



Improving Services for Offenders with Learning Disabilities and Difficulties

A Literature Review

August 2013



working in partnership with:



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1. Introduction

This literature review is the first stage in an on-going project to assist the National Offender Management Service (NOMS) with meeting its commitment to improve provision for offenders with learning disabilities and difficulties (henceforth LDD). It will look at the journey through the criminal justice system from point of arrest to sentencing and beyond, and will include consideration of measures to enhance staff awareness and understanding of LDD and appropriate reasonable adjustments aimed at improving outcomes for offenders with LDD. The term LDD is used in this report in a broad sense to encompass the range of (hidden and otherwise) disabilities and difficulties associated with learning, cognition and communication, including autism spectrum disorders. The issue of definition of LDD is briefly addressed at the outset of Chapter 2 below.

Background

Early work into learning disabilities (generally conceived in terms of low intelligence) and offending in the late nineteenth and early twentieth century tended to assume strong links between the two, and presented people with disabilities as a threat to society and social progress. This reinforced the popular perception that such individuals should be segregated in workhouses and asylums. When the National Health Service (NHS) was established in 1948, asylums were largely replaced with long-stay hospitals for 'mentally handicapped' patients requiring medical supervision; however segregation remained. In 1969, abuse scandals including one at Ely Hospital near Cardiff led to the White Paper *Better Services for the Mentally Handicapped* (1971) which emphasised the importance of supporting people with learning disabilities, where possible, within their local communities. In due course, this resulted in the closure of most long-stay hospitals.

Over the past forty years, a range of supports and services have been developed with the stated aim of helping people with learning disabilities to lead good lives in their communities. A number of policy documents have provided frameworks for the provision of individualised, person-centred support.

As part of this, there has been a recognition that people with learning disabilities who come into contact with the criminal justice system have particular needs that should be addressed whether within or outside criminal justice agencies. For example, Home Office circular 66/90 (1990) stressed the need for good inter-agency working to allow offenders to access care and treatment from health and social services rather than through the criminal justice system; while the Reed Report, in 1992, recommended closer working relationships between police, health and social services and the development of nationwide provision of court

assessment and diversion schemes supporting care and treatment in the community (Department of Health/Home Office, 1992). Concerns about the quality of prison health care, which were raised by various government departments in the late 1990s (Home Office, 1996; Prison Service/NHS, 1999), led to a transfer of the budgeting and commissioning of healthcare from the Prison Service to the NHS; this was completed in 2006. The anticipated improvements for offenders with learning disabilities were seen to be dependent on local partnerships and working arrangements between community health and prison staff.

The past fifteen years have seen a surge in activity aimed at supporting the social inclusion for people with LDD. For example the first White Paper focusing on learning disabilities for 30 years was launched in 2001: *Valuing People: A new strategy for learning disabilities for the 21st century* (Department of Health, 2001). This focused on the four key principles of civil rights, independence, choice and inclusion. It recognised that:

People with learning disabilities are amongst the most socially excluded and vulnerable groups in Britain today.... too many people with learning disabilities and their families still lead lives apart, with limited opportunities and poor life chances...they should have the same opportunities as other people to lead full and active lives and should receive the support needed to make this possible.

(Department of Health, 2001)

Valuing People acknowledged that a 'fundamental shift in attitude' (Department of Health, 2001) was needed towards people with learning difficulties both by public services and within local communities. With this, there was increasing recognition that social inclusion also entails better access to justice for people with LDDs – both in the sense that individuals with LDDs should be supported in reporting crime and giving evidence when they are victims, and in the sense that when they enter the criminal justice system under suspicion of having committed a crime, their particular needs are recognised and addressed. In a wider strategy aimed at protecting the public and reducing reoffending, the Home Office (2006) acknowledged that there had been inconsistencies in the implementation of diversion strategies for people with learning disabilities and mental health problems due to the absence of a nationally guided approach.

In 2009, *Valuing People Now* outlined the government's further three year strategy for people with learning disabilities (Department of Health, 2009a). In addition, it included the main recommendations from *Healthcare for All*, the report of the independent inquiry into access to healthcare for people with learning disabilities (Michael, 2008). The revised strategy recognised that the *Valuing People* White paper had overlooked the needs of

prisoners with learning disabilities and emphasised the need to improve support both in prison and in the community. It recommended the development of a health screening programme to identify learning disabilities among suspects and offenders, and to ensure that physical or mental health issues are addressed. Further, the influential Bradley Review (Department of Health, 2009b) highlighted the importance of mechanisms for diverting offenders with learning disabilities to support and services in their local communities coordinated by health and social care agencies. It recommended that all police custody suites and all courts should have access to liaison and diversion schemes which should include specialists in working with people with learning disabilities. Additional recommendations were made in relation to early identification procedures, collaborative multi-agency working, training and awareness-raising for criminal justice practitioners, and the development of community-based treatment and care initiatives for those at risk of offending.

Tackling disadvantage within the criminal justice system

There has, thus, been some considerable progress made towards a more inclusive approach to suspects and offenders with LDDs. And yet, as will be demonstrated over the course of this report, more needs to be done to overcome the disadvantages faced by these individuals. Disadvantage can be experienced by individuals with LDD at all stages of the criminal justice process – from initial apprehension by the police through to conviction, sentencing and release. It can take a wide variety of forms: for example, individuals may be denied or otherwise unable to exercise their legal rights; they may face arrest, conviction and punishment for behaviour that is associated with their disability and rather than having criminal intent; they may find it more difficult than their non-disabled peers to comply with non-custodial sentences or to cope with being imprisoned; and they may be unable to access or derive value from resettlement, educational or other services provided to convicted offenders.

Discrimination relating to disability, even where this is indirect and unintended, has the effect of undermining due process and justice for the individual, and can cause significant suffering. It can also impose additional burdens on the very system that institutes the discriminatory treatment, since suspects, defendants or prisoners with disabilities may make heavy demands on the staff and resources of already over-stretched criminal justice agencies. There are, furthermore, implications for wider society: the failure to appropriately address offending or otherwise challenging behaviour by individuals with LDD may reinforce rather than moderate or deter potentially harmful conduct.

The disadvantages faced by suspects and offenders with LDD were highlighted by the *No One Knows* programme, which was a national initiative led by the Prison Reform Trust over a three-year period from 2006 to 2009. A series of research reports were published during the programme, together with recommendations for policy and practice – a number of which have been adopted. Central to the programme was the involvement of criminal justice practitioners and of offenders with learning disabilities themselves who participated in interviews and shaped the work. Research undertaken for *No One Knows* found that offenders with LDDs are discriminated against ‘personally, systemically and routinely’ during their journey through the criminal justice system (Talbot, 2008).

Particular issues that were identified – as will be further considered below - include the lack of routine or systematic procedures for identifying people with LDD who come into contact with the criminal justice system, which in turn leads to lost opportunities to provide appropriate support. Another recurring theme was suspects’ and offenders’ lack of understanding and limited access to information that could facilitate understanding:

A common threadwas the problem associated with prisoners not being able to access or understand information and consequently not understanding what was happening around them or was expected of them. Whether at the police station, in court or in prison, prisoners frequently didn’t quite “get it” and as a result were left behind – both literally and metaphorically, because nobody cared to listen.

(Talbot, 2008)

A similar point was raised by the Bradley Review:

As a case proceeds from charge to conviction and sentence or other outcome, the defendant may be required to appear at several hearings at which the language used, procedures followed, and the range of professionals involved all contribute to a sense of stress, confusion and alienation.

(Department of Health 2009b)

Beyond the issues of identification of need and lack of understanding, another overarching issue is the need to link suspects and offenders to relevant support and therapeutic services, to ensure that they receive the help they require *within* the criminal justice system if prosecution proceeds, or *outside* it if they are diverted out of the process. Liaison and diversion services, based in police stations and courts, play a vital role in this – as will be discussed in Chapter 3, below.

The NOMS Commissioning Intentions for 2013-2014 (NOMS, 2012) recognise the importance of effective identification of offenders with LDDs and acknowledge the difficulties faced by these individuals in accessing services. NOMS has advocated the tailoring of services and resources to their specific needs, and has made a commitment to expanding liaison and diversion services. The goal of ending the discrimination and disadvantages experienced by offenders with LDD, and putting effective provision in place, can be furthered through a rights-based approach to disability. This approach is based on principles of inclusion, involvement and participation, whereby people with disabilities enjoy the same rights and duties as their non-disabled peers, with – as and where necessary – appropriate supports. At the core of this approach is the idea that an individual's inability to participate fully in his or her community reflects exclusionary societal factors, rather than any limitation of function resulting from the individual's particular disabilities. In the context of criminal justice, a rights-based approach to disability seeks to ensure fair and equal access to justice for the individual accused, his or her alleged victim(s) and society at large.

The rights-based approach to disability is supported by the provisions of the Equality Act 2010, and particularly the public sector 'equality duty'. This duty requires public bodies to eliminate discrimination and advance equality; and the legislation acknowledges that in order to achieve this it is not necessary to treat all groups exactly the same. Rather, groups that are particularly disadvantaged – such as those within the criminal justice system who have LDD - may require special treatment. In practice, this means that the criminal justice system has to make appropriate 'reasonable adjustments' to ensure that people with disabilities have a fair and equal chance alongside their non-disabled peers.

Structure of this report

Following this introduction, the rest of this report is divided in six sections. Chapter 2 considers the existing evidence on prevalence of LDD among people in the criminal justice system. This is followed by a discussion of issues relating to the identification of LDD and responses to them. The next three chapters look at the offender journey through the criminal justice system: Chapter 4 considers police responses to suspects with LDD; Chapter 5 looks at court processes; and Chapter 6 focuses on sentencing beyond. Finally, Chapter 7 concludes the report with a consideration of the key themes to have emerged from this review of provision, and the next steps in this project.

2. Profile and prevalence

An assessment of the prevalence of LDDs among offenders in England and Wales demands, in the first instance, a consideration of the complex issue of defining LDDs. Various definitions of learning disabilities and learning difficulties have emerged in recent years. For example the World Health Organisation (WHO) defines learning disability as ‘*a reduced level of intellectual functioning resulting in diminished ability to adapt to the daily demands of the normal social environment.*’ (World Health Organisation, 1996). WHO also provided a quantitative estimation of learning disabilities in the form of IQ levels, describing an IQ range of 50 to 69 as being ‘indicative of mild mental retardation’ or mild learning disability. However, many people with an IQ of 70 or above will also experience major difficulties with understanding and communication (Talbot, 2008).

From a national perspective, the Department of Health has provided definitions for both learning disabilities and learning difficulties.

A learning disability has been defined as:

- *a significantly reduced ability to understand complex information or learn new skills (impaired intelligence)*
- *a reduced ability to cope independently (impaired social functioning)*
- *a condition which started before adulthood (18 years of age) and has a lasting effect*
(Department of Health, 2001)

The learning disability charity Mencap (<http://www.mencap.org.uk/all-about-learning-disability/about-learning-disability>) has defined a learning disability as:

A reduced intellectual ability and difficulty with everyday activities – for example, household tasks, socialising or managing money – which affects someone for their whole life.

Several potential impacts of learning disabilities, particularly in relation to offenders, have been identified. These include slower understanding of information, the potential need for extra support in order to live independently, additional communication needs, difficulties filling in forms and following instructions, difficulties with concentration and understanding social norms. (Department of Health, 2011).

The term ‘learning difficulties’ is a broad one. It is understood to encompass a variety of conditions including dyslexia, dyspraxia, dyscalculia, attention deficit (hyperactivity) disorder

(ADHD). The Department of Health (2011) has defined learning difficulties in the following terms:

A specific learning difficulty is defined by specific problems processing certain types of information. It does not affect the overall intelligence ('IQ') of a person. It is common for a person to have more than one specific learning difficulty and/or other conditions.

(Department of Health, 2011: 7)

The focus of this report on both learning disabilities and learning difficulties is similar to that of the Prison Reform Trust's *No One Knows* programme. *No One Knows* followed *Valuing People* (Department of Health, 2001) in defining people with LDD as those who:

- *experience difficulties in communicating and expressing themselves and understanding ordinary social cues*
- *have unseen or hidden disabilities such as dyslexia*
- *experience difficulties with learning and/or have had disrupted learning experiences that have led them to function at a significantly lower level than the majority of their peers*
- *are on the autistic spectrum, including people with Asperger syndrome*

(Talbot, 2008: 3)

Caution should be exercised, however, in over-generalising the experiences of people with LDD within the criminal justice system:

People with learning disabilities are not a homogenous group....they are all individuals with a wide range of life experiences, strengths, weaknesses and support needs. However, many will share common characteristics which might make them especially vulnerable as they enter and travel through the criminal justice system.

(Talbot, 2008:3)

Prevalence among the general population

Valuing People (Department of Health, 2001), estimated that 65,000 children and 145,000 adults in England had severe or profound learning disabilities, with 1.2 million having mild to moderate learning disabilities. Emerson et al. (2012) provided an updated figure, estimating that 1,191,000 people in England have learning disabilities. This includes:

- 286,000 children (180,000 boys and 106,000 girls aged 0 to 17 years)
- 905,000 adults aged over 18 years (530,000 men and 375,000 women) of whom 189,000 are known to learning disability services.

The prevalence of severe and profound learning disability is fairly uniformly distributed across the country and across socio-economic groups. However, there is evidence of a link between poverty and mild to moderate learning disabilities, of which there are higher levels in deprived and urban areas.

More than 1% of the general population are thought to have autism (Baird, 2006; Brugha et al, 2007); of this 1%, it is thought that around 55% also have a learning disability (Baird, 2006). It had been widely assumed that autism affects more males than females, but this is now being challenged: girls and women may have been 'missed' from the figures for various reasons possibly including lack of referrals for diagnosis among females and greater capacity of girls and women to 'mask' their difficulties. A recent survey by the National Autistic Society (Bancroft et al, 2012) found that just one-fifth of girls with Asperger syndrome who responded to the survey were diagnosed by the age of 11, as compared to half of males.

Prevalence among the population of offenders

Estimating the proportions of offenders with LDD is an extremely challenging task. This reflects the complexities of definition, the lack of routine screening for LDD, limited opportunities for wide-scale screening and assessment for research purposes, and the difficulty of identifying certain forms of disability and difficulty even where screening and assessment are carried out. A number of studies have sought to estimate prevalence through a variety of methods, but have produced discrepant findings which appear to be attributable to a number of factors including variations in samples, definitions and use of control groups . In relation to dyslexia, different estimates of prevalence have been produced, depending on the use of screening versus full assessment (see for example, Klein, 1998) and whether literacy difficulties are required to be discrepant from other intellectual abilities (Snowling et al. 2000; Samuelsson, et al. 2000; Rice, 2008). These issues were addressed in the Yorkshire and Humberside study (Rack 2005) which is described later. One general issue in relation to the identification of LDD is that impairment is not binary, rather it exists on a continuum and, functionally, is influenced by both moderating and exacerbating factors, which themselves may be variable. (see for example, Klein, 1998; Snowling et al. 2000; Samuelsson, et al. 2000; Rice, 2008).

Loucks (2007) reviewed the range of research literature on the prevalence of offenders with LDD, from which she concluded that between 20% and 30% of prisoners have learning disabilities that interfere with their ability to cope with the criminal justice system. It was identified that this group of prisoners:

- *are at risk of reoffending because of unidentified needs and the consequent lack of support or services*
- *are unlikely to benefit from programmes designed to address offending behaviour*
- *are targeted by other prisoners when in custody*

(Loucks, 2007: 1)

The Social Exclusion Unit (2002) reported that, amongst those leaving the prison environment, half had a reading ability below that expected of an 11 year old and, in numeracy skills, two thirds of were below the level expected of an 11 year old. It has been argued that these high levels of under-achievement reflect, at least in part, a high prevalence of specific learning disabilities amongst the offender population and, in particular, a high prevalence of previously unidentified unrecognised specific learning difficulties. Rack (2005) found that 50% of the prison population had literacy skills below functional levels but that only about half of these (20% of the total prison population) showed clear evidence of specific learning difficulties, defined as a 'hidden disability' that will affect and undermine their performance in both education and work settings. Rack argued that literacy support was important for all with poor skills, but that this would be unlikely to succeed unless that support was designed to accommodate the specific blocks and barriers associated with hidden disabilities.

Various studies of children and young people in the criminal justice system have found high rates of LDDs within this group. Based on a large-scale analysis of assessment (ASSET) forms used in the youth justice system, the Youth Justice Board (2006) found that a quarter of children and young people entering the youth justice system had special educational needs and 29% difficulties with literacy and numeracy. A smaller-scale study of 13 to 18-year-olds in custody and under supervision in the community found that over half (59%) had a low (36% = 70-79) or extremely low (23%, under 70) IQ (Harrington and Bailey, 2005). In addition, skills assessments conducted at entry to custody have shown poor levels of attainment for age; 31% of boys entering prison had the literacy level, and 38% the numeracy level, expected of a seven year old (HMIP, 2002). Various other indicators, including lack of qualifications, truancy levels and school exclusion show a general lack of engagement with education (see, for example, Tye, 2009; Baker et al, 2003; YJB, 2006).

There is very little literature relating to the numbers of people with autism in the prison population or the wider population of people in the criminal justice system. The widespread assumption that people with autism are over-represented in the population offenders is not supported by clear and consistent evidence. Research has found, however, that there are large numbers of people with autism in high-security psychiatric hospitals. Scragg and Shah (1994), for example, found that the prevalence of Asperger syndrome in Broadmoor was almost three times higher than the prevalence in the general population. Hare et al. (1999) identified that between 2% and 5% of residents in three secure psychiatric hospitals in England (Ashworth, Rampton and Broadmoor) had autism, at a time when the prevalence in the general population was said to be 0.7%. Siponmaa (2001) found 15% of offenders aged between 15 and 22 who were referred for forensic assessments in Stockholm had a definite autism spectrum disorder and a further 12% a probable autism spectrum disorder.

Other studies have found similar or lower rates of offending behaviour among people on the autism spectrum compared to the general public. Mourisden (2008) found similar conviction rates among those with Asperger syndrome and those without, and Woodbury-Smith (2006) found a low rate of law-breaking behaviour among people with Asperger syndrome.

Women make up a small minority of people who get caught up in the criminal justice system, and an even smaller minority – around 5% - of those who end up in prison. Little information is available concerning the prevalence of LDDs among women in the criminal justice system; what is clear, however, is that there are very high levels of psychological, emotional and social vulnerability among these women (Corston, 2006). Among few studies specifically to look at the issue of learning disability among women offenders was research by Mottram (2007) at the woman's' prison HMP Styal, which found that 8% of the population had an IQ below 70 and a further 32% were classed as having a borderline learning disability.

3. Identifying and responding to need

There can be effective provision for offenders with LDD only if their needs have first been identified by the criminal justice services with which they are in contact. If the needs of individuals with LDD are not identified, then they

will be made vulnerable by a criminal justice system that neither recognises nor supports their needs, so creating particular difficulties with regard to people's ability to understand and to participate fully in the process to which they are subject

(Talbot 2008)

However, the identification of need cannot be an end in itself: systems must be in place for sharing relevant information about the identified LDD between agencies within the criminal justice system and outside it, and for responding to the needs through the provision of appropriate support and reasonable adjustments.

Screening and assessment

The identification of need is a challenging task. As discussed above, LDD take a wide variety of forms. LDD may co-exist with other types of need such as mental health problems or substance misuse, which might act to obscure the specific problems associated with the LDD. Furthermore, as Talbot (2008: 63) explains, many LDD are largely hidden with few visual or behavioural clues, this problem is heightened by the fact that:

Many people with such disabilities try hard to hide their impairments and even if asked directly, especially by people they don't know or in a stressful environment, may deny that they have learning disabilities or difficulties.

Identification of need therefore requires the implementation of sensitive, effective and routine screening procedures in police stations, at courts and in other parts of the criminal justice system; and scope for referral for more comprehensive assessment where the initial screening indicates the possible presence of LDD. Currently, the provision of such systems across the criminal justice systems is highly variable, and in many areas largely absent.

The police are generally the first point of contact between a suspected offender and the criminal justice system, and it is therefore particularly important that police officers are alert to indications that a suspect has LDD. However, as noted by Jacobson (2008), custody

officers and investigating officers often lack training and expertise in identifying LDD. A variety of factors may make identification more difficult for the police, including where a suspect is angry or distressed because of the circumstances of the arrest or anxiety associated with it, or is under the influence of drugs or alcohol. The establishment of liaison and diversion services at all police stations with responsibility for undertaking screening (to be discussed below) is thus likely to be the most effective way of ensuring that LDD are routinely identified at the initial stages of a suspect's journey through the criminal justice system.

The need for better recognition of and training in autism among criminal justice professionals has been well documented and is considered in a number of policy documents. For example, the Department of Health (2010) highlighted that criminal justice services might not be fully aware of the communication challenges when dealing with suspects and offenders with autism; however as yet no statutory duties in this regard have been placed upon criminal justice services. Recent guidance from the National Institute for Health and Clinical Excellence (NICE) asserted that the needs of people with autism in contact with the criminal justice system should be recognised and suggested that criminal justice services should have representatives on local autism multi-agency strategy groups (NICE, 2012). The Department of Health has produced a comprehensive handbook for professionals in the criminal justice system working with offenders with learning disabilities, *Positive Practice, Positive Outcomes* (Department of Health, 2011). Other practical measures that have recently been developed include the production of a guide by the National Autistic Society (2011) for criminal justice professionals that includes 'At a Glance Cards' to help custody officers identify individuals who may potentially have autism.

Concerns have been raised about the scope for identifying LDDs among young offenders as most youth offending teams do not use screening or assessment tools to assess learning disabilities, conduct disorders and other communication needs. (Talbot, 2010). Moreover, ASSET, the assessment tool used to assess young people who come into contact the youth justice system, does not address these issues in any kind of systematic way. In an effort to address these shortcomings, the Comprehensive Health Assessment Tool (CHAT), jointly funded by the Department of Health and the Youth Justice Board, is being rolled out across the secure estate over the course of 2013. The Youth Justice Board anticipates that this will result in an improved identification of needs. However some concerns remain about the tool's appropriateness in assessing young people with communication needs (House of Commons Justice Committee, 2013).

The Bradley Report (Department of Health, 2009b) emphasised the importance of prison staff knowing of a prisoner's learning disability when the individual is received into custody. However, there is no routine procedure for screening or assessment of prisoners to identify any learning disabilities (Talbot and Riley, 2007), and over 80% of prison staff interviewed as part of the *No One Knows* programme said that the information accompanying prisoners to prison is unlikely to show the presence of learning disabilities or difficulties (Talbot, 2008).

The Learning Disability Screening Questionnaire (LDSQ) has been piloted in four prisons under the auspices of the Department of Health. This tool has been developed to provide those who work with adults suspected of having a learning disability with a quick and easy means of screening. The questionnaire involves asking seven questions on a one-to-one basis; an important advantage is that the person using it does not have to have any clinical qualifications. The results of the piloting of the LDSQ in prison were reported in March 2010 and it was established that it was an effective tool for use in this context; however, it has not yet been made routinely available (Bromley Briefings November, 2012).

Another relevant screening tool is the Hidden Disabilities Questionnaire (HDQ), which has been developed by the organisation Dyslexia Action. It was originally mandated for use within educational services, but the intention is that it will become a nationally recognised tool that can be administered by non-specialists across the criminal justice system, and with particular relevance to prisons. The HDQ was produced by analysing the data from the Yorkshire and Humberside study (Rack 2005) to identify the consistent sets of questions that were reliably associated with particular patterns of literacy and cognitive processing difficulties. The resulting scores, based on 32 questions, highlight issues with: literacy and language; memory and organisation; maths; motor co-ordination; and tolerance for novelty. The HDQ does not purport to diagnose conditions that may be associated with problems in these areas (dyslexia, dyscalculia, dyspraxia, ADHD and Autism Spectrum Disorders), but can serve to both highlight the need for further assessment and to alert staff to possible adjustments and accommodations that can be put in place.

When education contracts were put out to tender by NOMS, providers were required to use the HDQ or a similar screening tool in order to identify offenders with possible hidden disabilities and funding was made available for a limited time for training in its use and 'train the trainer' sessions that were delivered by Dyslexia Action and by Manchester College. According to Dyslexia Action records, over 30 establishments have been involved in training and have embedded the HDQ in their educational delivery routines. Feedback on its use

has been positive, although there is an issue to resolve about the amount of time that can be devoted to such screening alongside other reception procedures and assessments.

Some other screening tools are in use or under development; for example, the Do It Profiler developed by Amanda Kirby, which is used at HMP Parc. Calderstones Partnership NHS Foundation Trust is developing a communications screening tool for use in probation settings.

Liaison and diversion services

Liaison and diversion services have particular importance for suspects and offenders with LDD. The function of these services is to ensure that suspects' and offenders' needs are identified, and that they receive the treatment and support they require – whether in lieu of or alongside formal prosecution. Liaison and diversion services are usually based in police stations or magistrates' courts, and tend to be staffed by mental health practitioners, although some also have specialist learning disability input.

All liaison and diversion services have two main roles. The first is to undertake **initial screening** of individuals in police detention or appearing in court, in order to identify those who have particular vulnerabilities. The second is to undertake the **onward referral** of individuals with identified needs for further assessment and, where appropriate, therapeutic help or support – whether this assessment and help or support are to be provided within or outside the criminal justice system.

Where a suspect's alleged offending behaviour is minor and/or where the individual's needs are very significant, it may be deemed inappropriate to pursue a criminal prosecution. In such cases, a liaison and diversion service should facilitate diversion out of the criminal justice system into treatment and other forms of therapeutic help. If, on the other hand, prosecution is deemed appropriate and in the public interest, notwithstanding the evident needs on the part of the alleged offender, a liaison and diversion scheme service should ensure that appropriate therapeutic support and assistance is put in place during and beyond the prosecution process. Thus a liaison and diversion service might facilitate provision of bail support to prevent unnecessary remanding in custody; reports on the offender's condition to feed into decision-making by police and courts; assistance with court appearances; treatment and/or activities tailored to and addressing needs, as part of community sentences; access to treatment and support in custody; and appropriate help and support provided during post-custody licence periods.

The first organised liaison and diversion scheme was set up in 1989 (Sainsbury Centre for Mental Health, 2009). Over the course of the 1990s and 2000s, various diversion schemes developed on a piecemeal basis and with fragile funding; most were court-based, some police-based. In the main, they were very small-scale and staffed by community psychiatric nurses. Policy support for this work came in the form of Home Office circulars in 1990 and 1995 which promoted treatment and multi-agency support for 'mentally disordered offenders', while the 1992 Reed Review called for 'nationwide provision of properly resourced court assessment and diversion schemes' (Department of Health/Home Office, 1992). By 2010, 120 schemes were in existence (Nacro, 2011). The Bradley Report (2009) recommended that all police custody suites and all courts 'should have access to liaison and diversion services'; in response the Department of Health made a commitment to 'promote and stimulate the development of liaison and diversion services' (DH, 2009).

The current administration's interest in liaison and diversion was signalled in the 2010 Ministry of Justice Green Paper *Breaking the Cycle*, which proposed that liaison and diversion services should be rolled out nationally by 2014. This led to establishment of the National Liaison and Diversion Development Network (NLDDN) in June 2011, by a partnership between the Department of Health, Ministry of Justice and Home Office. The Offender Health Collaborative (OHC) has been commissioned by the Department of Health to support and manage the national roll-out, subject to business case approval, and is in the process of developing a generic model for services.

Traditionally, liaison and diversion schemes have tended to focus primarily on offenders' mental health needs, but it is increasingly recognised that specialist learning disability provision should be an integral part of the services they offer – whether through the employment of specialist learning disability practitioners, or closer liaison with relevant external services including community learning disability teams. The NLDDN stresses the broad remit of the work of liaison and diversion services in the following terms:

The NLDDN brings together 101 adult and young people's sites in police custody suites and criminal courts and are open and accessible to all offenders – whether adult men, women, children or young people – and whether they have a mental health problem, learning disability, personality disorder, substance misuse issue or other vulnerabilities. They aim to ensure that wherever they are in the youth or criminal justice system, an individual's health needs are known, provided for by appropriate treatment and services, and enable the police and courts to make informed decisions about charging and sentencing.

<http://www.nliddn.org.uk/>

4. The police

It is the duty of the police to investigate any offence reported to them. If a suspect is then arrested, he or she should be taken to a local police station as soon as possible. Research has indicated that this very initial stage of an individual's contact with the criminal justice system is the 'point in the offender pathway that provides the greatest opportunity to effect change.' (Department of Health, 2009b).

Alternatives to prosecution

Arrest is only one of the options available to the police once a suspect has been identified. Particularly if the alleged offence is not a very serious one, there are various alternatives to prosecution such as the issuing of a caution, warning or fixed penalty notice; the police can also choose to take no further action (Jacobson, 2008). The police are increasingly being encouraged to look at the range of informal alternatives to prosecution – particularly for children and young people who come to their attention, but also for adults – for example, by instituting informal restorative or reparative work with the suspect. Where a suspect has LDD, this is likely to be a consideration in police decision-making about what action to take. For example, if the suspect is evidently very vulnerable, it may be apparent from the outset that a prosecution would not be in the public interest, and the police may opt to involve health or other services in the community in providing care or treatment. On the other hand, less significant LDD may also be taken into account in deciding on an appropriate disposal. For example, a conditional caution is an out-of court-disposal with specific conditions attached to it – such as to engage with treatment or support services - with which the individual must comply, or otherwise face prosecution. A suspect's LDD should also be taken into account where the police opt for more informal action, as this should ideally be tailored to the individual's abilities and understanding.

As noted in the preceding chapter, however, police investigating officers and custody sergeants often do not have requisite skills or expertise to identify LDD, and therefore may not even know of a suspect's needs, let alone be able to consider their implications for the available disposals. This illustrates the critical importance of ensuring that all police stations have access to liaison and diversion services - with staff available to conduct initial screening and refer to other agencies for assessment and support.

Diversion out of the formal prosecution process – via one of the various routes listed above – may be the most appropriate response where a suspect with LDD comes to the attention of the police. However, this will not always be the case. An approach to suspects and offenders

with LDD that has social inclusion at its heart presupposes that these individuals should be subject to the same full range of disposal options as their non-disabled peers. This means that they are potentially subject to arrest, charge and prosecution in the courts – provided that, first, their LDD are not so severe as to make it impossible for them to participate effectively in the criminal justice process; and, secondly, that adjustments are made to the process to ensure that their welfare and other needs are met and their legal rights are not compromised. This argument for prosecution, as appropriate, is on the grounds that:

the concept of 'inclusion' brings duties as well as rights – including the duty to abide by the law; and people with disabilities who do not abide by the law can expect to be subjected to the same due process, with the necessary support, as anyone else.

(Jacobson and Talbot, 2009: 21)

Arrest and interview

Where officers proceed with the formal prosecution process and take a suspect into police custody, a requirement of the Police and Criminal Evidence Act 1984 (PACE) is that an Appropriate Adult should be requested if the custody sergeant considers the suspect to be vulnerable, including by way of learning disabilities. An Appropriate Adult can be a relative, friend, or carer of the suspect, or can also be a social worker or other professional, and has the role of supporting the vulnerable person and facilitating communication between them and the police. This again raises the issue of identification, since the evidence suggests that in practice many suspects who should be supported by an Appropriate Adult do not receive this help because their needs are not routinely identified (Jacobson, 2008). Practical issues including the lack of availability of Appropriate Adults and the delays in their attending the police station have also proved problematic.

All individuals who have been arrested have certain legal rights safeguarded by PACE, including the right to silence and the right to see a solicitor. The right to silence is expressed in the police caution which must be given when a suspect is arrested, and at the outset of each formal police interview. These rights apply whether or not a suspect has LDD; but a suspect with LDD may struggle to understand them, as was found by Clare (2003), in which case it can be said that they are not able to exercise their legal rights fully. Suspects with LDD may also find it difficult to understand the questions put to them in police interview, or the style or questioning may be inappropriate. For example, a forensic practitioner with Cheshire and Wirral's Forensic Support Service commented that:

Suspects with communication problems need longer time to process a question and to think of their answer. Repeating the question before they have processed it only

confuses and delays them. The police should not automatically perceive a slow response to a question as suspicious for the person may have significant communication problems. (cited in Department of Health, 2011).

As noted by Clare (2003), suspects with LDD are also likely to be more acquiescent and suggestible. This again points to the importance of identifying LDD in order to ensure that an Appropriate Adult is present to facilitate communication and understanding; beyond this, it also points to a need for greater awareness and understanding on the part of the police of the vulnerabilities of people with LDD.

The importance of adequate police training has been highlighted recently in the case of the young man with autism who was placed in handcuffs and leg restraints after an incident at a swimming pool¹. His father sued the Metropolitan Police and the judge ordered them to pay almost £30,000 worth of damages to the victim - concluding that the young man had been falsely imprisoned and discriminated against. The Metropolitan police mounted an unsuccessful appeal which Lord Dyson, sitting with two other judges, dismissed: stating that the actions of the officers involved amounted to 'inhuman and degrading treatment' that breached the Human Rights Act and was equal to disability discrimination.

¹ (ZH v The Commissioner of Police for the Metropolis, 2012)

5. At court

Once a suspect has been charged with an alleged offence, he or she will appear at the magistrates' court. If the defendant pleads guilty, he or she will either then be sentenced by magistrates or, if the offence is relatively serious, in the Crown Court. If there is a not guilty plea, there will be a trial, either at the magistrates' court or – again, primarily depending on the seriousness of the offence – at the Crown Court.

The Bradley Report 2009 identified the difficulties faced by vulnerable defendants at court:

As a case proceeds from charge to conviction and sentence or other outcome, the defendant may be required to appear at several hearings at which the language used, procedures followed and the range of professionals involved may all contribute to a sense of stress, confusion or alienation.

(Department of Health, 2009b)

Fitness to plead and effective participation

Article 6 of the European Convention on Human Rights sets out the right to a fair trial for any individual charged with a criminal offence. This establishes the principle that all defendants must be presumed innocent until proven guilty. It also defines five minimum rights for the defendant: these concern the defendant's understanding of the charge; time and facilities for preparation of a defence; capacity to defend oneself or access to legal assistance to do so; capacity to examine witnesses for the prosecution and to obtain witnesses on one's own behalf; and access to an interpreter if needed. There is a general acceptance in law that the defendant's exercise of the right to a fair trial demands 'effective participation' in the court process (Jacobson and Talbot, 2009).

Court processes can be complex and confusing for any defendant, and are likely to be all the more so for defendants with LDD. This potentially undermines their capacity to participate effectively in proceedings. The Joint Committee on Human Rights (2008) enquiry into the human rights of people with learning disabilities received evidence that many people were not able to participate effectively in court proceedings and were therefore not receiving a fair trial:

We are concerned that the problems highlighted by the evidence could have potentially very serious implications for the rights of people with learning disabilities to a fair hearing as protected by common law and by Article 6 of the European Convention of Human Rights

(JCHR, 2008).

Likewise, Talbot (2012) has highlighted that high numbers of defendants have particular support needs, including low IQs and dual diagnosis in relation to mental health and substance misuse issues which, if not properly dealt with, can compromise their right to a fair trial.

The legal principle of effective participation in the court process is reinforced also in the criteria generally used to determine a defendant's 'fitness to plead': namely, that the defendant can plead with understanding, understand the proceedings, challenge a juror, question the evidence, and instruct counsel (Jacobson and Talbot, 2009). If there are concerns about a defendant's possible LDD or mental health problems, a 'fitness to plead' hearing can be held in the Crown Court (there is no such procedure for magistrates' courts); however, there is widespread criticism of the legal test used to determine fitness to plead, which largely dates back to the early nineteenth century, and does not reflect current understanding of defendants' needs and vulnerabilities (Law Commission, 2010). Further, if a defendant's LDD have not been identified by the court – which is very possible, given the limited screening for LDD across the criminal justice system, as discussed above - the question of their fitness to plead may not be addressed at all.

Dein and Woodbury-Smith (2010) argue that there are serious inadequacies in current understanding of the issues of criminal responsibility, fitness to plead and mental capacity among individuals those with autism who come in to contact with the criminal justice system. Research has raised questions about whether some offenders with Asperger syndrome have enough understanding of the consequences of their actions to be held responsible under *mens rea* (the principle that guilt requires criminal intent) (Barry-Walsh 2004; Schwarz-Watts 2005). It has also been argued that the broad capacity required by US courts to establish fitness to plead would be difficult to establish in many people with Asperger syndrome (Barry-Walsh 2004); similar concerns are also present for defendants with Asperger syndrome in British courts (Dein and Woodbury-Smith, 2010).

Issues of understanding

A significant barrier to the effective participation in court of defendants with LDD is lack of understanding. Research has consistently found that defendants with learning disabilities can struggle to understand court processes. Talbot (2008) found that just over 20% of all prisoners said that they did not understand what was happening to them during court

appearances. For some, the lack of understanding related to the court process whereas for others it was the use of language. This led to defendants:

- *not understanding what was happening to them*
- *having difficulties in expressing themselves and feeling rushed*
- *having thoughts of suicide and self-harm*

(Talbot, 2008: 24)

Over one third of prisoners interviewed for Talbot's study said that the use of simpler language and having things explained to them would have helped their experience of court; this rose to over two-thirds for prisoners with possible learning or borderline learning disabilities.

Talbot notes that people with LDD often have limited language, comprehension and communication skills. They might find it difficult to understand certain terms and struggle to respond to questions. This can have particularly serious repercussions for defendants with LDD who give evidence in court; and the problems can be compounded by the tendency among those with learning disabilities to be acquiescent and suggestible (Clare, 2003). Research has found that many lay participants in court, whether or not they can be deemed 'vulnerable', find it difficult to understand the language of the courtroom – and particularly in the more formal environment of the Crown Court – because of the use of jargon, and technical or overly-elaborate language by lawyers and judges, and the linguistic techniques used by lawyers to challenge witnesses under cross-examination (Jacobson et al, forthcoming).

The Department of Health (2011: 45)², has identified a range of anxieties that the court process can create for people with learning disabilities. These include:

- *The intimidating buildings and people*
- *Not knowing what is to happen*
- *Lack of preparation for the court hearing*
- *Confusing practices and procedures*
- *Difficulty in hearing and understanding the information presented in court*
- *The rapid delivery of information and the process*

² Extract from the *Court Protocol* developed by Yorkshire and Humberside Improvement Partnership with Hull and East Riding Magistrate's Court and others.

- *The use of legal jargon*
- *Excessive waiting during and between court appearances*
- *The lack of understanding about learning disabilities in the court system*

In order to alleviate some of these difficulties, the Department of Health (2011) has emphasised the importance of identifying the needs and issues for defendants with learning disabilities as early as possible to allow for pre-trial planning, the use of more accessible materials and access to support and advice.

Provisions for vulnerable defendants

Over recent years, there has been an increasing recognition, by the statutory authorities, of the need for support for vulnerable defendants – including those with LDD – to ensure that they are able to participate effectively in the court process and thereby exercise their right to a fair trial. Such support is, further, required if courts service and other criminal justice agencies are to comply with their duty under the Equality Act 2010 to eliminate discrimination.

For example, guidance for HM Courts and Tribunal staff (undated) states that:

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

The above principle is reiterated in section III.30 of the Consolidated Criminal Practice Direction (Ministry of Justice, 2011), which deals with ‘treatment of vulnerable defendants’, and applies to the Crown Court and magistrates courts. This document outlines a range of measures for vulnerable defendants: that is, those who ‘may be young and immature, or may have a mental disorder within the meaning of the Mental Health Act 1983, or some other significant impairment of intelligence and social function such as to inhibit his understanding of and participation in the proceedings’. Most of these provisions are aimed at making the court environment less intimidating, such as the removal of wigs and gowns, allowing the defendant to sit with members of his family, and familiarisation visits to the court room before the trial or hearing.

However, doubts have been raised about the impact that a practice direction can have, particularly because it does not have statutory force. Talbot (2012) has argued that the

practice direction is 'not sufficiently far reaching and can be confusing to the defendant'. The Working for Justice group of offenders with disabilities, which was set up in 2008 and is hosted by the organisation Keyring (<http://www.keyring.org/wfj>) have stated that some of the measures outlined in the practice direction may not be helpful for suspects and offenders with learning disabilities. For example, if wigs and gowns are removed then the defendant might not be able to identify who the judge is.

A particular concern is the lack of parity between provision for vulnerable defendants in court and provision for vulnerable witnesses (Jacobson and Talbot, 2009). Notably, the Youth Justice and Criminal Evidence Act 1999 introduced 'special measures' for vulnerable and intimidated witnesses. These include the opportunity to give evidence from behind a screen or via video-link outside the court-room; access to a registered intermediary to facilitate understanding and communication in court; and the removal of gowns and wigs by the judge and counsel to make the courtroom less intimidating. The Act makes it explicit that these measures were *not* designed to cover vulnerable defendants.

However, as noted by Jacobson and Talbot (2009), there have been some steps taken to extend certain special measures to defendants: some steps have recently been taken towards the extension of special measures to defendants. Under the Police and Justice Act 2006, a 'vulnerable accused' aged 18 or over can give evidence to the court by a live television link, where certain conditions are met. The Coroners and Justice Act 2009 extended the right to support from an intermediary in court to vulnerable adult defendants, but this provision has not yet been implemented. Nevertheless, judges have the discretion to direct the court to appoint an intermediary for a vulnerable defendant, and sometimes do so.

A recognition of the problems of understanding faced by vulnerable defendants, and the lack of specialist provision for these individuals, has led to calls for further training and development for all court professionals and staff (Talbot, 2008; Jacobson and Talbot, 2009). The Advocacy Training Council has emphasised the need for training on the handling of all vulnerable people who appear in the courts, and has identified three key elements:

- *how to identify witnesses and defendants who may be vulnerable*
- *how to consider and obtain measures in terms of procedure*
- *how to make adjustments in practice.*

(Advocacy Training Council, 2011)

As applies throughout the criminal justice process, the identification of defendants with LDD is essential to the development and implementation of provision to support them in court. This highlights, again, the important part that liaison and diversion schemes have to play. Whether these schemes are based within the courts or in police stations, it is vital that they not only identify defendants' needs but also inform the relevant professionals in court about these needs, who can then put the necessary supports in place to ensure that the defendants' treatment is just, fair, and in accordance with their legal rights.

6. Sentencing and beyond

If an individual is convicted of an offence in a magistrates' court or Crown Court – whether following a guilty plea or having been found guilty in a trial – the court can then consider a range of options in passing sentence. The main options for adults offenders are:

- An absolute or conditional discharge
- A fine
- A community order, to which various 'requirements' can be attached
- A suspended custodial sentence
- An immediate custodial sentence

According to the principle of proportionality, the court should pass a sentence whose severity reflects the seriousness of the offence; and seriousness is defined in terms of the harm caused by the offence and the culpability, or blameworthiness, of the offender (section 143 of the Criminal Justice Act 2003). In determining both the type of sentence (for example, custody or community) and the details of the sentence (for example, length of custody or requirements attached to a community sentence), the court may also take into account various factors relating to the background or circumstances of the offender (Jacobson and Hough, 2011). Such factors might include an offender's learning disabilities or difficulties – if the court is alerted to these through a pre-sentence report (PSR) prepared by probation, or the defence lawyer's plea in mitigation. If serious concerns about the offender's condition have been raised, the court might, further, request a psychiatric or psychologist's report, which would be likely to detail any LDD; however, it is relatively unusual for such reports to be ordered as they are expensive and can delay the sentencing process.

Where an offender is known to be 'mentally disordered' and the offence is punishable by imprisonment, an additional disposal that may be available to the court is a hospital order. This can be passed under section 37 of the Mental Health Act 1983, and entails compulsory admission to a psychiatric hospital. However, a defendant with a learning disability cannot be considered to be suffering from a mental disorder for the purpose of imposing a hospital order unless the disability is 'associated with abnormally aggressive or seriously irresponsible conduct' (sections 2A and 2B of the Mental Health Act 1983 as amended by the Mental Health Act 2007).

This chapter will consider various aspects of the sentencing of offenders with LDD: first, provision within community sentences for offenders with LDD; secondly, provision within custody; thirdly, the implications of LDD for offending behaviour programmes; and, finally, resettlement and rehabilitation of offenders with LDD.

Community orders

When a court passes a community order, it can attach to it a variety of different requirements. The available 'menu' of options available to the courts includes, for example:

- Unpaid work
- Mental health treatment
- Drug or alcohol treatment
- Supervision
- Offending behaviour programmes
- Specified activity (requiring the offender to participate in certain activities such as basic skills classes).

Concerns about the particular difficulties faced by offenders with learning disabilities in prison (see below) have led practitioners and commentators to argue that custodial sentences for this group of offenders should be avoided. Talbot (2008) argued in favour of limiting the disposals available to people with learning disabilities to non-custodial options such as fines or community sentences. Jacobson with Talbot (2009) asserted that there should be greater use of community orders when sentencing vulnerable defendants; but this requires ensuring that activity and programme requirements set out under community orders are fully accessible to, and appropriate for, individuals with learning disabilities.

The extent to which specific community order requirements are tailored to the needs of offenders with learning disabilities is highly variable, and depends in part on the accessibility of local learning disabilities services and their involvement in the design and delivery of requirements. Moreover, a lack of identification of an offender's LDD at the point of service can lead to the imposition of inappropriate community orders:

Low level offences can be dealt with without a full assessment completed by a probation officer and can lead to an offender receiving a Community Order – hidden disabilities could be missed due to either party not recognising an individual's needs - this could mean that some offenders with learning disability are unable to understand

or complete their conviction. It is important that any tasks or courses that form part of a community sentence suit the person's level of ability. Where there is any doubt, a full assessment or specialist should be called to assess whether they are actually capable

(Effective practice training manager, North West Training Consortium, cited in Department of Health, 2011: 43)

It is also important that sentencers consider what the offender can realistically comply with, when they determine which requirements to attach to a community order. Even if the requirements are well-suited to the offender's needs and level of ability, the individual may lack the necessary time-keeping and organisational skills to comply fully with them, especially if multiple requirements are imposed as part of a single order. It is important, in other words, to avoid setting up offenders to fail with overly demanding community sentences, the breach of which is likely to lead to custody. Similarly, offenders with LDD may have difficulty complying with ancillary orders that are imposed by the courts to run alongside community or other sentences, or with other orders imposed as alternatives to prosecution. The Bradley Report (Department of Health, 2009b) noted that the civil anti-social behaviour order (ASBO) (which can be imposed as an ancillary order or on a stand-alone basis) is problematic for people with LDD as they may not understand the terms of the order or why it has been imposed. Breach of an ASBO (which the government proposed to replace with the Criminal Behaviour Order, under the Anti-Social Behaviour, Crime and Policing Bill currently before Parliament) is punishable by custody.

PSRs have a vital role to play, not only in alerting the court to an offender's specific needs and capabilities, but also in ensuring that appropriate provision is in place for offenders on community orders, and alerting sentencers to this provision in order that they can make informed decisions about requirements. Input from liaison and diversion services, and links between these services and community learning disability teams, should support probation officers in preparing appropriate and informative PSRs. It should be noted that the preparation of PSRs is to remain a public sector probation responsibility following the forthcoming opening to competition of the majority of probation services provided in the community.

Restorative Justice (RJ) is an approach to tackling criminal and anti-social behaviour whereby 'those harmed by crime or conflict, and those responsible for the harm, [are brought] into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward' (Restorative Justice Council,

http://www.restorativejustice.org.uk/what_is_restorative_justice). RJ can be part of a community order, through a specified activity requirement – for example, where the offender is expected to attend a restorative conference with the victim. (RJ practices have also become increasingly widespread in other parts of the criminal justice system: for example, as part of pre-court disposals, at the pre-sentence stage, and in prisons.) However, it has been noted that there are limitations to the extent to which offenders with LDD may be able to engage in RJ work, which potentially disadvantages them within a criminal justice process which attaches particular value to RJ. For example, offenders with autism find empathy and therefore restorative justice difficult. Paterson (2007) describes how one offender showed no remorse for biting another man's nose off, but also lacked any concern or emotion when he described an assault upon himself. There is debate around whether people with autism can show remorse or partake in reparation due to difficulties they have with 'putting themselves in someone else's shoes' and understanding the consequences of their actions.

Custody

The importance of screening for LDD across the criminal justice system, including on entry to custody, has already been discussed above. With respect to the prison service, the Ministry of Justice (2011) stresses that prison governors must ensure that prisoners are encouraged to disclose any disability and that procedures are in place to record information relating to disabilities throughout an offender's prison sentence in a confidential manner. It was acknowledged that staff need to be proactive in identifying prisoners with disabilities as prisoners might not be aware of their disabled status (Ministry of Justice, 2011).

The particular challenges faced by prisoners with LDD have been comprehensively documented by the Prison Reform Trust's *No One Knows* final report (Talbot 2008). Among the difficulties faced by these prisoners, according to the report, are the following:

- Information for prisoners is generally in written form and they must complete forms relating to meals, visits from family and friends, making complaints, and other aspects of the prison routine. This poses problems for prisoners who cannot read or write.
- Asking for help in relation to reading, writing and understanding the prison regime is often difficult as some prisoners wanted to keep their learning disabilities hidden. Under these circumstances some do not know what was happening or missed out on some provision.

- Help is sought primarily from the prison officers but there is a reluctance to ‘bother them’ if they were busy. Overcrowding in prisons means that numbers of prisoners per staff member have increased, and there are fewer opportunities for staff to devote time to prisoners who may need support.
- Prisoners are also often reluctant to ask for help from either prison staff or other prisoners because of a lack confidence, fear of ridicule, or shame and embarrassment at their lack of understanding.
- Some prisoners learn about the rules and routines of prison life through formal methods such as during induction; others rely on watching what others do and picking things up as they went along; and some say that they learn through their mistakes: only finding out about a rule when they have broken it.
- Many have difficulty making themselves understood, or are frustrated that what they said was not believed or taken seriously (especially by prison officers).
- Prisoners with LDD may be scared for many different reasons, such as not understanding what is happening to them or what is expected of them – particularly when they first enter custody - or as a result of being bullied or assaulted by other prisoners and staff.
- Compared to prisoners without LDD, those with LDD were:
 - five times more likely to say that they had been subject to ‘control and restraint’;
 - more than three times as likely to say that they had spent time in the segregation unit;
 - more than three times as likely to have clinically significant depression or anxiety

Some research has found that certain individuals with autism cope relatively well with the prison environment because they enjoy the routine and predictability. For example, Paterson (2008) describes Paul, an offender with autism who adheres rigorously to prison routines, but struggles with his interactions with others. As he became agitated when in the company of others and could have aggressive outbursts, the decision was made that he could remain in his cell after lunch. This meant that Paul was able to have the structure and predictability that prison life can bring, whilst also avoiding social contact with others for the majority of the day. However, others have more negative experiences; Paterson (2008) also describes Michael, a prisoner who chose to isolate himself from others because his autism left him very vulnerable to bullying. This kind of vulnerability to bullying is characteristic of many

people with autism not only in prison, but also in the wider community. A related difficulty faced by offenders with autism is that aggressive outbursts may be misunderstood as manifestations of poor behaviour rather than indications of fear, frustration and misunderstanding of social situations (Gomez de la Costa, 2010).

Under the provisions of the Equality Act 2010, the prison authorities have an obligation to make 'reasonable adjustments' to ensure that prisoners with learning disabilities do not experience discriminatory treatment or that their experiences are poorer than those of prisoners who are not disabled. Such adjustments should include:

- Provision of written information in a variety of accessible and easy-read formats; for example, with use of pictures, line drawings, photos, diagrams, maps, flow charts and specialist cartoons and symbols were appropriate. *Change*, a human rights organisation for people with learning disabilities, has launched a specialist set of images and templates for those working the criminal justice system. In addition, the NOMS toolkit *Crossing the Communication Divide* (2009) provides guidance, information and templates for prison and probation staff
- Provision of accessible prison rules and instructions to help prisoners with LDD to understand and cope with the demands of prison life
- Each prison should develop a matrix of available support both within the prison and in the wider community and ensure that this information is known by all staff
- All interventions should be accessible to offenders with learning disabilities, or alternatives of the same quality should be provided.
- Each prisoner with a learning disability should have an annual health check and a Health Action Plan
- Provision of peer support advocacy groups and professional advocacy schemes.

(Talbot, 2008, 2012; Department of Health, 2011)

The current government has placed a strong emphasis on improving opportunities for learning in prison. The difficulties faced by prisoners with LDD, as outlined above, indicate that much needs to be done to ensure that these individuals are fully included within these efforts. A review of offender learning undertaken by the Department for Business Innovation and Skills with the Ministry of Justice (2011) recognised that:

Prisoners are not always allocated to skills programmes despite having a clear learning need and that people with learning disabilities and difficulties are not always assessed to allow their needs to be met.

In response to this, the review report states a commitment to focus, as a priority, on 'identifying and meeting the needs of those with learning difficulties and disabilities who are participating in learning and skills, particularly in prison'. The associated action plan includes the intention to:

Re-procure the prison learning contracts in order to:

- *strengthen the arrangements to assess prisoners' needs at the start of their sentences;*
- *ensuring prisoners with a clear learning need are allocated to skills programmes;*
- *ensuring prisoners with learning difficulties and disabilities are identified, and meeting those needs;*
- *focussing on those in transition from youth detention.*

There is a clear need for training and workforce development across the prison service focused on awareness of learning disabilities and, particularly, issues around communication. As part of a project in 2010, Learning Disability awareness training was delivered to three key members of staff in every prison in England and Wales, targeting in each the Disability Liaison Officer, a Healthcare representative and a member of staff from reception or induction. The one day course was commissioned by the Department of Health and delivered by two advocacy organisations, the Skillnet Group and Keyring Living Support Networks. The course was delivered to groups of 15-20 staff at their local regional prison training centre. It was written by the Department of Health with help from national experts, operational staff, and ex-offenders with learning disabilities. The material included slides, notes, activities, and a quiz, all of which were designed to work with the Department of Health 'Positive Practice, Positive Outcomes' booklet. These resources are still available for free via the KeyRing website (www.keyring.org/cjs). There is also available a DVD of offenders with learning disabilities talking about their experience. An evaluation of the training course revealed it to be well received, particularly because it provided lots of easy tips, sign-posting and advice designed to help front-line staff in their role, saving them time

and helping them to assist offenders to avoid situations which may trigger challenging behaviour.

Offending behaviour programmes

Offending behaviour programmes are a type of intervention which is intended to address the patterns of thinking and behaviour which are associated with offending. Most such programmes are based on the techniques of cognitive behaviour therapy, and some are geared towards particular forms of offending such as sexual offences or domestic violence, while others are more general in their scope. Offending behaviour programmes are variously delivered in custody and as elements of community sentences.

It has been noted that offending behaviour programmes are often not accessible to offenders with LDD. It is reported that offenders with an IQ of below 80 are generally unable to participate in programmes (Talbot, 2008). A Home Office study (Davies et al, 2004) assessed the literacy demands of three accredited offending behaviour programmes delivered in six probation areas; this involved a comparison of the skill levels required for these programmes with the literacy skills of offenders required to attend them. The study concluded that 'there was a mismatch between the literacy demands of the programmes and the skills levels of offenders [which] was particularly significant in speaking and listening skills.' More generally, Giraud-Saunders and Norman (2012) identified a failure to deliver the types of support required by offenders with learning disabilities if they are to address their own offending behaviour. These authors assert that support should be provided that includes access to appropriate treatment and offending behaviour programmes along with tailored assistance from specialist services such as community learning disability teams.

For prisoners serving indeterminate sentences, successful completion of offending behaviour programmes is often the primary means by which they can seek to demonstrate to the parole board that they no longer pose a risk to the public and can therefore be released. The effective exclusion of prisoners with learning disabilities from these programmes therefore potentially has very serious consequences for them in that it can result in their serving much longer periods in custody than they otherwise might. In 2008, authors of a Joint Committee on Human Rights report on adults with learning disabilities stated that they were 'deeply concerned' about the evidence of failure to provide for the needs of prisoners with learning disabilities, with the result that these individuals potentially 'serve longer custodial sentences than others convicted of comparable crimes ... [which] clearly engages Article 5 ECHR (right to liberty) and Article 14 (enjoyment of ECHR rights without discrimination).'

This has been a particular problem in relation to the indeterminate sentence of imprisonment for public protection (IPP) – introduced in 2005 for dangerous offenders - as the following quotation from a young man on an IPP sentence illustrates.

To lower my risk, I have to do ETS [Enhanced Thinking Skills: a course offered in prison] but because I can't read and write, I can't lower my situation. I'm just stuck. They are saying that until I can read and write I can't do ETS and I can't lower my risk. ...It's like when I'm trying to say I can't learn no more. I've been to a special school and I've learnt as much as I can but they don't believe that. But why should I be punished for two things? I'm being punished for the crime and again for not being able to read and write.

(Prison Reform Trust, 2007: 8)

Widespread criticisms of the IPP on the grounds of the unjust treatment of prisoners unable to access (for a variety of reasons) offending behaviour programmes and other grounds (see also, for example, Jacobson and Hough, 2010; HM Chief Inspectors of Prisons and Probation, 2008) eventually led to the abolition of the sentence by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, the legislation was not retrospectively applied, with the result that a significant number of IPP prisoners remain in custody and can only be released if they persuade the parole board that they are no longer dangerous – a task which continues to pose particular challenges for those with LDD.

In February 2010, Dennis Gill, a prisoner with learning disabilities, who had been in custody for a period of more than twice his tariff, was awarded a case for breach of the Disability Discrimination Act and for breach by the Secretary of State for Justice for failing in their duties to take steps to enable him to undertake some type of offending behaviour work. The Judge ruled that that 'reasonable adjustments' were not made to take account of Mr Gill's learning disabilities (Bromley Briefings November, 2012).

Some offending behaviour programmes have been developed in adapted forms for offenders with LDD. For example, the Adapted Sex Offender Treatment Programme - Community Version is an adapted community-based sex offender programme similar to the more widely used Sex Offender Treatment Programme (SOTP), but is appropriate for those who have social or learning difficulties. Work is under way by the Foundation for People with Learning Disabilities to adapt the Thinking Skills Programme; this has been funded by the Department

of Health and NOMS and the adapted programme has been piloted in the Midlands, North-West and Yorkshire.

The difficulties with social interaction faced by many individuals with autism can make their involvement in interventions, including offending behaviour programmes, difficult although not insurmountable. People with autism have difficulty transferring skills from one place to another because of their limitations in their social imagination; and, for example, this may mean that they cannot apply their learning from prison-based offending behaviour programmes to the outside world. Wing (1997) pointed out that offenders with Asperger syndrome who behave in an exemplary manner in one setting, may go on to reoffend in a less appropriate setting. Good practice exists in relation to developing appropriate support for people with autism who offend; however, research has found that the availability of this support is often shaped by local circumstances rather than need (Woodbury-Smith, 2005). Further, it is evident that modified therapies do not always work well for people with autism. For example, Murphy (2010) has noted mixed results of modified behavioural therapy. There has been some success addressing functional impairments, but difficulties have arisen in relation to trying to engage with individuals who present with 'significant egocentricity, take limited personal responsibility and reject their diagnosis.' (Murphy, 2010). As observed by other clinicians, some people with autism take an immediate dislike to professionals and they can also struggle with goal setting and recognising the need to change their behaviour (Murphy 2010, Attwood 2007).

Resettlement and rehabilitation

It is widely recognised that prisoners leaving custody – whether or not they have LDD – tend to have a wide range of resettlement needs. Resettlement provision has been defined by government in the following terms:

Resettlement is where prisoners and their families receive assistance and support from the Prisons and Probation Services, and voluntary agencies to help them prepare for life after prison. This includes advice about their entitlement to state benefits, training, education, work experience and preparation for release. The objective is to help prisoners return to normal life, get a job and home, and cope with life without re-offending.

(Ministry of Justice, <http://www.justice.gov.uk/offenders/before-after-release/resettlement>)

It is increasingly recognised that providing prisoners with ‘through the gate’ support with matters such as accommodation, finances and employment is essential to successful resettlement; and towards this end government has recently announced that a network of resettlement prisons will be established (<https://www.gov.uk/government/news/70-resettlement-prisons-announced-for-england-and-wales>). Voluntary sector organisations are seen as playing a critically important role in providing practical and emotional assistance to prisoners as they leave custody, and many such organisations operate both within and outside prisons with the aim of ensuring consistency of support.

However, the extent to which resettlement provision addresses the needs of offenders with LDD is questionable. Talbot (2008) has observed that ‘Effective resettlement plans are important for prisoners with learning disabilities in particular, and for those with learning difficulties as they prepare for release. But how well prisoners are prepared is not encouraging.’ Because – for the range of reasons outlined above – prisoners with LDD often find it difficult to access services and interventions within prison, including offending behaviour programmes, many may leave custody with little prospect of avoiding re-offending in the future. The risk of a return to custody may therefore be higher than for other ex-prisoners (Talbot, 2008).

Further, access to education and employment are known to be among the key factors linked to reduced re-offending (Social Exclusion Unit, 2002), and this is severely limited by poor literacy and numeracy skills. To the extent that former prisoners with LDD, and indeed offenders on community sentences, are helped to develop their basic skills, this may therefore help to break the vicious cycle of offending, punishment and re-offending. There is also a strong argument that interventions are likely to succeed only if they are delivered in a way that is sensitive to individuals’ specific patterns of strengths and weaknesses. For example Andrews, Bonta and Hogue (1990), reviewing ‘What Works’, specify that interventions should comply with a ‘responsivity principle’: programmes must match interventions to learning styles and needs of individuals in order to maximise the probability of preventing recidivism.

The risk and repercussions of social exclusion is a broader consideration with respect to the resettlement and rehabilitation of offenders with LDD. Most prisoners have experienced exclusion and disadvantage prior to their imprisonment, and these are factors that are likely to have contributed to their offending, at least to some extent. Learning disabilities and difficulties may serve to exacerbate problems of exclusion. The extensive research literature on ‘desistance’ from crime stresses that an integral part of this process tends to be the

development of a sense of social inclusion, or what is described by Uggen et al (2004) as 'civic reintegration' (see also, for example, McNeill, 2010; Maruna, 2001). Resettlement provision that supports the social integration of offenders with LDD may thus have a particularly important role to play; albeit defining the parameters of such provision – given the intangibility of the goal – is challenging. Voluntary organisations, and particularly those with specific experience of working with individuals with needs relating to LDD, may be best placed to take on this kind of role.

7. Conclusion and next steps

The overall aim of the project 'Improving Services for offenders with learning disabilities and learning difficulties', of which this literature review forms the first part, is to assist NOMS in meeting their commitment to improving provision for offenders with learning disabilities and learning difficulties both in custody and in the community. The project is undertaking a programme of work which will include the identification and dissemination of good practice in the treatment and support of offenders with LDD, and the development of a package of measures for making reasonable adjustments to provision within the criminal justice system and beyond it.

This literature review has identified some considerable gaps in provision for offenders with LDD. Of particular concern is the lack of routine screening for LDD at different stages of the criminal justice system. This means that, very often, individuals with LDD are simply not identified, and their vulnerability to direct or indirect discrimination within the justice system is increased.

Even where LDD are identified, the extent of specialist provision and adjustments for offenders with these needs is highly variable, with significant repercussions for how these individuals are treated throughout their journey through the criminal justice system. Thus, for example some individuals with LDD may be prosecuted when it would be more appropriate, and in the public interest, to divert them away from prosecution into therapeutic or support services. Suspects with LDD may not receive the support they need to understand their legal rights when arrested, or to answer the questions in police interview as they wish to. In the criminal courts, defendants with LDD may struggle to understand and hence effectively participate in criminal proceedings. Sentencing options for offenders with LDD may be constrained if there are few local community-based services for this group, or if sentencers are unaware of what services do exist. In prison, offenders with LDD potentially face a wide array of challenges, including problems understanding what is happening and how the prison regime works, and limited access to offending behaviour programmes, resettlement provision, and other services.

Notwithstanding the gaps in provision, there is evidence also of progress being made on various fronts. The Bradley review was certainly influential, and made very clear the importance of early identification of need and multi-agency working. The proposed national roll-out of liaison and diversion services, to be based in police stations and magistrates'

courts, should contribute to much improved screening and assessment of need, and help to ensure closer working relations between the range of agencies with an interest in offenders with LDD – including, for example, community learning disabilities teams. Liaison and diversion services can also play a vital part in helping probation to prepare pre-sentence reports that properly reflect offenders’ needs and available sentencing options. Other positive developments include the creation and piloting of new screening tools, which offer the promise of more systematic identification of need in the future – albeit this will be of benefit only to the extent that information about identified needs are properly communicated between relevant agencies within and outside the criminal justice system. (Here, again, liaison and diversion services have an important role to play.) The development of some adapted offending behaviour programmes is another area in which progress is being made.

Looking ahead

There are thus some promising signs that the various components of the criminal justice system are moving towards fulfilling their ‘equality duty’, as set out under the Equality Act 2010, with respect to offenders with LDD; and it is to be hoped that this project will contribute to the achievement of that goal. The project has been commissioned by NOMS, and therefore its focus must be on the impact it can have on the probation and prison services. It is necessary to identify ‘quick wins’ that are cost-effective, given the economic climate in which this work is being undertaken. The budget for the project is small, and there must therefore be scope for testing the outputs simply and quickly, and for rolling them out in a cost-effective manner if NOMS decides to take them forward.

A particular focus of the project is likely to be the development and testing of various methods for improving communication with offenders with LDD; for example, through the production of easy-read materials and at a glance cards. Some of these methods are likely to have relevance and value across the population of offenders, given the large numbers who are known to have relatively low literacy and numeracy skills, and/or may have English as an additional language.

The project is also undertaking a mapping exercise which aims to build links between resettlement prisons and local community-based services, including learning disability teams and the range of voluntary sector organisations that are potentially involved in providing support and assistance to offenders with LDD. The mapping exercise should facilitate the sharing of knowledge and good practice between the agencies, and also help to increase the continuity of ‘through the gate’ resettlement provision.

An issue that recurs in all discussion of provision for offenders with LDD is the need for improved training for practitioners in all parts of the criminal justice system. However, the introduction of new and extensive systems of training is not realistic in an environment in which costs are being cut and more is expected of each individual practitioner. Moreover, the rapid turn-over of staff in many agencies, including prisons, can limit the benefits to be derived from additional training. One of the aims of this project is to identify and disseminate the kinds of small adjustments that can be made by individual staff members in order to improve their communication skills. Further, there is an intention to devise and test some awareness raising campaigns and modular e-learning to assess the effectiveness of these approaches.

The project aims to identify a variety of effective practices from within prisons and probation, as well as community based services, that can be combined along with existing resources into a single but wide-ranging web-based resource on which agencies can draw in order to improve all aspects of their work with offenders with LDD.

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