impairment, mental health condition and / or neuro-diverse condition affects people in different ways, including:

- memory loss or difficulty retaining information
- having a short attention span
- being reluctant to speak up
- having extreme anxiety, and
- an inability to control impulses or thoughts.

These effects can be exacerbated when an individual is a defendant or an accused person in criminal proceedings. We are concerned about whether people with such conditions can properly engage in and understand the proceedings they are involved in.



Some members of the judiciary we interviewed told us that when defendants or accused people are helped to engage with the court, they see the process as fairer and are more likely to obey court orders.

We focused on the pre-trial period⁷ as this is when important decisions, that determine the criminal process, are made. This includes:

- whether to plead guilty or not guilty
- how any trial will proceed, and
- whether changes or support are needed to ensure the defendant or accused person can effectively participate in proceedings.

We have considered some aspects of police investigation where identification of an impairment or need could be made.

We covered the criminal justice systems in England and Wales, and in Scotland. While the two systems are different, and some issues are country specific, we found broad similarities in the barriers faced by disabled defendants and accused people and our findings resonate across the two jurisdictions.

⁷This is the period after a person has been charged but before they go to trial. It includes all criminal justice processes relevant to their defence, from the start of a prosecution up to the disposal (completion) of their case or beginning of a trial, whichever occurs first.

Effective participation

What is effective participation and why is it important?

It is a longstanding common law principle that defendants or accused people must be able to understand and be involved in the criminal proceedings that they are a part of. This is also a right under the Human Rights Act 1998. Defendants or accused people need to understand what they are being charged with, what evidence there is for this, and be able to give their account and effective instructions to their legal team. We call this **'effective participation'**.⁸

Finding your way through the criminal justice system is complicated. Many people find it hard to deal with many different agencies at once, language isn't always clear or simple and legal processes can be difficult to understand. These barriers are more likely to affect defendants or accused people with a cognitive impairment, mental health condition and / or neuro-diverse condition. They may need adjustments or support to help them effectively participate in the process.

“

It was so blinking obvious that most of them didn't have a clue what was going on in court. We have a quote, I think it was a woman actually, who said: **“I know I've done something wrong, but I'm really not quite sure what that was.”**

When people end up in prison and they're saying that, it's really not good.

”

Academic, England

⁸See legal framework.

Effective participation

Defendants or accused people must be able to understand and be involved in the criminal proceedings of which they are a part. We refer to this as **'effective participation'**.

Effective participation means that the accused / defendant:

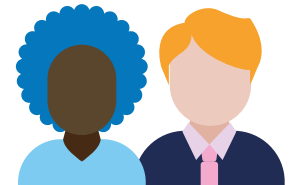
- ✓ Can explain their version of events
- ✓ Understands what they have been charged with
- ✓ Understands the case and evidence against them
- ✓ Understands the defences and options available to them
- ✓ Understands written communication
- ✓ Has a general understanding of the trial process
- ✓ Can give their best evidence
- ✓ Understands the significance of any penalties they face
- ✓ Understands the requirements of out of court disposals

Benefits of effective participation:



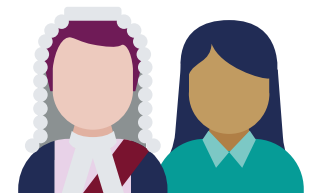
Accused / defendant

Sees the system as fairer



Victims and witnesses

Gain a better sense of justice



Professionals

Ensure a fair trial

Effective participation

How are court reforms affecting participation?

In recent years, the criminal justice systems in Scotland and England and Wales have been going through a period of reform. The changes mean fewer people now need to appear in court for their offences. However, this means that many defendants or accused people may not have interaction or support from others as their cases proceed, making it harder for them to navigate the system and to properly understand the implications of a particular course of action.

Courts in England and Wales have been increasing the use of video hearings⁹ (the use of video hearings in Scotland is limited, although this could change). Almost all the criminal justice professionals in England and Wales who we interviewed felt that use of video hearings does not enable defendants or accused people to participate effectively, and reduces opportunities to identify if they have a cognitive impairment, mental health condition and / or neuro-diverse condition. This is partly due to poor sound and image quality, which can make communication harder for everyone. These problems are even worse for the group our inquiry looks at, as video-links create separation – the defendant or accused person cannot see the whole court room and everyone in it.

“

If people are appearing from custody, they often like video-link. This avoids having to disrupt their routine (they don't have to get in a van and face the possibility of being returned to a new cell). While defendants may prefer, lawyers do not. It is much more difficult to take instructions by video-link, difficult to make a connection and get instructions. During the hearing itself, barriers are made worse by the use of video-link.

”

Defence solicitor, England

⁹The bulk of our inquiry evidence focused on remand review hearings, before the coronavirus pandemic. Our findings and recommendations in this area are increasingly relevant to the current move towards fully virtual hearings in response to coronavirus.

Findings and recommendations

Our findings and recommendations are based on the evidence gathered

This evidence is gathered from:



The evidence is clear – the criminal justice system must design and deliver its services around the needs of disabled people, following the social model of disability. The social model recognises that the way society is organised, its structures and attitudes, are what prevent disabled people from participating fully and effectively, not the impairments.¹⁰

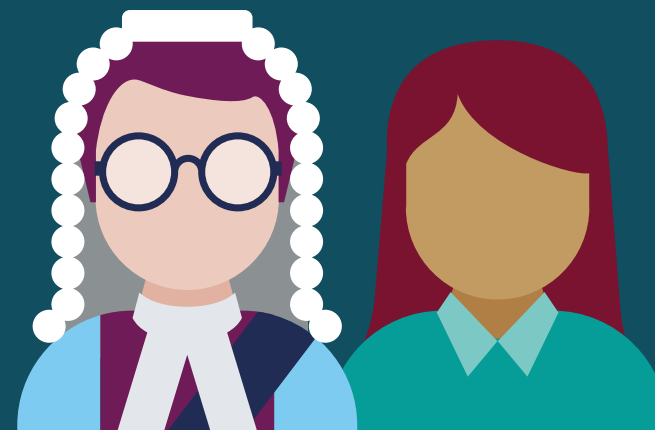
“ We have one justice system and it needs to be fair. And if it’s not then you run the massive risk of people who are completely innocent being prosecuted for things that they haven’t done. And for the victim, what that means is that the actual offender is out wandering the streets. And equally, you run the risk of people who actually are guilty of offences not being held to account for their actions because adjustments weren’t made, and therefore the trial process is not fair and it fails.

” Appropriate adult, England

¹⁰The social model is at the heart of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which identifies disabled people as having impairments that ‘in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

Findings

The justice system is not designed around the needs and abilities of disabled people, and reforms in England and Wales risk further reducing participation



“

Health issues and disability issues are so huge that they need to be addressed comprehensively, not as an add-on to the justice system but as a core part of what we do.

” Academic, England

Our evidence from criminal justice professionals, defendants and accused people, repeatedly drew attention to the fundamental problem of a flawed, ill-designed criminal justice system. This is a barrier for most of us, but particularly affects those with a cognitive impairment, mental health condition and / or neuro-diverse condition.

“

[The] whole environment is not geared up to people with needs because it's a hostile, clinical, process-driven environment... The processing environment is not really designed to support people's needs and have a lot of adjustment along the way.

” Police, England

A recurring theme was the overuse of complicated legal language and terms. We found that defendants or accused people with a cognitive impairment, mental health condition and / or neuro-diverse condition struggled to understand the language used in the criminal justice system. Many of the defendants and accused people who responded to our survey said they did not understand everything they were charged with, and understood only some or none of what the judge said during their hearings.

“

When they say, 'is there anything you don't understand?' you just say 'no', even though you're not quite sure.

” Accused person, Scotland

“

It seems to me that language is the real key, that the way we speak in court has to change. We don't have to be casual, we don't have to use slang, we don't have to speak in the same way we might speak around the dinner table, or to our friends if we're out for an evening. But we do have to speak in a way which is not so far removed from the way that ordinary people speak and that includes people with impairments.

” Crown court judge, England

To design a system around its users, governments and their agencies need to understand who uses the system and how different characteristics might affect experiences and outcomes. The Public Sector Equality Duty (PSED) requires certain public bodies - including the Home Office, Ministry of Justice (MoJ), HM Courts and Tribunals Service (HMCTS), the Scottish Government and Scottish Courts and Tribunal Service – to actively consider how to take steps to eliminate discrimination across the protected characteristics, including disability. This duty aims to integrate equality in how public bodies make day-to-day decisions, develop their policies and design and deliver their services. Collecting data and monitoring who is in the criminal justice system is part of this.

The proportion of people coming into the criminal justice system who have a cognitive impairment, mental health condition and / or neuro-diverse conditions is believed to be high, yet we saw no evidence that relevant public authorities are collecting sufficient information about the characteristics of defendants or accused people. This includes a lack of data on how having impairments can affect their ability to participate. This information is vital to understand who is in the system and how it could be better designed to work for everyone.

The court reform programme for England and Wales specifically refers to designing a system around the people who use it, and accessibility is one of its three core principles.¹¹ Yet, our evidence suggests that opportunities to design digital court systems to be more accessible in England and Wales have been missed. Data about the needs of defendants with cognitive impairments, mental health conditions and / or neuro-diverse conditions was not gathered or taken into account when these policies and systems were put in place.

The impact on access to justice for this group and people with other protected characteristics has not been evaluated to date (although we are aware that MoJ and HMCTS are planning an evaluation of the reforms). This raises concerns about the extent to which HMCTS, the MoJ and others have met their obligations under the PSED when reforming and modernising the courts. In England and Wales, serious concerns have also been raised by the Justice Select Committee¹² and the Public Accounts Committee¹³ on the impact of these reforms on ‘vulnerable defendants’. They both called for the reforms to be halted until the impact of the changes is better understood.

It is essential that all relevant public bodies across Britain (especially the MoJ and HMCTS in relation to their court reform programme) ensure any new court processes are designed with disabled people in mind. This should include a process to assess whether defendants with impairments can participate fully in video hearings and whether that affects their outcomes.¹⁴

¹¹Ministry of Justice (2016), Transforming Our Justice System. ¹²House of Commons Justice Committee (2019), Court and Tribunal reforms.

¹³House of Commons Public Accounts Committee (2019), Oral evidence: Transforming Courts and Tribunals: progress review. ¹⁴HMCTS is currently assessing the impact on participation of video-enabled justice.

Defendants in England and Wales, whose cases are dealt with under the single justice procedure,¹⁵ need a better designed system to help them understand what they are charged with, how to provide information that might reduce their sentence, and the implications of their plea (including not giving a plea at all). Defendants must be able to use an alternative process if the written or online plea system is not accessible to them.

A system that is designed to be accessible to disabled defendants and accused people would shift focus away from adjusting a generally inaccessible system, to identifying and providing adjustments for those with the greatest need. This makes the whole system more effective, efficient and potentially less costly.

¹⁵The single justice procedure is a process for dealing with criminal cases in England and Wales without the defendant going to court unless they plead not guilty or ask for a hearing. A guilty plea and any mitigation is submitted in writing (by post or online) and the case is decided by a single magistrate. If a defendant doesn't respond to the written charge, the case can be decided by a magistrate without their say.

Recommendations

The system should be designed around the needs of its users. To understand the barriers faced by disabled defendants or accused people and to meet their PSED obligations, the UK and Scottish Governments should ensure departments and executive agencies:

- Address gaps in the collection, monitoring and analysis of disability data for defendants and accused people to inform better system design.
- Ensure there is clear regulatory oversight to monitor the effective participation of defendants and accused people.

In England and Wales, the MoJ and HMCTS should:

- Establish a clear evidence base on the impact of court reform for disabled defendants.
- Address existing barriers for disabled defendants before any further measures are introduced or extended.



Barriers to participation

Finding your way through the criminal justice system is complicated. These barriers are even more likely to affect defendants and accused people with impairments.



Individual needs are not identified

- adjustments are not being made

Complicated legal language

- jargon and terminology are inaccessible
- important information can be difficult to retain



Many agencies involved

- can be intimidating and cause confusion
- dealing with unfamiliar people and different situations
- lack of disability awareness

Barriers to participation

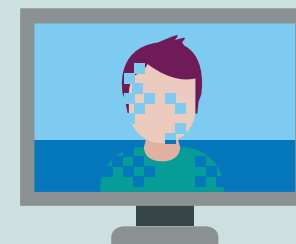


Inaccessible written information

- alternative formats unavailable
- lack of interaction and support to help explain written instructions

Video hearings

- not suitable for people who need support with communication
- poor connections cause important information to be missed
- can cause disconnection and separation from people and legal process



A system that is accessible by design would recognise that many defendants or accused people could have impairments that affect their ability to participate, and would address that.



Findings

Impairments that may require adjustments are not always identified – this is a barrier to effective participation



Identifying whether defendants or accused people have impairments is complex. If impairments are not identified, this could mean no adjustments are made for them and they may not be able to effectively participate in their trial.

Our survey showed that many criminal justice professionals viewed it as part of their role to help recognise and / or identify whether a defendant or accused person has any impairments. The majority of their responses¹⁶ stated that impairments sometimes get missed. The reasons for this include a lack of awareness or understanding about impairments; no processes in place to flag identification (particularly for minor offences being dealt with using the single justice procedure in England and Wales) and a lack of accountability as a result of professionals sharing responsibility.

“

If there is a guilty plea by letter, then the court is never going to become aware of any condition of an accused.

”

Court clerk, Scotland

Our interviews also highlighted concerns about the numbers of unrepresented defendants or accused people. For example, nearly all those who go through the single justice procedure have no legal representation. Interviewees felt this increased the risk that the courts might not identify any need for adjustments, or that a defendant or accused person would not ask for them.

“

I think there's an element of luck. I think the whole stage from the police arresting through what happens in the police station, through to the court; there's an element of luck of whether there's a difficulty and whether the difficulty is recognised.

”

Magistrate, England

Our inquiry found that legal professionals rely strongly on the defendant or accused person themselves to disclose any impairment and / or say whether they face any barriers. Many will not do so. Some people don't know they have an impairment, while others choose not to offer this information.

¹⁶In England and Wales, 97 out of 132 respondents said impairments are sometimes missed. In Scotland, this figure was 36 out of 52 respondents.

A number of defendants interviewed in England and Wales said they didn't want their needs to be identified, because they felt embarrassed, ashamed or were worried they would be stigmatised. Some accused people in Scotland said they had disclosed disability or support needs in the past, but received no support. This had influenced their future decisions not to disclose issues or seek support.

“

No one really knows what it is like. I don't tell people what I've got cos I find it embarrassing.

” Defendant, England/Wales

The creation of NHS Liaison and Diversion (L&D) services in England is a positive development. Medical practitioners are embedded in both the police station and criminal courts, with the aim of improving both health and justice outcomes. Screening people in custody for pre-existing conditions and, in some cases, assessing their communication needs is becoming more systematic and this information is increasingly being passed on to the courts. L&D professionals are perceived to be more independent than the police, which potentially encourages detainees to disclose their needs. Some services have developed specialisms, such as a focus on women or homeless people. In some areas, L&D staff deliver training for the police, to help them build expertise on particular impairments. In one area of England, nursing assistants systematically screen all detainees rather than relying on referrals from the police.

In Wales, there is no funding available for L&D services, nor a co-ordinating body to oversee them. There are some examples of L&D services being delivered in Wales,¹⁷ but they are not widespread.

In Scotland, there is a reliance on the accused person to disclose any impairments. The Appropriate Adult scheme in Scotland is now on a statutory basis reinforcing the role and duty of the police to assess whether accused people have difficulties communicating and understanding due to a 'mental disorder'.¹⁸ This assessment relies on the officer's own judgement.

¹⁷For example, Cardiff & Vale University Health Board, in conjunction with partner agencies, provides dedicated, nurse-led mental health services in the police station, magistrates' court, HMP Cardiff and probation service. ¹⁸As defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Case study

The Kent NHS Liaison and Diversion service covers six magistrates' courts and seven custody suites. It assesses detainees whom the police have identified as potentially at risk. The service was concerned that the police screening primarily focused on immediate health risks, and self-harm in particular. In September 2019 it introduced a new model to assess everyone entering police custody for a wider range of conditions. These include learning disabilities, whether someone is on the autism spectrum, mental health conditions, drug and alcohol addiction, and other issues such as debt or homelessness.

The new system is cost-effective as it involves employing more, less-qualified staff who ask a series of initial questions, guided by tablet-based software. Where necessary, detainees are then referred to a small team of specialists who carry out more detailed assessments. They can identify difficulties with communication and understanding as

well as conditions, such as brain injuries, that might have gone undiagnosed.

All information gathered is fed directly into a detainee's NHS medical records. If they are charged, this data will also routinely be sent on to their defence team and the courts. The courts will also receive advice on any recommended adjustments for a hearing. The process includes gaining the detainee's consent to share this information.

Early information from the scheme is encouraging, indicating that universal screening by health professionals feasibly identifies more people who have a disability than the previous system of referrals by the police. The trial is, however, at an early stage and a robust evaluation will be needed to conclude whether the scheme has been effective.

Recommendations¹⁹

The UK and Scottish Governments should develop early and effective screening for all defendants and accused people.

- In England, NHS England should consider introducing universal screening by NHS L&D services, building on existing best practice and learning from current pilots.
- In Wales, the Welsh Government should require health boards to consider providing universal screening for all those coming into the criminal justice system.
- In Scotland, the Scottish Government should agree a long-term aim of a health-led screening and assessment process.

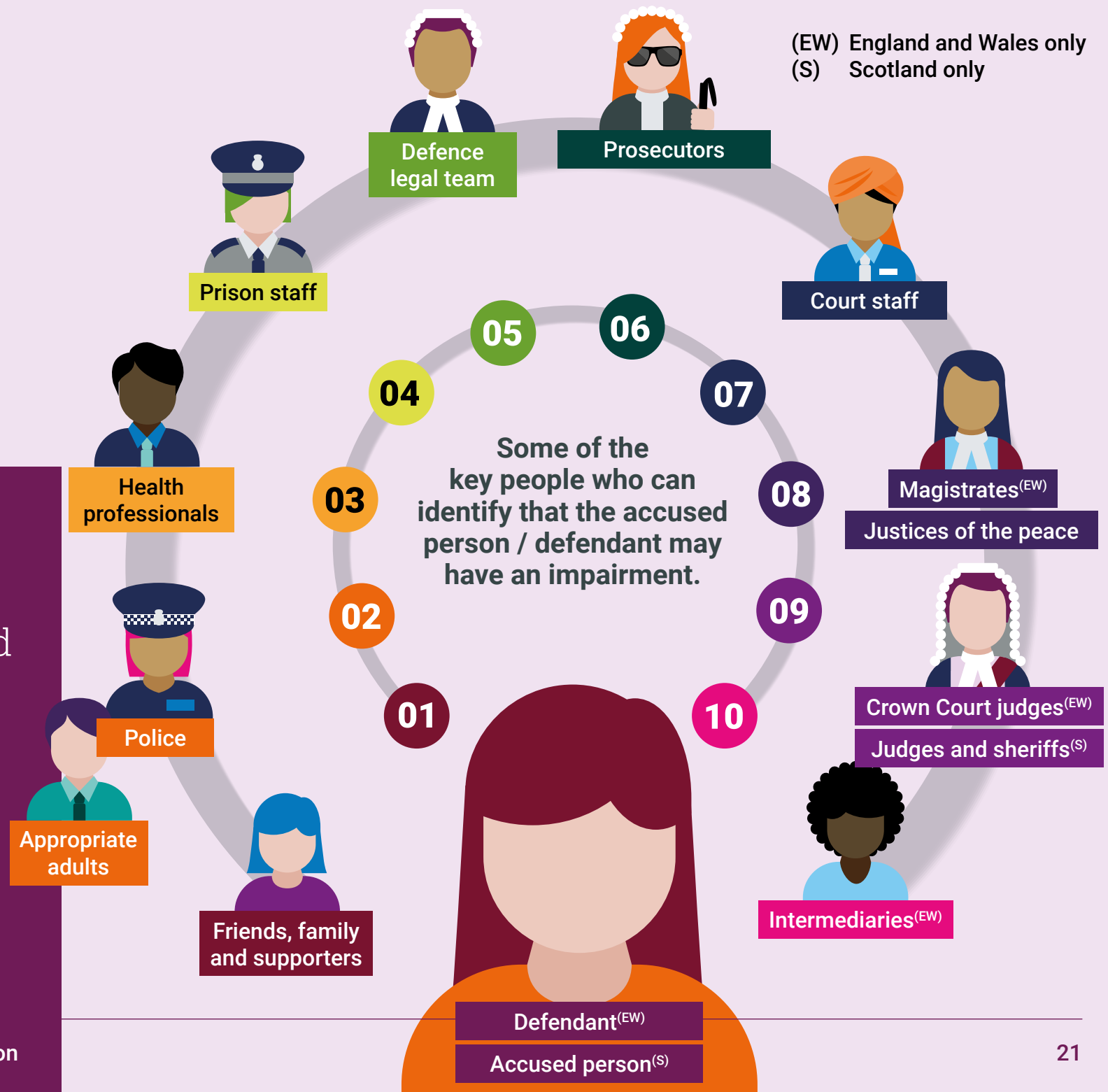
Governments should also give consideration to how screening might work for those involved in criminal proceedings where the route does not involve the police and / or custody.



¹⁹These recommendations were developed before the coronavirus pandemic took hold in the UK. We ask Governments to consider them as a longer-term aim as the current health crisis subsides.

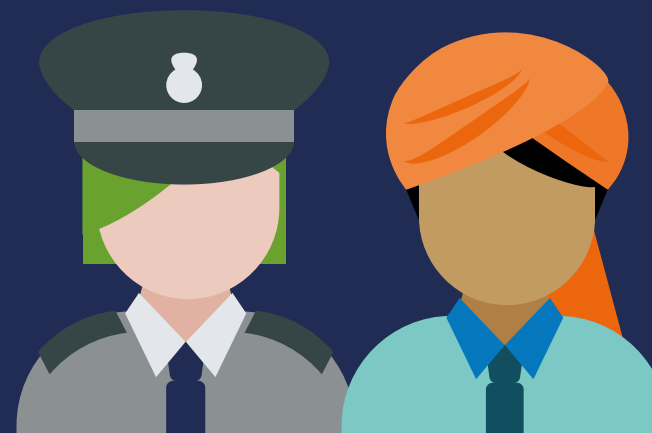
Identifying impairments

Identifying impairments of defendants or accused people is complex, but not doing so could affect whether adjustments are made and how well someone can take part in their own trial.



Findings

Adjustments are not always made for disabled people because information about their impairments is not passed on



Sharing information, with the defendant or accused person's consent and in line with data protection legislation, is a key part of ensuring effective participation. It ensures that early efforts to identify needs or make adjustments are not wasted, and defendants or accused people can continue to be supported and engage in their cases.

The police, courts, prisons and health services use different information systems. This means that even when information is known or collected about a defendant or an accused person's impairment it may not be passed through the system. This means the opportunity to make adjustments is lost and agencies must make further efforts to identify or assess their needs.

“

It's a conversation that comes up quite regularly; information about someone's support needs not getting passed on from one agency to another.

” Academic, Scotland

Criminal justice professionals highlighted a number of critical stages where information about impairments should be shared. This includes arresting police officers sharing concerns with interviewing and custody officers; relevant information being shared with prosecutors,²⁰ and, where appropriate, the judiciary.

Criminal justice professionals suggested a range of reasons why information is not always shared effectively, including: a shortage of time; a lack of awareness about impairments among professionals; and incompatible systems and / or unclear or inconsistent procedures and policies. They also raised concerns about data protection and confidentiality, if the person hadn't consented to share information.

“

Information about impairments often isn't passed on to you by other professionals. The system is not joined up.

”

Defence solicitor, England

Recommendations²¹

To ensure timely access and sharing of information:

- NHS England and Welsh Health Boards should ensure they have mechanisms in place to enable appropriate sharing of case-specific information with HMCTS's case management IT systems on identified needs and recommended adjustments.
- The Scottish Government should create a system that will ensure appropriate collection and sharing of information on identified needs and recommended adjustments across health, social work and justice.

²⁰The Crown Prosecution Service in England and Wales and the Crown Office and Procurator Fiscal Service in Scotland. ²¹These recommendations were developed before the coronavirus pandemic took hold in the UK. We ask Governments to consider them as a longer-term aim as the current health crisis subsides.



Findings

The existing frameworks to provide adjustments to secure effective participation for disabled defendants and accused people are inadequate



All those involved in the design, management and conduct of the criminal justice system²² have a legal duty to make reasonable adjustments to remove the barriers that disabled defendants or accused people may face. The police, prisons and courts services, in enforcing the law, are carrying out public functions where the reasonable adjustments duty applies. The duty is anticipatory and continuing, which means that organisations have to think in advance and on an ongoing basis about disabled people's requirements and the adjustments they may need.

While 'judicial functions' are exempt from the Equality Act 2010 reasonable adjustment duty, judges do have duties under the common law and the Human Rights Act 1998 to make 'accommodations' to ensure a disabled defendant or accused person can participate effectively.²³ Our interviews with members of the judiciary across England, Scotland and Wales suggested that, in most cases, they were willing to make accommodations / adjustments.

“
If my judgement is, they need an intermediary, they'll get one. If they need an adjustment they'll get them. So I've never known reasonable adjustments not being complied with.

” Crown court judge, England

In both jurisdictions, implicit or explicit procedural rules allow a judge, sheriff, magistrate or justice of the peace to make adjustments or 'accommodations' to help secure a defendant or accused person's participation.²⁴ However, the rules and accompanying guidance do not make it clear that adjustments must be made for disabled defendants or accused people if they need them to effectively participate,²⁵ or how much weight requests for adjustments should be given compared to other considerations, such as the need to deal with cases efficiently and quickly.²⁶ There is also unequal statutory provision of adjustments for defendants compared to non-defendant witnesses.²⁷

²²The Ministry of Justice (MoJ), Scottish Government (SG), Her Majesty's Courts and Tribunal Services (HMCTS), Scottish Courts and Tribunal Service (SCTS), Her Majesty's Prison and Probation Service (HMPPS), Scottish Prison Service (SPS), the Legal Aid Agency (LAA) and Scottish Legal Aid Board (SLAB). ²³See legal framework. ²⁴For England and Wales, see e.g. the Youth Justice and Criminal Evidence Act 1999 ss33A, Criminal Procedure Rules 1.1, 3.2 3.5, 3.9, 18.14-17, and the Criminal Practice Directions, CPD I General Matters 3D, 3E, 3F. 3G. In Scotland, where the accused gives evidence, they may benefit from statutory provisions for vulnerable witnesses. In other cases, adjustments may be made in terms of the court's inherent power to regulate proceedings in the interest of fairness. ²⁵The right to a fair trial should be interpreted in light of the UNCRPD requirement to make procedural accommodations to ensure equal access to justice for disabled people (see legal framework). ²⁶See for example Criminal Procedure Rules 1.1(2)(e), and Criminal Practice Direction I 3F.12 (England and Wales); see also s148(1A)(a) and s72(7) of the Criminal Procedure (Scotland) 1995 Act. ²⁷For England and Wales, see Youth Justice and Criminal Evidence Act 1999.

The lack of a clear or equal legal framework for the provision of adjustments, may partly explain the mixed evidence we received on whether adjustments were made. Criminal justice professionals told us about adjustments that had been made for defendants or accused people. These include using plain language and avoiding multi-part questions; adjusting hearing times and taking regular breaks; and having the support of another individual or individuals, such as an appropriate adult at the investigative stage, or (less commonly) an intermediary. Conversely, some of the defendants, accused people and their supporters we interviewed and / or surveyed reported very few adjustments being made in their cases.

“ I think that the knowledge of the judge, some judges are very good and knowledgeable about the area, others aren't, some are quite dismissive about the need for the adjustments and they're almost irritated by the need for adjustments.

” Legal professional, England

“ From our experience sheriffs and judges have been very open to providing these sorts of things when they're asked for. But all too often they're not asked for.

” Disabled people's organisation, Scotland

For defendants or accused people with a cognitive impairment, mental health condition and / or neuro-diverse condition having the support of an intermediary could be a reasonable adjustment. Intermediaries are communication specialists, often speech and language therapists. Their role is to facilitate communication between groups, for example disabled defendants and the police, prosecution, defence solicitors or advocates, and the court. They can be commissioned to produce reports, identify needs and make recommendations about adjustments.

“ We are professionals but we are only qualified to do our job as lawyers. We're not medical professionals, we're not teachers, we're not parents, we're not social workers. Intermediaries, their job, they are specially trained people to sit and spend time with a person to really understand their unique situation and their diagnosis. They're trained within the criminal justice system to help that person participate. I can't do that as a solicitor because I'm not qualified to do that.

” Defence solicitor, England

In England and Wales, criminal courts have a power under primary legislation to direct that an intermediary be made available to assist non-defendant witnesses in giving evidence.²⁸ Witnesses are supported by intermediaries in around 6,000 cases a year. There is no equivalent power under primary legislation available to provide intermediaries for defendants. Although the courts retain a common law power to direct that an intermediary is made available to assist a defendant their use is subject to a more onerous test than that for non-defendant witnesses.²⁹ There is a registered scheme for the provision of intermediaries for witnesses in England and Wales, but not for defendants. This means professional standards for defendant intermediaries can be inconsistent and the cost is higher than it would be for witnesses.

“
As a registered intermediary, which I am, the Ministry of Justice supports us with a scheme which is backed up by statutory legislation that I can only work with vulnerable witnesses and very often, someone can be a vulnerable witness supported from someone like me as the communication specialist and then they might be, the next week, a vulnerable defendant and they have no rights to an intermediary.

” Intermediary, England

In Scotland, adjustments can be made for accused people giving evidence through the provisions set out for vulnerable witnesses. However, we found little evidence that these provisions were being used. There is no intermediary scheme at all in Scotland.

“
It’s interesting how the rest of the world reacts when they hear that in this country we’ve been looking after witnesses, but not defendants. Because the response I got from people in Mexico and Kenya and Zimbabwe and China was, ‘But surely it’s the defendants who need the help, because they’re the people who could be sent to prison. Why are you looking after witnesses when you’re not looking after defendants?’

” Intermediary, England

²⁸Witnesses deemed ‘vulnerable’ under Section 16, Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) are eligible for the assistance of an intermediary and other special measures when giving evidence. ²⁹The Criminal Practice Direction I 3F.12.

Most of the criminal justice professionals we interviewed underlined the value of intermediaries in supporting disabled defendants and the important role they can play. Some pointed to the need for a registered defendant intermediary scheme, similar to that for witnesses, which would address issues of higher costs and variable quality. Several professionals interviewed in Scotland suggested it would be a useful step for intermediaries to be introduced there.

“

If we're going to have a proper, functioning, non-discriminatory criminal justice system, you have to find the money for that. That's the real angle with intermediaries because that is one of the most important reasonable adjustments, to have an intermediary present.

” Defence solicitor, England

³⁰The entitlement to special measures should be on an equal basis with non-defendant witnesses for the giving of evidence, and throughout trial proceedings where necessary to ensure effective participation.

Recommendations

To support the duty to make reasonable adjustments and respect fair trial rights, for England and Wales the UK Government should:

- implement the recommendations for legislative reform in Chapter 2 of the Law Commission report on Unfitness to Plead to give defendants a statutory entitlement to intermediaries and other special measures,³⁰ and
- address the lack of Welsh-speaking intermediaries in Wales.

In Scotland, the Scottish Government should:

- introduce its own registered intermediary service for disabled accused, and
- Review the use and effectiveness of current vulnerable witness provisions available to a vulnerable accused.

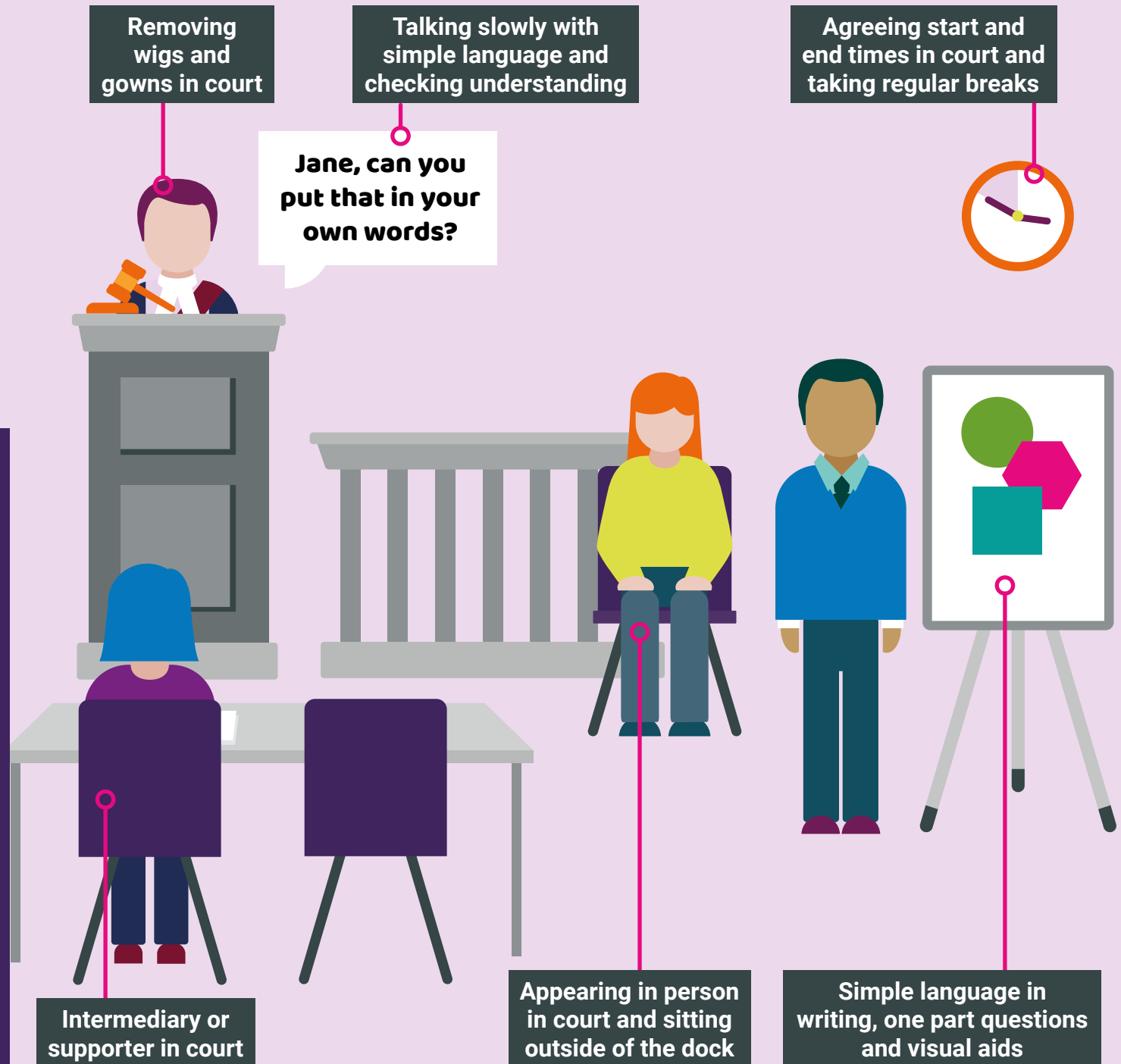
The High Court of Justiciary in Scotland should:

- change the criminal procedure rules to require all courts to enquire whether any adjustments are necessary to ensure an accused person can participate effectively in the proceedings.



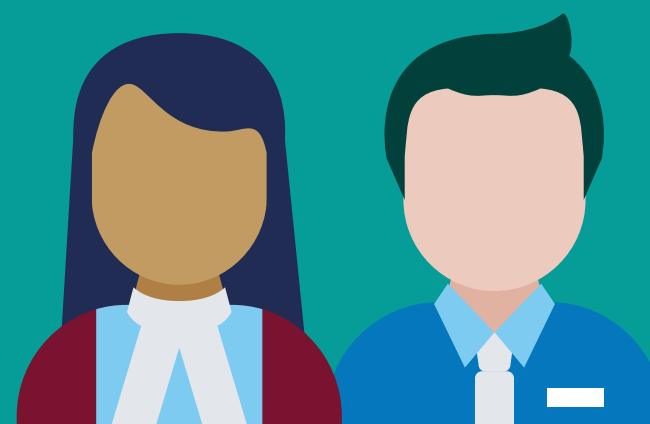
Assessing individual needs to make adjustments

The needs of defendants and accused people should be assessed on a case-by-case basis so that appropriate adjustments can be made to ensure effective participation.



Findings

Legal professionals do not consistently have the guidance or training they need to be able to recognise impairments, their impact, or how adjustments can be made



Guidance and training, much of which is relevant to the issues faced by defendants or accused people with a cognitive impairment, mental health condition and / or neuro-diverse condition, is available for legal professionals in both jurisdictions.³¹

Our evidence highlighted a number of different resources including: The Advocate's Gateway, which provides free access to guidance around vulnerable witnesses and defendants; the Equal Treatment Bench Book (versions for both jurisdictions), a regularly updated resource for judicial office holders focusing on good communication and increasing participation; and Advocacy and the Vulnerable training (England and Wales only), provided by the Inns of Court College of Advocacy and rolled out to barristers to aid understanding on the key principles to questioning vulnerable people in the justice system.

The criminal justice professionals we interviewed were generally positive about these resources, but we sensed they weren't being used as much as they could.

“
There's a book called the Equal Treatment Bench Book that has surfaced, I would probably say over the last couple of years. [It] has some incredibly useful material in there, which covers a whole range of subjects, including, inevitably, defendants with impairments. It's a book that I think should be used far more than it is.

” Crown court judge, England³²

Interviewees told us there is no compulsory or free disability training for solicitors or barristers in England and Wales and limited funding is available. Available training on 'vulnerability' usually focuses on victims and witnesses, rather than defendants. In its submission to our inquiry, the Solicitors Regulation Authority (SRA) said that in 2019, only a third of private practice solicitors had training on supporting vulnerable people. Some of the magistrates we interviewed said diversity training is provided but not mandatory, while disability training is mandatory but with a greater focus on access for those with physical impairments.

³¹Much of this uses the term 'vulnerable' and looks at issues of 'vulnerability' as defined in law. No one group is vulnerable by nature, but anyone can be made vulnerable by the situation they find themselves in; this includes witnesses, defendants or accused people, disabled and non-disabled people. ³²The first edition of the Equal Treatment Bench Book was published in 2013.

In Scotland, there is no mandatory training for the judiciary in relation to impairments. Solicitors are required to undertake 20 hours of continuing professional development per year (there are continuing professional development requirements for solicitors and barristers in England and Wales too). However, participants can self-select the type and subject of their training. This means there is no guarantee they will cover disability-related issues in their training. Prosecutors undertake compulsory training on witness vulnerability, but there is no equivalent for defence solicitors in relation to the accused.

The magistrates we interviewed in England and Wales pointed to the differences between the youth and adult courts, including in relation to training. Their evidence suggested that those who work across both courts were applying some of the better practice between the two.

“

What I found when looking around the county, was that youth magistrates who were presiding in the adult court... because of their additional training, understanding and experience, would deal with people who had recognised difficulties – not just the cohort of young adults, but also people with cognitive impairments and mental health issues – [and] would automatically deal with them differently because of their youth court experiences. So, I think there is a lot to be borne out that training and experience in this arena will also change the environment more readily.

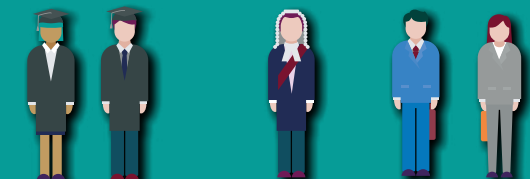
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Magistrate, England

Recommendations

To improve understanding of disability and the barriers to effective participation disabled defendants and accused people experience, steps should be taken by the relevant bodies to ensure:

- initial professional qualification training for law students includes disability awareness
- all relevant codes of conduct and standards are amended to specifically include disability awareness as a professional requirement, and
- disability awareness is a mandatory element of continuing professional development for those working in criminal law.





Acknowledgements

We would like to thank all those individuals and professionals in England, Scotland and Wales who contributed to our inquiry

We heard from defendants and accused people about their experiences of the criminal justice system, and from their friends, families and supporters. We interviewed and consulted professionals working in the sector – solicitors, barristers, the judiciary and court staff. All spoke candidly about the challenges of the system and opportunities and scope for improvement, which has helped to inform our inquiry report.

To inform the development and progress of our inquiry, we set up a small External Reference Group consisting of professionals from the sector and representatives from disabled people’s organisations. We’d like to thank them for sharing their expertise, insight and knowledge with us.

Contacts

This publication and related equality and human rights resources are available from our website



Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. We welcome your feedback.

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