



Learning Disabilities, Autism and Neurodivergence Bill consultation:

Section 10: Justice:

Information from SOLD

February 2024

Introduction

The purpose of this paper is to provide information to SOLD members and other partners in their response to the 'Justice' section of the Scottish Government's Learning Disabilities, Autism and Neurodivergence Bill consultation. It includes information that we have previously submitted to the Scottish Government in drafting the consultation:

<https://www.gov.scot/publications/learning-disabilities-autism-neurodivergence-bill-consultation/documents/>

We particularly refer you to pages 120 to 136, which SOLD helped to inform. We believe the LDAN Bill consultation provides an opportunity to address some long-running challenges in achieving equity of justice. We encourage SOLD members and other partners to submit a response to help make these changes happen. Deadline is 10pm on 21st April 2024.

Here we set out practical changes that will reduce offending and improve equity of access to justice for people with communication support needs (CSN) in Scotland. This includes all people who will be included in the LDAN Bill and some who may not, for example people with dementia and complex trauma.

SOLD's aim is to improve support and reduce offending for people with CSN in Scotland. Since 2013, we have worked with justice professionals and people with lived experiences to identify and implement improvements. Our intention is not that people with CSN do not face the consequences of offending behaviour, or to be treated more lightly in the justice system.

<https://soldnetwork.org.uk/>

SOLD is a partnership between ARC Scotland and People First Scotland.

We propose changes in the following 3 areas:

- 1. Identification and data collection**
- 2. Accessible information and independent advocacy**
- 3. Community-based support and Diversion from Prosecution**

In each case, we set out evidence of need, links with the LDAN Bill consultation proposals and other policy frameworks and routes to delivery.

More broadly, the LDAN Bill consultation proposes: *We could consider bringing together a single national strategy that deals with neurodivergence and learning disabilities in the civil and criminal justice systems.*’ (p133) We support this proposal. It should include those at risk of offending, as well as those accused or convicted of an offence and should be broadened to include any person whose ability to understand and communicate is significantly impaired.

Arguably, Scotland already has strategies, policies and legislation that ought to support these proposals, and therefore we do not need to go to the trouble of creating something new. For instance, the duty on public bodies to provide information in accessible formats for people who will be unfairly disadvantaged without it, is enshrined within the Equality Act 2010. However, in reality understanding of the need for, and nature of, reasonable adjustments is inconsistent within justice services. Consequently, the needs of people with CSN are frequently not met, and their rights not upheld. Perhaps pulling together each of the various frameworks and policies under one single national strategy with clearly defined rights and responsibilities would support successful implementation in a way which is consistent across Scotland.

Who should the Bill include?

This is an important issue to be resolved, and has clearly been a topic of considerable debate during the development of the Bill to date. We naturally favour an approach which aligns with the social model of disability, and are pleased that this has been prominently represented within the consultation: “People expressed strong preferences for language associated with the **social model of disability, rather than a medical model**, to be used throughout the Bill.” (p.22)

For this reason, proposal 2 is probably closest to a definition SOLD would support: ‘People who are Neurodivergent/’Neurodivergent People’. The consultation goes on to explain: “such an approach could allow us to define neurodivergence by reference to common barriers or behaviours faced or expressed by various groups. This would be similar to the approach taken by the Education (Additional Support for Learning) (Scotland) Act 2004, where a child or young person does not require a diagnosis to be able to receive support.” (p.25)

In the course of our work, we have met people whose learning disability is immediately obvious, but because they have no formal diagnosis, justice professionals on occasion have questioned their entitlement to support. Therefore, we support the statement in the consultation: “because the social model of disability focuses on impairment, it allows people to be recognised as disabled even if they do not have a formal diagnosis.” (p.21) In the simplest of terms, we would say any person who is experiencing the difficulties is in need of the help. A social model approach would hopefully make it less likely that groups of people who would benefit from the proposed improvements are not inadvertently excluded. This could include people with dementia, foetal alcohol spectrum disorder, or complex trauma, any of which can have a profound impact on a person’s ability to understand and

communicate, especially with the stress and anxiety associated with justice system involvement.

1. Identification and data collection

We think:

- **People with CSN should have the right to have their needs identified if they come into contact with the justice system.**
- **Justice services should be required to collate CSN data nationally.**

Evidence of need

It is not possible to significantly improve outcomes for people with CSN in the justice system without a having reliable and consistent method that identifies them at an early stage. This is the first and most essential part of ensuring “effective access to justice for persons with disabilities on an equal basis with others” (UNCRPD, Article 13)^[2]

The current practice of identification relies on individual police officers’ ability to recognise CSN. The lack of any method impacts adversely on the ability of officers to include CSN as an identifiable need in the antecedents section of the Standard Police Report (SPR) sent to the Crown Office and Procurator Fiscal Service (COPFS). This in turn limits the information available to inform suitable interventions to be made to enable people with CSN to fairly engage with the justice system (such as the provision of an Appropriate Adult) and for alternatives to continuation on the justice pathway, such as Diversion from Prosecution (DfP) to be considered.

Currently we have no reliable data for people with CSN who enter the justice system. A routine and reliable procedure for identifying CSN in police custody will significantly improve our understanding of the prevalence of people entering the justice system, patterns of offending, the routes people are taking through the system, and the impact of interventions. For instance, we will know if people with CSN are over-represented in prisons but under-represented in diversion.

The annual report of the Scottish Appropriate Adult Network (2018/19) showed appropriate adults were requested for roughly 2% of arrests. By comparison, the Do-It Profiler, piloted by the Scottish Prison Service in 2017, found 39% of prisoners having either a learning disability or difficulty. Although these figures should be treated with caution, they are indicative of an under recognition of CSN in police custody.

The Equality and Human Rights Commission^[3] identified two key concerns with the justice system in Scotland:

- The lack of reliable data on the prevalence of vulnerable people entering the system
- The lack of a reliable method of identifying vulnerability.

Reliable identification of people with CSN in police custody will:

- Provide more accurate data on the prevalence of people with CSN entering the justice system to inform future policy initiatives and interventions.
- Unlock provision of relevant support and interventions for individuals, such as an Appropriate Adult, special measures in court, or DfP.
- Provide reassurance and confidence to police officers that they have followed an official procedure.

Further work is needed to understand processes used by the Scottish Prison Service (SPS) to ensure people with CSN are identified in the prison estate, reasonable adjustments made, and support put in place upon discharge.

Links with policy

Improving identification and data collection is included in the LDAN Bill consultation.

On identification, the consultation paper sets out two proposals in its vision for “Where do we want to get to?”

“Neurodivergent people and people with learning disabilities are better identified at any key point of contact within the civil and criminal justice system, and information is passed on to other relevant partners.” (p.123)

“Neurodivergent people and people with learning disabilities who need additional support have confidence that this will be identified. Access to an Appropriate Adult and advocacy support will always be considered.” (p.123)

It includes our proposal that this should happen on admission to custody:

‘One way that this could happen in practice would be to identify individual needs, including communication needs, on arrest or admittance to custody. In custody, questions could be added to the vulnerability assessment that is used. Better identification would allow the information to be included within the Standard Prosecution Report that is sent to the COPFS. We might also wish to ensure that the Vulnerable Person's Database is a reliable source of information and used effectively in all cases.’ (p133)

And

‘The Bill could potentially place a duty on public bodies such as the Police, COPFS, and the Scottish Prison Service to seek to identify neurodivergence and learning disabilities when people are coming into contact with the criminal justice system.’ (p133)

And

‘We think that mandatory training for staff in the civil and criminal justice systems is a key element to support better identification of needs, better support and improved communications.’ (p135)

We support these proposals, however training should be supported by the availability of information and guidance to justice professionals.

Data collection is one of the overarching themes of the LDAN Bill consultation, including:

‘We collect sufficient and adequate data and measure outcomes to properly inform the development of national policies.’ (p 44)

In relation to Justice, *‘Improving data is a key proposal in this consultation and this includes access to better data within the civil and criminal justice system’ (p133)*

However, there are no specific proposals for justice services to be required to collate and report data nationally. We believe this should be included.

This will also support the second priority action of the revised National Strategy for Community Justice (2022):

“Improve the identification of underlying needs and the delivery of support following arrest by ensuring the provision of person-centred care within police custody and building upon referral opportunities to services including substance use and mental health services.”

It will also support the Scottish Government’s Reducing Reoffending policy, as identification of CSN and provision of suitable support will reduce the likelihood of reoffending^[5].

Routes to delivery

Police Scotland should have in place a procedure for identifying CSN in accused people entering police custody. We believe the most practical and proportionate way of achieving this is to add questions related to CSN to the vulnerability assessment currently in use. Enhancing an existing procedure would avoid placing unreasonable additional demands on police officers.

Following existing procedures, people identified with CSN should be added by Police Scotland to the vulnerable persons’ database so they can be ‘flagged’ in the event of future arrest and used to provide support.

Information about CSN should be included as an identifiable need in the antecedents section of the SPR sent to COPFS. This should include any information already held on the vulnerable persons’ database. This will help ensure that COPFS have the information they need to make an informed decision about suitability for DfP. Similarly, information concerning a person’s CSN should be communicated to the court and defence agent. Currently there is a duty on the prosecutor to inform the court of any evidence that the accused has a mental disorder^[4]

Guidance and training should be made available to Police Scotland, COPFS and Courts staff to apply new procedures to identify and record people with CSN entering the justice system and how to respond when this is an identified need.

Resources should be developed in partnership with justice agencies (including Police Scotland, COPFS, Court staff, SPS, and Justice Social Work) and people with lived experience to increase awareness of CSN, its impact on people's lives, and influence on offending behaviour.

2. Accessible information and independent advocacy

We think:

- **People with CSN should have the right to receive information as it relates to their case in an accessible format.**
- **People with CSN should be provided with accessible information about independent advocacy available to them.**
- **Independent advocacy services should be equipped to provide people with CSN with support throughout their journey through the justice system.**

Evidence of need

A lack of accessible information and advocacy support to understand and navigate the complexities of the justice system leaves people with CSN vulnerable to disadvantage in terms of equitable access and poorer outcomes.

The duty on public services to provide information in accessible formats as a reasonable adjustment, is already established by the Equality Act 2010 (s.20(6))^[6], and the United Nations Convention on the Rights of persons with Disabilities (Article 9)^[7]. The entitlement to independent advocacy is set out in the Mental Health (Care & Treatment) (Scotland) Act 2003^[8], as is the duty on local authorities and health boards to ensure advocacy is available to those entitled (s.259). This entitlement is not limited to involvement with health and social care and includes the justice system.

People who enter the justice system are not provided with accessible information when receiving communication about their case. This leaves them vulnerable to missing appointments including undertakings, breaching Bail conditions and Community Payback Orders, and being unaware of their legal rights. This places additional burdens and costs on the justice system through additional court appearances and placing people in prison on remand.

For people with CSN with poor reading skills, no written information is accessible without support. The provision of advocacy would assist people to understand their rights, understand any information they are given, and to navigate their way through the complex systems and processes of the justice system.

We know there is a broader issue with the availability of advocacy services across Scotland and is addressed elsewhere in the LDAN Bill consultation. In relation to the justice system:

- People with CSN should be informed of their right to independent advocacy and what is available to them.
- Advocacy services should be equipped to provide people with the support they need in the justice system.

The role of independent advocacy is generally well understood by professionals working in health and social care. However, many people with CSN who come into contact with the justice system have no involvement with these services and consequently, have no knowledge of advocacy. Despite being entitled to advocacy, people with CSN are rarely made aware of this when they enter the justice system. There is in general, a low level of knowledge and understanding of independent advocacy among professionals working in the justice system.

Links with policy

Inclusive information and independent advocacy are two of overarching themes of the LDAN Bill consultation.

On inclusive information in relation to justice, it states in its vision for *“Where do we want to get to?”*

“People with learning disabilities and neurodivergent people are given access to accessible and inclusive information throughout the civil and criminal justice system.” (p.123)

We support this proposal.

On advocacy, it states:

‘...Access to an Appropriate Adult and advocacy support will always be considered.’ (p.123)

And

‘An independent advocate is in addition to and different from an Appropriate Adult and can also be provided.’ (p126)

We think it should also include provisions that independent advocacy services are equipped to provide people with CSN with support throughout their journey through the justice system and that when in custody, people with CSN should be provided with accessible information about independent advocacy available to them.

This also supports a key objective of the revised National Strategy for Community Justice (2022) by providing person-centred care and making improved use of support services to reduce the risk of re-offending (Priority Action 2).

The Equality Act 2010 sets out that where a disabled person will be put at a substantial disadvantage in comparison with persons who are not disabled, public services as a reasonable adjustment, have a duty to ensure information is provided in an accessible format (s20(4)&(6)).

The Mental Health (Care & Treatment) (Scotland) Act 2003 sets out the right of access to independent advocacy of all people with a mental disorder, and the duty of local authorities and health boards to ensure availability of advocacy services to all those entitled to it (s.259(1)). Mental Disorder includes learning disability and autism, but may not cover all neurodivergence.

Routes to delivery

Statutory justice services should work in consultation with people with lived experience to produce accessible versions of key documents that accused people with CSN need to be able to understand. For instance, the SOLD user group recently produced an easy read version of the Letter of Rights^[9] which is given to people in police custody.

This should include the provision of accessible information in all police custody suites informing people of their right to independent advocacy, how it may help them and who to contact. Training for police officers should include information on the role of independent advocacy, and how to make people aware of it.

Justice services should work in partnership with the Scottish Independent Advocacy Alliance (SIAA) to produce a standard format for advocacy information to be given to people with CSN. Independent advocates should have access to specialist training, resources and guidance to support people with CSN to understand and engage with justice processes.

3. Community-based Support and Diversion from Prosecution

We think:

- **People with CSN who are at risk of offending should be provided with support to address their offending behaviour at an early stage.**
- **Justice partners should work together to develop national standards for Diversion from Prosecution (DfP) for people with CSN and implement these across Scotland.**

Evidence of need

While we recognise the associated challenges, the provision of social care support for people with CSN at risk of offending will help to reduce offending and demands placed on the justice system.

Due to the way eligibility criteria for social care support are applied, many people with 'mild to moderate' levels of need receive no formal support to address offending behaviour at an early stage. Although many people with CSN do not need support with daily living tasks such as washing and dressing, many people do need support with the more complex aspects of life such as employment, relationships and combatting loneliness. Leaving people trying to meet their basic human needs without support leaves people vulnerable to becoming involved in offending behaviour. This can be due to exploitation by others, the way they respond to

harassment and abuse, or a lack of understanding of societal norms and appropriate behaviour.

The Bill consultation states: “We know that for some neurodivergent people and people with learning disabilities preventative support to address offending behaviour can make a difference.” And that: “neurodivergent people and people with learning disabilities may benefit from the use of DfP where they are alleged to have committed offences.” (p.135). SOLD agree with this. We believe that when an offence has been committed, the priority should always be to find the most effective way of preventing it from happening again. For many people with CSN, diversion to a supportive intervention rather than a traditionally punitive sentence will be a more effective way of reducing the likelihood of re-offending.

However, anecdotally, the use of DfP for adults with CSN appears to be inconsistent across Scotland and underutilised. The key to improving this situation will require a combination of improvements to be strung together: reliable identification of CSN in police custody; routine inclusion of that information in the SPR; understanding among COPFS staff of CSN as an identifiable need; and justice social work interventions that meet the needs of people with CSN so that there is judicial confidence in the use of DfP.

We are pleased to see that largely each of these is included in the consultation as proposals for improvement: “Better identification within the justice system and training for staff to understand how to do this could help. A requirement to identify needs should allow better information to be provided by the Police to COPFS in the Standard Prosecution Report (SPR). The SPR is the basis on which COPFS can make a decision about DfP. This will also help local authorities when they complete their DfP assessment as they would need to take this into account.” (p.135). And: “Training and awareness raising provided to professionals working in COPFS on neurodivergence and learning disabilities, how it impacts on people’s lives, and how it can have an influence on offending behaviour, could help with increasing consistency of decisions around DfP for these groups. This training could include the role of support in reducing the likelihood of re-offending.” (p.136)

Diverting a person will avoid the costs to the taxpayer associated with progress through the justice pathway and reduce the workload burden on those working in the justice system. Effective interventions that prevent re-offending will deliver further savings and could link into non-criminal justice support.

We need to be clear that unlike community-based support provided through a social work funded package of support, DfP is a criminal justice response and cannot be a replacement for support packages. However, ideally it would segue into it, because it is access to long-term packages of support that will most effectively prevent reoffending.

Links with policy

Diversion from Prosecution is included in the LDAN Bill consultation. It sets out a proposal in its vision for “*where do we want to get to?*”

“People are diverted from the criminal justice system where it is appropriate, and any underlying needs are addressed in an effective way.” (p.124)

Community-based support is not included in the Justice section of the consultation. However, this is key to preventing many people with CSN from offending or reoffending. It should be included in policy developments, including for the National Care Service.

Community-based support and diversion from prosecution will support two key objectives of the revised National Strategy for Community Justice (2022):

“Optimise the use of diversion and intervention at the earliest opportunity” (National Aim 1).

“Ensure that services are accessible and available to address the needs of individuals accused or convicted of an offence” (National Aim 3).

And aims of the Vision for Justice (2022):

“We work together to address the underlying causes of crime and support everyone to live full and healthy lives” (p.16).

“We support rehabilitation, use custody only where there is no alternative and work to reduce reoffending and revictimization” (p.24).

Routes to delivery

Local Authorities should review eligibility criteria for provision of social care support to include ‘at risk of offending’ as a critical or substantial need to facilitate the provision of social care support packages for people with CSN.

Training and awareness raising should be provided to professionals working in COPFS on how CSN impacts on people’s lives and how it can have an influence on offending behaviour. This should include the role of support in reducing the likelihood of re-offending.

Methods should be in place to ensure COPFS have access to all the relevant information concerning a person with CSN that will assist them to make the best-informed decision as to that person’s suitability for DfP. The principal source of information is the SPR which comes from the police, but others with knowledge of a person’s CSN such as family members or support services should know how to pass that information on.

Justice social workers, third sector partners and others involved should be facilitated to develop national standards and guidance for DfP for people with CSN to achieve consistent approaches to diversion in all parts of Scotland. This should include learning from Liaison and Diversion practices in other parts of the UK^{[\[10\]](#)}.

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References

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[2] <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-13-access-to-justice.html>

[3]

https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

[4] <https://www.legislation.gov.uk/ukpga/1995/46/part/VI/crossheading/committal-of-mentally-disordered-persons>

[5] <https://www.gov.scot/policies/reducing-reoffending/>

[6] <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/2/crossheading/adjustments-for-disabled-persons>

[7] <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-9-accessibility.html>

[8] <https://www.legislation.gov.uk/asp/2003/13/part/17/chapter/2/crossheading/advocacy>

[9] <https://www.gov.scot/publications/rights-police-station-easy-read-version/>

[10] <https://prisonreformtrust.org.uk/publication/relative-justice-the-experiences-and-views-of-family-members-of-people-with-particular-needs-in-contact-with-criminal-justice-and-liaison-and-diversion-services>