

Inclusive justice: a system designed for all

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Evidence base

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About this inquiry

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. Inquiries are a way for us to find out more about an issue of equality, diversity or human rights. Evidence was gathered between March 2019 to November 2019. 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 issue.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 be masked by the effects of alcohol 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

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.

¹ Defendants in England and Wales, and accused person/people in Scotland.

² These would include but are not limited to autism, attention deficit hyperactivity disorder, acquired brain injury, depression and anxiety.

³ NICE (2017), [Mental health of adults in contact with the criminal justice system](#).

⁴ Prison Reform Trust (2012), [Fair access to justice?](#)

⁵ The 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](#).

⁶ Lai M.C. (2019), [Prevalence of co-occurring mental health diagnoses in the autism population](#), *Lancet Psychiatry* 6, 819-829.

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.

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 apply to both jurisdictions.

In our role as regulator for equality legislation and promoter of human rights, we examined whether the right to a fair trial (Article 6 of the European Convention on Human Rights) was being realised. We explored whether reasonable adjustments were being made, as required by the Equality Act 2010. Finally, we examined whether public authorities were considering their policies and services and making decisions in line with the public sector equality duty (PSED).⁸

We did not focus on the issue of whether people had the capacity to stand trial (fitness to plead). In recent years, these matters have been subject to extensive scrutiny and comment.⁹

⁷ This 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.

⁸ [See legal framework.](#)

⁹ This includes the Law Commission's 2016 report, '[Unfitness to Plead](#)'. The Scottish Government's forthcoming Review of Mental Health and Incapacity legislation in Scotland will consider the definition of 'mental disorder', which forms a crucial part of the test for fitness to plead.

A detailed methodology for our inquiry is available in Annex 1.

Importance of participation

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

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’.¹⁰

I think if any vulnerabilities that relate to participation aren’t highlighted then you are at a very real risk that you’re going to end up with an unfair process which is fundamental to not just the justice system but as a democratic society we have to have a legitimate system to be able to detain or restrain people in terms of any criminal activity. The legitimacy for that is embedded in the fact that it is a fair and just process otherwise it becomes completely arbitrary.

Third sector body, England

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.

¹⁰ [See legal framework](#)

Our interviews with professionals highlighted a range of adverse impacts including not being able to engage meaningfully with the police, defence solicitors, advocates or the courts. Defendants or accused people may not understand charges, cautions, bail conditions or court orders. They may not understand letters from the court, or be able to respond to them. Without support in police interviews, they might make false admissions or comments that affect their defence without proper advice. If they don't fully understand the evidence against them, they may not plead guilty, when it's in their interests to do so.

They might have been given ... what they called ... like non-molestation orders or they might have been given orders not to enter certain areas, but they kind of agree and sign it all, but then they're like 'oh, I didn't understand that's what that meant' or 'I didn't understand I wasn't supposed to do this', and it's just setting them up to fail in my opinion because they're not, they're then breaching those orders because they didn't understand them in the first place.

Liaison and Diversion staff member, England

Taking steps to promote participation can ensure an individual's right to a fair trial and enable public authorities to meet their obligations under equality legislation. It can also bring a number of other potential benefits. These include helping defendants or accused people to respond to questions in police interviews, helping them to understand any charges faced and to comply with bail conditions or court orders. Defendants and accused people may also perceive the criminal justice process as fairer if they have been able to participate in a meaningful way.

I think it's extremely important, to enable there to be a fair trial. Just as it's extremely important that a vulnerable witness is able to tell their story and explain what happened, then it's exactly as important for a vulnerable defendant to understand what's happening and then be able to put their case, as well.

Intermediary, England

Court reform

In the last decade, wide-ranging changes have been rolled out across the courts estate in England and Wales. Between 2010 and 2019, 162 (out of 323) magistrates' courts have closed, as well as 8 (out of 92) Crown Courts.¹¹

A key part of the modernisation programme in England and Wales has been significant investment in digital systems. This includes the use of video-link for criminal court hearings and the use of online pleading for certain offences.

Video-link technology is available in most courts in Scotland but its use is limited and reserved for specific procedural hearings.

We were keen to learn about the impact of these reforms on participation for defendants with a cognitive impairment, mental health condition and / or neuro-diverse condition in England and Wales. As part of our evidence gathering for this inquiry, we undertook a mapping project, to explore the use of video hearings in England and Wales.

¹¹ House of Commons Library (2019). [Court Closures and Access to Justice](#).

We found that most criminal courts in England and Wales had some form of video-link technology (207 out of 234 venues) in Spring 2019. In a sample of courts contacted, most (31 out of 37) reported that they could connect by video-link to a local police station. However, it is notable that not all of the courts for our mapping research reported that they actually used these links. Video-link technology is also common in prisons. We contacted 104 prisons (out of 114¹²) in England and all three prisons in Wales. All establishments contacted have the technology and its use is widespread. Our analysis of Crown Courts with listings available on a sample of dates¹³ showed that most (62 out of 72) had at least one defendant listed to appear by video. Our interviews with criminal justice professionals confirmed that video is often used for remand and interim hearings (between prisons and courts).¹⁴ They are also regularly used for consultations between prisoners on remand and their defence solicitors or advocates.

A key finding of our inquiry was that before their rollout in criminal hearings, there was limited assessment of the potential impact on disabled defendants of using video for hearings. Little evidence has been collected by Her Majesty's Courts and Tribunals Service (HMCTS) or by the Ministry of Justice (MoJ) about the actual impact of these policies on people with protected characteristics, including disabled people.

I have not seen any real thought given where people appear from the police station to the court as to whether or not that person is suitable to go over the link or not. It's more a case of they've got the orders to do all first appearances by video link and that's what we're going to do. There's no real consideration being given to children or people who may have learning difficulties or mental health problems.

Legal professional, England

¹² House of Commons (2019). [‘The prison estate’ House of Commons Briefing paper.](#)

¹³ Court listings were analysed on 10 April, 17 April, 24 April and 1 May 2019.

¹⁴ Interim hearings are hearings that take place at any stage of proceedings, other than the trial itself. The bulk of our inquiry evidence focussed on remand review hearings, links from prison to court, where the defendant has already been remanded in custody. We received very little evidence on police remand hearings, links from the police custody suite to the magistrates' court for first appearances.

Our inquiry findings

Our key inquiry findings are set out in this report. Please see our accompanying findings and recommendations report for our recommendations for action.

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

All those involved in the design and management of the criminal justice system¹⁵ have a responsibility under the PSED to understand the needs of disabled defendants and accused people, and consider ways in which the system can be designed to meet their needs. Under the Equality Act 2010, they need to anticipate the needs of disabled defendants and accused people and make reasonable adjustments to eliminate barriers that they may face. Adjustments should be based on evidence about who the service users are, including defendants or accused people with cognitive impairment, mental health conditions and / or neuro-diverse conditions. Without an accurate picture of those coming into the criminal justice system, public authorities can't design relevant policies and practices effectively, or assess the impact of reforms on different groups.

¹⁵ The 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).

During our inquiry, we did not find evidence that HMCTS collects sufficient information about defendants' protected characteristics in England and Wales. This means that HMCTS does not have a clear understanding or evidence base about the number of defendants who are disabled, or the nature of their impairments. The Scottish Court and Tribunal Service (SCTS) does not collect or hold data about the impairments that accused people may have. This raises questions about the extent to which these bodies and others are meeting their obligations under the PSED.

Our interviews with some professionals also revealed wide-ranging concerns about court reform and the increasing use of digital systems including video hearings in the criminal justice system. The evidence suggests that opportunities to design digital court systems in a more accessible way in England and Wales (where the extent of reform is greatest) have been missed.

From our interviews with professionals, we found that using video-links from prison to court is the norm for remand review hearings in England and Wales. Numerous concerns were raised by interviewees about video-links with poor sound and image quality. They said that links may not work at all, or they may be intermittent. It was suggested that the technology in magistrates' courts can be particularly bad. This can mean that hearings or consultations (between defendants and defence solicitors or advocates) can't go ahead, or are delayed. When consultations are delayed, timeslots can run out and defence solicitors or advocates may not have enough time to repeat or simplify information for disabled defendants, or to ensure that the defendants have understood the information.

The research conducted with defendants included several individuals who had used video-links. There were mixed views about the experience and the issue of poor connection was raised by several participants.

The separation between the defendant and their solicitor and / or court was also highlighted, particularly by defence solicitors and advocates. It was outlined that defendants may not have a full view of the court, or know who is present in the room at the other site. Concerns were raised about privacy and legal privilege with video-links in courts not always being soundproof. It was also noted that being alone for a video hearing, without support, can be difficult for some people.

It wasn't what I would call a real court because I was sat in a room all on my own with a screen but I couldn't hear what was being said ... I found it very difficult and I was unable to take part in it

Defendant, England / Wales

While some positive impacts of video hearings were noted for defendants, they were usually not related to participation. For example, professionals noted that using video means that prisoners don't have to spend all day travelling in uncomfortable conditions or waiting in court. It means that they don't miss meals, lose their cell or move to another prison. Our interviews with defendants indicated that several individuals found remand hearings via video-link less disruptive.

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). Whilst 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.

Legal professional, England

Due to concerns about their use and suitability for some people, a number of interviewees said their use should be paused until further evidence has been gathered about their impact.

I have cases where people with severe disability are on the video link and we just refuse to continue the case. You cannot communicate with somebody like that over a screen. And not just the video link, the quality of the video link is terrible anyway, so it doesn't help. But it's not the way to communicate with someone with communication difficulties over a video link. It's just not appropriate.

Legal professional, England

In addition to video-links, the single justice procedure¹⁶ was introduced in magistrates' courts in England and Wales in 2015. This includes online pleading for a number of minor offences, with an ambition to expand its use to other crimes. Although our inquiry received much less evidence in this area, some concerns were raised in our interviews with criminal justice professionals. Interviewees said that individuals may struggle to navigate the online system and, with no advice from legal or other professionals, they may not understand the implications of making a guilty plea. A lack of screening for impairments, meaning needs won't be identified and adjustments can't be made, was also flagged as a concern.

¹⁶ Single justice procedure is a process for dealing with criminal cases in the Magistrates Court in England and Wales without the defendant going to court unless they plead not guilty or ask for a hearing. The 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.

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

Importance of identification

Identifying whether defendants or accused people have impairments is complex. If impairments are not identified, this could mean that no adjustments are made for them and they may not be able to effectively participate in their trial. Our interviews with criminal justice professionals noted the importance of effective identification due to the effect this has on outcomes for defendants and accused people within the criminal justice system. For example, if the police have identified an impairment, this can affect decision-making about how interviews should proceed and should be taken into account by prosecutors¹⁷ when determining how the case will progress. For defence solicitors, knowledge of their clients' impairments can influence the advice that they give, including about pleas. For the judiciary, identified impairments can affect decisions about remand, bail conditions and how proceedings should take place.

Extent of identification

Four out of five professionals who responded to our survey in England and Wales (109 out of 132) said that defendants' impairments sometimes (97 out of 132) or always (12 out of 132) get missed. Similarly, nearly four out of five (41 out of 52) professionals in Scotland said that accused people's impairments are sometimes (36 out of 52) or always (5 out of 52) missed. Concerns about identification were also raised by survey respondents who supported defendants in England and Wales. Half (11 out of 22) of those surveyed said that the person they were supporting had not had their impairments identified. Findings for supporters in Scotland were similar. Everyone working in criminal justice has some role to play in identification of need. This shared responsibility makes accountability unclear and there is an acknowledgement that some people will not have their needs identified.

¹⁷ The Crown Prosecution Service in England and Wales and the Crown Office and Procurator Fiscal Service in Scotland.

Self-disclosure

The inquiry evidence we received suggested that people's needs were more likely to be identified if they were forthcoming about their impairment, and that the onus was on the defendant or accused person to disclose their impairment.

However, our interviews with criminal justice professionals highlighted that disabled defendants or accused people may be reluctant to disclose their impairments for a number of different reasons. As highlighted, it may be that the impairment isn't known about or diagnosed. But even where information is known, there may still be a reluctance. Interviewees in our inquiry said that people might be reluctant to share personal information with strangers, and in particular, the lack of privacy in custody suites was highlighted. Defendants or accused people might worry that they will be seen as guilty, or get a more punitive outcome if they disclose an impairment. Interviewees suggested that defendants or accused people might be discouraged from sharing information as they worry that the police will think it is being given as an excuse for offending behaviour. Some accused people in Scotland said that they had disclosed an impairment or support needs in the past, but received no support. This influenced future decisions not to disclose issues or seek support.

During screenings or assessments, people may not recognise terms used for their conditions. One interviewee gave the example of someone with autistic spectrum disorder declaring that they have 'ASD,' but not knowing the relevance of questions about 'autism' or 'Asperger's'. A number of defendants interviewed in England and Wales said that they didn't want their needs to be identified because they felt embarrassed, ashamed or at risk of stigmatisation. They said that, in their experience, information about impairments isn't always treated sensitively, and it might be 'exposed' or 'broadcast', and discussed openly in court. They felt they might be treated differently if they disclosed such information.

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

Defendant, England / Wales

Finally, a number of interviewees stressed that disclosing an impairment or need is not a defendant or accused person's first priority, their priority is to leave custody. This can be for a range of reasons, such as addictions, anxiety, or childcare but also a fear of indefinite detention under mental health legislation.

I've had people who have been so deeply paranoid that they haven't wanted to sign a legal aid form. And actually, the most recent time that happened, that person was very quiet and controlled and wasn't displaying any outward signs of paranoia. But, clearly there was something going on because they just would not commit to signing something which was going to get them free legal assistance because they didn't trust what was going to happen with the data.

Legal professional, England

Identification by professionals

Given that defendants or accused people may not disclose impairments, it is vital that agencies across the justice system take proactive steps to identify concerns and encourage individuals to share information about barriers they experience.

Our survey of criminal justice professionals showed that many considered that it is part of their role to recognise and identify whether a defendant or accused person has any impairments. This was the view of 87% (113 out of 130) of respondents in England and Wales and 61% (39 out of 64) of respondents in Scotland.¹⁸

Police

The police are often the first point of contact in the criminal justice system, so police custody is an important opportunity for people's needs to be identified. A number of the professionals interviewed in England said they believe that police awareness about non-physical impairments and their impact on participation is growing and this has a positive effect on being able to identify an impairment.

Interviews with professionals in Scotland suggested police were getting better at identifying when an appropriate adult was needed. They stressed difficulties around identification as the police are not medical or communication experts and may be under time and resource constraints in busy custody areas. One disabled people's organisation felt the emphasis should be on the police knowing how and when to ask for advice.

¹⁸ There were more professionals within the England and Wales sample than in the Scotland sample for whom recognition of health needs was a formal part of the role. This includes Liaison and diversion staff and intermediaries.

Interviews with disabled people's organisations in England presented a slightly different picture; they suggested that there is limited awareness among the police about how impairments affect people's reactions to incidents or to questioning, and that this has implications for identification. Professionals interviewed in England had encountered police officers who viewed attention deficit hyperactivity disorder (ADHD) as bad behaviour, or thought that it only affects young people. It was suggested that some police view impairments as an excuse for criminal behaviour, or do not understand the links between addictions and impairments. This can result in impairments being missed or dismissed.

Interviewees underlined that the police have to make a number of important decisions that are based only on an individual's presentation. This may include whether to, for example, provide an appropriate adult, hold an interview or issue a caution. It was underlined that cuts to police budgets in England and Wales have had an impact on their workloads and their ability to spend time on cases. One interviewee in England suggested that identifying impairments can add to an officer's workload. This can deter police from identifying impairments, particularly where resources are stretched. Overall, interviewees highlighted that the immediate priority of the police is to identify safety risks for those coming into custody. This is a different issue from assessing the ability of defendants or accused people to participate in the justice system.

I think, for the police, it's not that we would be saying we would want them to be identifying people. But what we would want them to be doing is thinking differently. So if they see something that looks unusual, that they respond to that. Not that they just kind of ignore it or pass it off as being something different.

Third sector professional, England

Interviewees also raised the growth of voluntary interviews by the police in England as a barrier to identification. Under these circumstances, individuals are not under arrest and they don't have to consent to an interview. They can withdraw consent or leave an interview at any time, unless arrested. If charged, they may not interact with any professionals until they go to court. Voluntary attendees are not usually subject to the same risk assessment as those who are detained in police custody. This means that their needs are unlikely to be identified.

In Scotland, a suspect can be released by the police under investigative liberation. One interviewee in Scotland felt this presented a good opportunity if, for example, someone disclosed a learning disability or it was apparent that additional support would be needed, to liberate them until the necessary supports were put in place for interviews. However, we did not collect evidence about the extent to which this approach is used in practice.

Liaison and diversion

A major development in terms of identifying impairments was the introduction of liaison and diversion (L&D) services in England. These services identify people with mental health conditions, learning disabilities or other vulnerabilities, such as substance misuse, when they first come into contact with the criminal justice system.¹⁹ Healthcare staff can provide screening or assessments in police custody or in court. Most individuals are supported within the criminal justice system rather than diverted away from it. In Wales, no funding has been made available for such services and there is no coordinating body. However, local areas can choose to operate services if they wish to do so. There are no equivalent screening services in Scotland.

We identified widespread support for L&D services during our interviews with professionals across England. Interviewees suggested that they can be viewed as more independent than the police, potentially encouraging better disclosure. It was reported that some services have developed specialisms, like a focus on women or homeless people. This could potentially be a useful model for other areas, if funded adequately. In some areas, L&D staff deliver training for the police, to help them build expertise on particular impairments.

Despite these very welcome developments, interviewees in England highlighted a range of factors that can limit the ability of L&D to identify defendants' needs. A key issue is that the police are nearly always the first point of contact, and it usually falls on them to identify people to be screened by L&D. This creates a risk that some disabled people will not be identified.

We don't want police officers to be the gate keepers of L&D ... vulnerability is so structured by who the police officer thinks you are. If you are six foot three and young and male, you might look a lot less vulnerable than 55 and female.

Third sector body, England

¹⁹ NHS England. ['About Liaison and diversion'](#) [ONLINE] Accessed 4 February 2020.

As a result, there is growing support for all suspects who come through custody to be screened. A range of interviewees from different sectors recommended this approach. In some police force areas, L&D screen everyone in police custody, so that the police don't have to make referrals. Kent Police undertook a pilot project to assess the effectiveness of this approach²⁰.

We have tried to move to a model whereby we're screening everybody regardless and our starting point would be that anybody in custody is in some way vulnerable. And therefore we don't particularly want to differentiate between one set of vulnerabilities or the other, so we try and see everybody.

L&D, England.

Interviewees in England raised a number of other barriers to identification. They noted that L&D opening hours vary, and they are not usually open 24 hours a day. Even when services are open, staff may not be able to see all referrals due to large workloads. It was highlighted that L&D staff have to cover significant ground during their assessments and they may not have expertise on all impairments. They may not be able to access relevant information from other agencies and as L&D is an opt-in service, defendants may choose not to engage.

An ongoing challenge to the effectiveness of L&D services is the growing use of voluntary interviews. As stated above, this may mean bypassing risk assessments and L&D services. It was reported by interviewees that in some areas, L&D can arrange assessments before interviews or court dates. There is increasing awareness about the importance of screening for those who participate in voluntary interviews.

Our interviews with defendants in England highlighted that not all disabled defendants knew about L&D services, but those who did viewed them positively.

²⁰ See findings and recommendations report for case study.

Defence solicitors and advocates

Our interviews with professionals in England, Scotland and Wales highlighted the vital role that defence solicitors and advocates play in identifying impairments and asking for adjustments. They often spend more time with defendants or accused people, compared with other professionals. They can speak to family members and may be able to access information from other agencies including health, school and social care records to aid identification.

A range of interviewees in England stressed the importance of solicitors having enough time with their clients, to enable them to build rapport. This can help to create an atmosphere where defendants are comfortable to disclose impairments. Furthermore, spending time helps them to observe when people are struggling to understand or communicate. In Scotland, our survey highlighted similar points – that lack of time is a barrier to effective identification. It was cited as one of the most common reasons for impairments not being identified.

Our interviews with accused people in Scotland indicated that people felt supported if their lawyer took the time to understand their needs, talk to them and explain processes. Defendants interviewed in England and Wales reported that solicitors didn't always spend enough time with them to be able to understand their impairments and how they are affected by them.

Interviewees in England advised that changes to the provision of criminal legal aid in England have adversely affected the time solicitors can spend with clients. It was stressed that complex mental health issues can't be properly explored in the time available, under the fixed fee system. Solicitors who spend time to support clients with these needs are not paid for the extra work undertaken. Solicitors can apply for further funding for complex cases, but they must be able to justify that there are exceptional circumstances, which can be problematic. In many cases in England, solicitors meet their clients for the first time at court.

Legal aid is fairly limited in criminal cases so you receive a fixed fee for each case that you deal with and from an economic pressure point of view the sooner you deal with one case the better because you can move on to the next. So there is an economic pressure on solicitors not to perhaps spend the time that's required in these cases because there won't be any additional payment.

Legal professional, England

A further issue that was raised by interviewees in England and Wales was the availability of medical and other expert reports. These are valuable assessments of a defendant's needs. It was highlighted that the fees payable for this work were significantly cut under legal aid reforms. As a result, many medical experts have withdrawn from legal aid work and it can be difficult to find someone to undertake a needs assessment. Furthermore, the application process for legal aid is cumbersome and time-consuming. It was argued that these factors can discourage solicitors from commissioning reports, which undermines the identification of impairments.

Finally, concerns were raised by interviewees about unrepresented defendants or accused people. In light of the critical role that defence solicitors and advocates can play, being unrepresented may reduce the chances of needs being identified, or adjustments being made for defendants and accused people. Interviews with members of the judiciary in Scotland suggest they see themselves as having a key role in ensuring the participation of an unrepresented accused person.

Prison staff

Prison staff can play a role in identifying impairments for defendants or accused people held on remand. Our interviews with prison officers in England and Wales flagged that healthcare staff screen new arrivals in prison, which can be a useful opportunity to spot issues. Furthermore, custody staff are in contact with individuals over a period of time, which may be helpful for identification.

Members of the judiciary

Members of the judiciary are likely to have a more limited role in terms of identifying impairments, though they can still be the professionals who are identifying a need or an impairment. For example, during hearings, they might observe defendants or accused people who are struggling to follow proceedings or engage with the court. This may also be the case for legal advisers in magistrates' courts.

It was argued that members of the judiciary in England and Wales (and legal advisers) are under significant pressure to deal with cases quickly. This is particularly the case in magistrates' courts. The limited amount of time that magistrates can spend on cases undermines their ability to identify issues, among defendants. Interviewees suggested that where they do have concerns, they are under pressure not to adjourn cases in order to gather more information.

I think the pressure for speedy justice makes it difficult for people to slow things down. You've got to be quite a brave Magistrate, especially if you don't sit that often to say, "Do you know what? I don't think this person is really getting what is going on and I'm going to stop proceedings until we've had an assessment done." You've got to be quite courageous to do that.

Third sector professional, England

Virtual or other justice procedures

In recent years, the criminal justice systems in Scotland and England and Wales have been going through a period of reform. The changes mean that fewer people now need to appear in court for their offences. This can mean that opportunities for identification are lost or reduced. As already highlighted, video hearings are now a common feature of the justice system. For those whose first meeting is over video, professionals from a range of sectors felt that this significantly undermined the ability of advocates to identify impairments. Without meeting a defendant in person, advocates may not be aware that an individual is struggling to understand them. It was suggested that the 'human element' is missing from these interactions and that trust and rapport are harder to build up. It was underlined that both people and behaviours can be easily misunderstood over remote technology.

I think it is less easy for the court to identify if somebody is confused, or unable to pay attention, or whatever else it may be, because you are a little remote figure on a TV screen. Yes, I think you are less well able to represent yourself, as it were, or for the court to easily identify that you are not necessarily able to follow what is going on. You are just less present, I think.

L&D, England

It was noted by a number of interviewees that these barriers are compounded by the short timeslots available for video consultations. Before hearings, standard slots for meetings are just 15 minutes long, even if the quality of the link is poor. This may be the first opportunity that a defence solicitor or advocate has to meet their client.

The time slots that are given to the defence solicitors or representatives are only quite limited, perhaps maybe fifteen minutes. If that individual has a particular vulnerability or need and they struggle to understand concepts, trying to ram that all home in fifteen minutes and make an informed decision is going to be far from ideal. The fact is it's just not going to work.

Prosecutor, England

A further issue that was raised in relation to identification in England was that there is no screening of those who use the single justice procedure and plead by post or online. Those who use this service are expected to do so on their own, without legal or other advice. In Scotland, concerns were also raised about the lack of identification of impairments for people responding to complaints served by post, where pleas are submitted by letter.

Most people don't turn up to court for it because they've just been sent letters and they either can't read or they don't open their post, or they can't work out what day of the week it is to turn up, or they get so stressed by it ... all of the reasons we know that people don't go to court. I'm not sure telling them to go to a website, and logging on, and creating your government sign in, is going to achieve any of those.

Third sector professional, England

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.

Criminal justice professionals highlighted a number of critical stages where information about impairments should be shared. These include police custody, where arresting officers may need to share concerns with interviewing officers and/or pass on relevant information to L&D or to prosecutors.

While our inquiry heard of some good examples of information being shared (for example, L&D services, some of which have developed helpful protocols for sharing information between agencies) overall, it seems that information sharing about impairments is patchy and inconsistent.

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

Legal professional, England

In England and Wales, half (53%, 69 out of 131) of professionals responding to our survey stated that information about impairments is only sometimes shared with relevant professionals. The figure for Scotland was similar, at 50% (32 out of 64). Around one in ten respondents in all nations said it is rarely or never shared: 9% in England and Wales, (12 out of 131) and 11% in Scotland (7 out of 64).

Our survey findings suggested a range of reasons why data is not shared effectively. In England and Wales, these were a shortage of time, defendants not wanting to disclose, disjointed communications and confidentiality issues. In Scotland, common reasons given in the survey were information not being viewed as relevant, unclear or inconsistent procedures and policies, and a lack of awareness among professionals.

You can have a massive row with the custody officer about whether they can be disclosed or not. It becomes ludicrous because they say, "No, no. We can't disclose that to you because it's confidential to the detainee." And then, you say, "That's fine. The detainee's standing next to me and he's saying that I can have them." "No, you can't have them." Or, you get a written consent. "No, can't have them." And, that's been going on for years, and it's the most ridiculous, pointless waste of time ever.

Legal professional, England

Our interviews with criminal justice professionals echoed similar points to the findings from our survey. In England, it was noted by interviewees that the police do not always pass relevant information about the needs of disabled defendants to the Crown Prosecution Service. Police custody staff don't always share relevant information from risk assessments with defence solicitors, despite having permission from suspects. This may be due to concerns about data protection. It was also highlighted that solicitors may find it difficult to access relevant information held by staff escorting prisoners to court.

In Scotland, prosecutors highlighted that they rely on the police to flag issues. However, they said that if they had concerns about unidentified mental health issues (from reading a police report), they would instruct a community psychiatric nurse to visit the accused person. It was noted that social workers might hold relevant information about an accused person's impairment. However, they can only share this with relevant agencies if they are aware that an individual has been charged with an offence. As a result, this information may not come to light until after sentencing. Some professionals in Scotland reported that the sharing of relevant information on an informal basis between professionals no longer occurs, possibly due to data protection concerns.

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

Third sector body, Scotland

While some L&D services have made good progress in information sharing, a number of barriers still exist. Interviewees said that L&D staff might have access to a person's NHS records, but not have permission to share them with other agencies and that L&D can't usually access records from drug or alcohol services or agencies in other areas. Some L&D services struggle to send reports to courts as their systems are not compatible. One interviewee said that their L&D service had had to employ an administrator based in the courts to work around this problem.

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

Provision of adjustments

Evidence gathered for our inquiry demonstrated that the criminal justice system presents multiple barriers to participation for defendants or accused people with a cognitive impairment, mental health condition and/or neuro-diverse condition. This includes both traditional court procedures and settings, and digital procedures.

In both jurisdictions, implicit or explicit procedural rules allow a judge or magistrate to make adjustments or ‘accommodations’ to help secure a defendant or accused person’s participation²¹. 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 participate²², or how much weight requests for adjustments should be given compared to other considerations, such as the need to deal with cases efficiently and quickly²³. There is also unequal statutory provision of adjustments for defendants compared to non-defendant witnesses.²⁴

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.

Interviews with professionals highlighted some of the procedural adjustments that can be made to support participation. Common adjustments highlighted in Scotland were: taking breaks, talking slowly and using simple language during hearings. Asking accused people if they understood charges, bail or other conditions was also considered to be an adjustment. However, some interviewees said this wasn’t always an effective approach.

²¹ For England and Wales, see eg. 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.

²² The 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](#)).

²³ See for example Criminal Procedure Rules 1.1(2)(e), and Criminal Practice Direction I 3F.12 (Eng & Wales); see also s148(1A)(a) and s72(7) of the Criminal Procedure (Scotland) 1995 Act.

²⁴ For England & Wales, see the Youth Justice and Criminal Evidence Act 1999.

Similar points were made in our interviews with professionals in England and Wales. Magistrates said that they spoke in less complicated language and asked defendants to explain points back to them so that they could check their understanding. Legal advisers said they tried to create a less formal environment, such as allowing defendants to sit outside the dock, or using first names rather than formal titles. Some respondents made comparisons with youth courts and stated that the less formal practices used in that context supported participation for defendants.

In criminal cases in England where a defendant has an impairment that affects their ability to participate in their trial, ground rules hearings should be held to identify adjustments and next steps for the trial. Some Crown Court judges and barristers told us that these are used occasionally, to promote fairness and participation.

Our interviews with defendants and accused people highlighted that families, friends and 'informal supporters' play a key role at the pre-trial stage. Informal support in court from someone familiar was helpful in reducing anxiety, and aiding understanding and participation.

I could take my friend wi' me cos he knows my background. I had tae take that wi' me. [...] He's there cos tae explain things, an' tae explain how things are an' how, how tae explain it properly for me.

Accused person, Scotland

However, a notable minority of professionals responding to our survey said that it is common for no adjustments to be made, even where needs have been identified. Professionals in England, Wales and Scotland indicated that the main barriers to adjustments being made were needs not being identified and a lack of understanding about the needs of defendants or accused people. Our survey of defendants, accused people and supporters also 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

We found that limited data is available about the extent to which adjustments are made. SCTS does not collect or hold data about adjustments made. HMCTS has introduced mandatory reporting of requests for reasonable adjustments.²⁵ In its submission to our inquiry, HMCTS provided some data about reasonable adjustments made during a six-month period in England and Wales. However, the data indicated that very few adjustments were requested and subsequently made for defendants and the overwhelming majority were for jurors. The system at HMCTS is still bedding in, so it's likely that their data doesn't capture all of the adjustments being made for defendants.

Impact of a lack of adjustments

Almost half the professionals responding to our survey in England and Wales felt that disabled defendants would be more likely to plead guilty if they did not receive adjustments (49%, 64 out of 130). Half said that without adjustments, disabled defendants would be less likely to be granted bail (50%, 65 out of 130). Over half of professionals in Scotland felt that disabled accused people would be more likely to plead guilty if they did not receive adjustments (58%, 37 out of 64). Over half said that without adjustments, they felt that disabled accused people would be less likely to be listened to by the court (55%, 35 out of 64).

My lawyer just asks what my disabilities are but he doesn't ask if there's anythin', you know, extra that I need, like, done, so ...

Accused, Scotland

Many of the accused people interviewed in Scotland highlighted the provision of appropriate adults in police stations. There were mixed views about how helpful they were. While some were felt to be very good, concerns were raised by both accused people and professionals who felt the service was varied in terms of communication support. In England and Wales, interviewees advised that appropriate adults, who are mandatory for children and vulnerable adults, were, in some cases, used in police stations, but there can be delays in their attendance. They felt this served as a disincentive for their use, both for the police and for defendants.

²⁵ Under a new system called OPTIC.

Video hearings

We received some evidence that suggested video hearings could be an adjustment. For example, those who might experience high levels of stress or anxiety when attending court hearings in person might find a video hearing to be a helpful adjustment. However, most of our evidence focused on the barriers that video hearings can present to defendants or accused people with a cognitive impairment, mental health condition and / or neuro-diverse condition.

In my view, anybody who's got language issues, mental health problems, or autism, ADHD, or any other learning-based difficulty, they shouldn't be appearing by video link. It's difficult enough working with somebody who has those problems to make sure that you're doing your job properly and making reasonable adjustments to do it in person, so it should be avoided at all costs, other than for the most simple things.

Legal professional, England

Many interviewees underlined that, due to concerns about participation, it is not usually appropriate for defendants with impairments to attend hearings by video-link. They strongly urged that disabled defendants should be able to attend remand or interim hearings in person, where relevant, by way of an adjustment. In practice, professionals in England said that they were sometimes successful in requesting in-person appearances, rather than video-links.

My overall view would be that it is better for them to be brought to court, for all sorts of reasons, because – amongst other things – they can see the solicitor, the solicitor can make a judgement on the day, the barrister can make a judgement on the day, and then the trial process can be adapted in a particular way. Doing it remotely, as far as getting the defendant's participation and understanding is concerned, I would have thought is acutely compromised.

Judiciary, England

Among defendants, some would have preferred to attend in person because the video-link impaired their ability to understand. They wanted to take part or 'reach out' to the judge and felt that their impairments would be more visible if they attended in person. Just one defendant from the sample we interviewed was given the choice as to whether they would attend a hearing by video-link or in person.

I often write to the court beforehand to ask that a defendant be produced in person. I did this in the case of an individual with a brain injury. It was very hard to get instructions. I wrote to the court explaining, but because it would cost more money for the individual to be produced, the court refused and the person appeared by video-link.

Legal professional, England

Intermediaries

Intermediaries are communication specialists, often speech and language therapists and their role is to facilitate communication between suspects or 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.

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.²⁶ 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 witnesses²⁷. 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.

If a witness requires an intermediary, those are almost always funded by CPS or whoever, whereas the hurdle for a defendant to get an intermediary is much, much higher. And I think there is a big disparity in terms of equality of arms, in particular when it comes to intermediaries.

(Legal professional, England)

²⁶ Section 16, Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999).

²⁷ The Criminal Practice Direction I 3F.12

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. Several Scottish professionals suggested that it would be a useful step for intermediaries to be introduced.

Many of the criminal justice professionals interviewed for the inquiry underlined the value of intermediaries in supporting disabled people.

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.

Legal professional, England

Intermediaries interviewed highlighted the adjustments they can facilitate including the defendant sitting outside of the dock or with family, asking professionals to remove wigs or gowns in court and use simpler language, proposing questions to be asked in a certain order and using communication aids, and ensuring regular breaks can be taken and agreeing start and end times.

She just sort of explained, like dumbed things down basically ... And just made sure that I was feeling ok throughout everything, it was a very, just calm, just well-mannered way. Everything was just down to my level.

Defendant, England

Some defendants from England and Wales highlighted the work of intermediaries during their interviews and some had had an intermediary with them in court, which they found useful.

The MoJ is currently reviewing the provision of intermediaries across the justice system, which may provide a useful opportunity to expand their use. Numerous professionals interviewed identified a need for an increase in provision of intermediaries for defendants, in line with witnesses. In our view, an accessible register of intermediaries for defendants, backed up by a clear framework and funding, would support the right to a fair trial and ensure equality of arms.²⁸

When you think over all the support and people and extra bits and bobs that get thrown at the witnesses and the prosecution witnesses and then the defendant, it's almost like, they're almost labelled as guilty and not worth it from the start.

Intermediary, England

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 there present.

Legal professional, England

²⁸ Equality of arms means that both parties have the opportunity to present their case, under conditions where they will not be disadvantaged, compared with the other party.

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 on adjustments

There is no single framework or statute to guide professionals about the provision of adjustments in the criminal justice system. However, a number of relevant policies, guides, directions and training processes deal with barriers faced by disabled defendants or accused people and set out potential adjustments. These include Code C of the Police and Criminal Evidence Act 1984, which the police must follow in England and Wales. It covers the detention, treatment and questioning of suspects, including those who are vulnerable. Prosecutors need to follow the guidance of the Crown Prosecution Service and the Crown Office and Procurator Fiscal Service when taking decisions about charging and prosecuting those with mental health conditions. The Crown Prosecution Service has recently updated its guidance.

In their work with disabled defendants, defence solicitors, barristers and advocates must be guided by their professional principles and the regulatory requirements. The Advocate's Gateway toolkits²⁹ provide useful guidance for advocates on questioning vulnerable witnesses and defendants, and was also highlighted as a resource by professionals in Scotland.

²⁹ The Advocates Gateway. '[Toolkits](#)' [ONLINE] accessed 4 February 2020.

The English and Welsh judiciary can be guided by the 'Equal Treatment Bench Book',³⁰ which provides advice on communication and participation for those appearing in court, including disabled people. A Scottish version of the Equal Treatment Bench Book is also available which includes a short section on mental disorders and key points to maximise communication. In England and Wales, the Criminal Procedure Rules, Criminal Practice Direction and pre-trial preparation forms³¹ all require judges or magistrates, and advocates or defendants to identify any adjustments needed. The equivalent written record of state of preparation forms in Scotland do not currently address vulnerability or adjustments.

Our survey of criminal justice professionals in England, Wales and Scotland pointed to a good awareness of the legal frameworks and guidance available about adjustments. The vast majority in England and Wales (75.4%, 98 out of 130) felt that there is 'some' to 'very high' awareness of legal frameworks and guidance relating to adjustments within their profession. The majority in Scotland (69%, 45 out of 65) felt that there is 'some' to 'very high' awareness of the legal frameworks and guidance relating to adjustments in their professions.

The criminal justice professionals interviewed in England and Wales were broadly positive about the information available for their sector. However, a number of respondents suggested that the resources are potentially under-used.

And there's a book called the 'Equal Treatment Bench Book' that has surfaced I would probably say over the last couple of years, 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 utilised far more than it is.

Crown court judge, England

³⁰ Courts and tribunals judiciary. the 'Equal Treatment Bench Book' (2018).

³¹ These are the [pre-trial preparation forms](#) in the Crown Court, and [preparation for trial form](#) in the magistrates' court. Questions in the Crown Court form relating to adjustments for defendants were expanded in July 2019.

Training on adjustments

Interviewees said that there is no compulsory training on adjustments for solicitors or barristers in England and Wales. Training that is available on 'vulnerability' usually focuses on victims and witnesses, rather than defendants. One interviewee said that most firms operate on small margins, with limited funding for training. 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. In their submission to our inquiry, the Judicial College said that diversity e-learning is available to judicial office holders. This covers learning disabilities, autistic spectrum disorder, and mental health disorders. Some professionals suggested that members of the judiciary can sometimes view impairments as an excuse for offending behaviour. It was also suggested that due to a limited understanding of the issues, some judges assume that all relevant issues have already been identified (either by themselves or others). Some of the magistrates interviewed said that disability training is mandatory for them but that it is mainly focused on physical impairments.

In Scotland, solicitors are required to undertake 20 hours of Continuing Professional Development per year (there are continuing professional development requirements for all solicitors and barristers in England and Wales too). However, this includes a range of activities and the content of any training is self-selected. This means that there is no guarantee that they will cover adjustments for disabled people in their training. The Judicial Institute for Scotland provides training for Judges, Sheriffs and Justices of the Peace, including optional training modules in relation to diversity awareness and equal treatment.

Interviewees in all nations observed that like in other sectors, understanding about impairments and their impact on participation varies significantly among members of the judiciary.

It is an alarming lack of skill sets in a workforce where we know you're dealing with particularly vulnerable people.

Third sector professional, England

Many interviewees said that all professionals need better training on these issues. It was suggested that training should be done on a regular basis, as people often move between roles and organisations. A range of good practice was highlighted by interviewees. For example, charities with expertise on particular impairments deliver briefings to the police. Training that is delivered by disabled people or those with lived experience of the justice system was also highlighted as being effective.

Annex 1: Methodology

The inquiry report draws on a wide range of evidence sources. Evidence was gathered between March 2019 to November 2019. We wanted to hear directly from criminal justice professionals, defendants and accused people with cognitive impairments, mental health conditions and/or neuro-diverse conditions and their supporters.

Our staff conducted 100 in-depth qualitative interviews with criminal justice professionals in England (69), Scotland (24) and Wales (7). This included staff from the police and prisons as well as appropriate adults, intermediaries and liaison and diversion staff. Court-based interviewees included legal advisers, magistrates, crown court judges, justices of the peace and sheriffs. Legal interviewees included prosecutors for the Crown Prosecution Service and the Crown Office and Procurator Fiscal Service, solicitors, advocates and barristers. Finally, we interviewed academics and professionals from the third sector, including disabled people's organisations, disability bodies and criminal justice charities.

We also engaged directly with a range of government departments and arms-length bodies. This included: the Ministry of Justice, HM Courts and Tribunals Service, the Scottish Government and the Scottish Courts and Tribunals Service. We talked to the College of Policing, the National Police Chiefs' Council, Police Scotland, the Crown Prosecution Service and the Crown Office and Procurator Fiscal Service. HM Prison and Probation Services and the Scottish Prison Service also engaged with the inquiry. We spoke to the Judicial college, the Judicial Institute and the Joint criminal justice inspectorates in England and Wales and HM Inspectorate of Prisons for Scotland. We spoke to the Mental Welfare Commission and NHS England and Wales. The Independent Office for Police Conduct, the Bar Standards Board, the Faculty of Advocates and the Solicitors Regulation Authority also responded. Finally, we spoke to the Law Society of Scotland and the Scottish Legal Aid Board.

We commissioned the following research projects as part of this inquiry:

- ATD Research conducted 39 qualitative interviews with ex-defendants in England and Wales. Researchers at the University of Glasgow conducted 15 qualitative interviews with ex-accused people in Scotland. This research provides in-depth insight into the lived experiences of defendants and accused people.

- Justice Studio Ltd carried out online surveys with 200 criminal justice professionals and 46 defendants, accused people and supporters in England, Scotland and Wales. Statistically significant inferences have not been made from this data because it was not a randomised sample. The percentages that are given simply refer to the proportion of respondents to the surveys. However, these findings do represent the views of those included in the survey and offer a valuable insight into people's views and experiences.
- Justice Studio Ltd conducted a mapping of the extent of court modernisation and digitisation across the criminal justice systems in England, Scotland and Wales. They also analysed the publicly available policy documents relating to court modernisation and digitisation and the pre-trial stage.
- Fair Trials International conducted desk-based research to provide examples of how various legal systems outside Great Britain have attempted to improve effective participation of defendants with cognitive impairments, mental health conditions and/or neuro-diverse conditions. The research focussed on the pre-trial stage and on procedural adjustments.

The inquiry draws on published research, official statistics and policy documents. An External Reference Group (ERG), with members representing legal professionals, disabled people's organisations and an advocacy and human rights organisation provided valuable expertise and advice about the inquiry.

We would like to thank HM Prison and Probation Service, HM Courts and Tribunals Service, the Senior Presiding Judge for England and Wales, the Senior Presiding Judge in Scotland, the Crown Office and Procurator Fiscal Service and the Scottish Prisons Service for giving permission for us to conduct interviews and surveys to inform this inquiry. The Judicial College refused permission.

Annex 2: Terms of reference

1. The inquiry will examine the procedural and practical adjustments that are required at the pre-trial stage to ensure that adult defendants/ accused with cognitive impairments, mental health conditions and/or neuro-diverse conditions can participate equally and effectively in criminal proceedings against them in (a) England and Wales, and (b) Scotland.
2. The inquiry will explore the experience of defendants/ accused with the impairments set out in paragraph 1 at the pre-trial stage of the criminal justice system and specifically:
 - whether needs that might require adjustments are identified;
 - which adjustments, if any, are made in practice, including whether adjustments required for trial are identified;
 - whether barriers and enablers exist to the provision of adjustments and if so what these are; and
 - the impact of modernising reforms in the courts, including the use of video-link and online and digital processes, on participation.
3. The inquiry may consider aspects of the investigative stage where the evidence indicates this is necessary to understand barriers to the provision of adjustments at the pre-trial stage.
4. The inquiry will consider the adequacy of:
 - the duties owed by government, public bodies and the judiciary to anticipate, consider and make adjustments for defendants/accused with the impairments set out in paragraph 1 at the pre-trial stage of the criminal justice system; and
 - the legal framework to ensure compliance with these duties.
5. The inquiry will consider the operation of the criminal justice system in the calendar years 2017 and 2018 but it may exceptionally examine evidence from other points in time where relevant.
6. The inquiry will consider proposals for future reform where relevant, including UK and Scottish Government proposals to modernise the court system and review criminal procedure rules.
7. The inquiry will make recommendations as appropriate.

8. Interpretation:

- ‘accused’ in this inquiry means anyone charged with and being prosecuted for a crime in Scotland, reflecting the terminology used in that jurisdiction (see also ‘defendants’).
- ‘adjustments’ in this inquiry includes but goes beyond the reasonable adjustments required under section 20 of the Equality Act 2010. It includes obligations on judges to adapt trial procedure to accommodate the needs of disabled defendants/accused arising under Articles 6 and 14 of the European Convention on Human Rights, incorporated into domestic law by the Human Rights Act 1998, and Articles 5 and 13 of the United Nations Convention on the Rights of Persons with Disabilities.
- ‘cognitive impairments’ include, but are not limited to, learning disabilities, acquired brain injury, dementia and foetal alcohol syndrome.
- ‘criminal justice system’ without specific reference to a particular jurisdiction refers collectively to the criminal justice system in England and Wales and the criminal justice system in Scotland.
- ‘defendants’ means people charged with and being prosecuted for a crime in England and Wales, reflecting the terminology used in that jurisdiction (see also ‘accused’).
- ‘investigative stage’ includes, for the purposes of this inquiry, all criminal justice processes up until the point of charge, including, but not limited to, arrest, pre-charge bail and police interview.
- ‘legal framework’ includes relevant legislation, procedural rules, policies and guidance.
- ‘mental health conditions’ include, but are not limited to, anxiety, depression, schizophrenia, bipolar disorder and post-traumatic stress disorder.
- ‘neuro-diverse conditions’ include, but are not limited to, autism spectrum disorder and attention deficit hyperactivity disorder.
- ‘pre-trial stage’ includes all criminal justice processes relevant to a person’s defence from the commencement of a prosecution up to the disposal of the case or beginning of a trial, whichever occurs first.
- ‘processes’ include, but are not limited to, plea and trial preparation hearings, remand hearings and engagement with a legal representative, including hearings and conferences conducted by video-link from prisons and police stations.
- ‘disposals’ include guilty pleas.

Glossary

Accused person/people: anyone charged with and being prosecuted for a crime in Scotland.

Adjustments: these include, but go beyond, the reasonable adjustments required under section 20 of the Equality Act 2010. It includes obligations on judges to adapt trial procedure to accommodate the needs of disabled defendants/accused arising under Articles 6 and 14 of the European Convention on Human Rights, incorporated into domestic law by the Human Rights Act 1998, and Articles 5 and 13 of the United Nations Convention on the Rights of Persons with Disabilities.

Appropriate Adult (AA): safeguards the welfare, rights and effective participation of children and vulnerable adults detained or interviewed as suspects.

Criminal justice system (CJS): one of the major public services in Great Britain. Across the CJS, agencies such as the Police, the Courts, the Prison Service, the Crown Prosecution Service and the National Probation Service work together to deliver the criminal justice process.

Court familiarisation visit: a visit arranged in advance of a trial to help witnesses become more familiar with the courtroom.

Cross-examination: being questioned by the other lawyers after questioning by the person who has asked the witness to come to court.

Custody: when a person is kept in prison or a police cell.

Defendant: anyone charged with and being prosecuted for a crime in England and Wales.

Disabled person: according to the Equality Act 2010, a person is disabled if they have an impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Intermediary: works in the justice system to help and support users with learning or communication disabilities. They help them to give complete, clear and accurate evidence to police and courts, and to make sure the hearing is fair. Intermediaries can support victims, witnesses, defendants and others. Intermediaries tend to be experienced professionals, such as speech and language therapists, psychologists, teachers, social workers and mental health specialists. Intermediaries for defendants are non-registered whereas intermediaries for victims and witnesses need to be registered.

Liaison and diversion (L&D): services that identify people who have a mental health condition, learning disability, substance misuse disorder or other vulnerabilities when they first come into contact with the criminal justice system as suspects, defendants or offenders.

Mental health conditions: these include, but are not limited to, anxiety, depression, schizophrenia, bipolar disorder and post-traumatic stress disorder.

Neuro-diverse conditions: these include, but are not limited to, autism spectrum disorder and attention deficit hyperactivity disorder.

Non-registered intermediaries: intermediaries who are not registered with the Ministry of Justice and have been selected, trained and accredited by independent organisations. Non-registered intermediaries can be used by defendants.

Pre-trial hearing: held before the magistrates' court begins to hear evidence from the prosecution at the actual trial. They are held to resolve particular legal issues that need to be dealt with before the trial begins. This is usually a first appearance when a plea is entered.

Pre-trial stage: all criminal justice processes relevant to a person's defence from the commencement of a prosecution up to the disposal of the case, guilty plea or beginning of a trial, whichever occurs first.

Public Sector Equality Duty (PSED): the duty on public authorities to consider how their policies, practices or decisions affect people who are protected under the Equality Act. If a public authority hasn't properly considered its public sector equality duty, it can be challenged in the courts.

Reasonable adjustments: as set out in the Equality Act 2010, these remove or minimise disadvantages experienced by disabled people, correct policies and practices and ensure disabled people are not put at a disadvantage. See legal framework for judicial and other exceptions.

Registered intermediaries: intermediaries who are selected, trained, accredited and regulated by the Ministry of Justice (MoJ) in England and Wales, or the Department of Justice in Northern Ireland. Intermediaries used for defendants do not have to be registered.

Remand (also known as pre-trial detention or provisional detention): the process of detaining until their trial a person who has been arrested and charged with an offence.

Single justice procedure notice: sent to the defendant to explain the offence which has given rise to the proceedings, explaining the options available to the defendant, and the consequences of not responding to the notice. It is accompanied by the evidence upon which the prosecutor will be relying to prove the case.

Video-links / hearings: a hearing in which participants take part from a remote location via a video-link with the court.

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