

Autistic
Spectrum
Disorder

Learning
Disability

Mental
Health

Learning
Difficulty
e.g. ADHD

Communication
support needs

Complex
Trauma

Acquired
brain injury

Foetal
Alcohol
Spectrum
Disorder

PRACTICE GUIDE *for support staff*

People with Communication Support Needs in the Scottish Criminal Justice System

SECOND EDITION

February 2019



Compiled on behalf
of the SOLD Network
by ARC Scotland

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Foreword

Providing support for someone within the justice system who has a learning disability, or communication difficulty, can be challenging and particularly complex. This is an area that we know health and social care workers require further support as they often, understandably, do not have in-depth knowledge of Scotland's criminal justice system and its processes.

Through exploring these challenges, the Supporting Offenders with Learning Disabilities (SOLD) Network have developed invaluable guidance to support workers who find the person they care for going through the criminal justice system. The SOLD Network's 'Practice Guide for Support Workers – People with Learning Disabilities in the Scottish Criminal Justice System' and 'easy read' guides provide critical support for both workers and individuals going through the justice system. These guides set out the different criminal justice processes and highlight points at which support can be provided to individuals. I am confident that they provide great support for those who use them, and help to continuously improve the support given to those on Scotland's criminal justice pathway.

More recently, I am delighted to see that beneficiaries of the work of the SOLD Network have extended to include people who have other significant communication difficulties – such as acquired brain injury, autism and foetal alcohol syndrome. This positive step ensures that everyone is equally supported when facing the criminal justice system.

The Scottish Government is committed to reducing reoffending and improving support for people with learning disabilities and communication needs. As the new Cabinet Secretary for Justice, I am truly grateful for the continued commitment, dedication and hard work that the SOLD Network devote to identifying and supporting the needs of people with learning disabilities, or communication difficulties, within the justice system. I believe that this guide will provide essential information and support for health and social care workers in making well-informed and constructive contributions. This will undoubtedly be valued by both the individual they support, and also by partner professionals in the criminal justice system.

Foreword by Humza Yousaf MSP
Cabinet Secretary for Justice

Contents

Foreword

1. **Introduction**
2. **What we mean by 'communication support needs'**
3. **About SOLD**
4. **How might the person be feeling?**
5. **What skills and knowledge do I have that can help support the person?**
6. **Independent Advocacy**
7. **Police**
8. **Defence Lawyer**
9. **Appropriate Adult**
10. **Crown Office and Procurator Fiscal Service**
11. **Court**
12. **Social Work – Criminal Justice Social Work Report**
13. **Social Work – Structured Deferred Sentence and Community Payback Order**
14. **Prison**

Afterword

Acknowledgements

References

Introduction

This guide aims to help support staff working with a person with communication support needs, who find themselves in the criminal justice system. It provides information about how they can make a well-informed, constructive contribution, which is valued by the person they support, and professionals in the criminal justice system.

It has been produced by the SOLD Network in consultation with our partners in Police Scotland, Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service, Scottish Prison Service, NHS, Law Society of Scotland, Scottish Legal Aid Board, Social Work, Independent Advocacy and the voluntary sector.

It is aimed at those who provide front-line support for people who have a communication support need in social care agencies in the voluntary, statutory and independent sectors. It will also be useful to those responsible for developing organisational policies concerning their role in supporting people who are accused or convicted of an offence.

The principal aim is to help ensure that nobody in the criminal justice system is at a disadvantage because they have a communication support need. It is concerned with helping to:

- ensure that people with communication support needs are supported to understand and exercise their rights to fair and equal access to justice
- ensure people with communication support needs are able to participate fully in the criminal justice system's processes
- inform support providers of their role in these processes

The intention is not to help people with communication support needs to avoid the consequences of offending behaviour, or be treated more lightly in the criminal justice system.

This is a difficult and challenging area. Social care staff are unlikely to have an in-depth knowledge of the criminal justice system. They may also find that the person's offending behaviour challenges their personal values or beliefs. Whatever the circumstances, professionals have a responsibility to support individuals to the best of their ability, and not to allow personal feelings to influence the quality of professional practice.

The guide is concerned only with the processes of the criminal justice system and with mainstream criminal justice sentences. It does not contain information regarding diversion from prosecution or other stages of the criminal justice system.

If the person becomes involved with the criminal justice system, you should always follow organisational procedures for reporting this. Do not act without your appropriate manager's knowledge and agreement.

The intention is to help support workers provide the most effective and constructive support to people with communication support needs involved in the criminal justice system, and for that support to be of value to both the person being supported and to criminal justice professionals. The intention is not to be specific about what is required in individual circumstances. Agencies working with people with communication support needs must ensure that they comply with legal requirements across several pieces of legislation, and strive towards best practice. This is not a guide to the law and should not be used as a substitute for taking appropriate legal advice on the implications of specific situations. Nor should it be used as an alternative to established organisational policies and procedures.

Where references to legislation are made, we have done our best to accurately state the legal position as at the present time. Updated information is available on the SOLD website: www.soldnetwork.org.uk



What we mean
by 'communication
support needs'

For the purpose of this guide we are using the phrase 'communication support needs' to mean any person whose ability to understand and communicate is significantly impaired due to some form of cognitive or neurological impairment. This includes people with learning disabilities, acquired brain injury, foetal alcohol spectrum disorder, mental health problems, complex trauma, autistic people and people with other neurodevelopmental disorders such as attention deficit hyperactivity disorder (ADHD). The information provided in this guide is not intended for supporting people whose communication support need is caused by sensory impairment.

The SOLD project was originally established to consider the needs of people with learning disabilities. While there remains a need to increase awareness within the criminal justice system of the needs of specific groups, we have found that the key points on the criminal justice pathway at which people have most need of support with communication and understanding are broadly the same, regardless of the underlying cause. The information provided in this guide is therefore relevant for supporting all people who have difficulty with communication and understanding due to cognitive or neurological impairment.

We believe that people should not be defined by their condition, and would advocate for addressing the communication support needs of each individual, regardless of diagnosis.

The support each individual person needs will be of course be different. As support staff, you are the person best placed to understand the individual communication support needs of the person you support.



About SOLD

The SOLD network was established in response to the Keys to Life, the Scottish Government strategy on improving the quality of life for people with learning disabilities 2013, recommendation 46:



"That a national criminal action group is to be established in 2013, consisting of professionals in this field and working in partnership with people with learning disabilities, to identify challenges and promote opportunities and influence change and to provide support for people with learning disabilities in the criminal justice system."

The remit of SOLD was expanded in 2018, according to the Scottish Government's Scottish Strategy for Autism: outcomes and priorities 2018 – 2021:



"We will work the Scottish Offenders with Learning Disabilities Network (SOLD) to improve autism awareness across the Criminal Justice System."

SOLD is led by a partnership between People First Scotland and the Association for Real Change (ARC) Scotland, and the National Autistic Society (NAS). Support and guidance for our work comes from a User group of people with cognitive and neurological impairments who have experience of the criminal justice system, and an Advisory group of professionals and a representative from the User group.

ARC Scotland is a national charity that advances knowledge, practice and policy in health and social care for the benefit of people with learning disabilities or other additional needs. The organisation is committed to people with learning disabilities or other support need being at the heart of their services and communities.

People First Scotland is a collective self-advocacy organisation that seeks to change the way people with learning disabilities see themselves and

are thought of by society, and to influence law and social policy that affects people with learning disabilities.

National Autistic Society is a leading charity for autistic people and their families. It provides information, support and pioneering services, and campaigns for a better world for autistic people. Autism is a lifelong developmental disability that affects how people perceive the world and interact with others.

There are over 330 members of the SOLD network from a broad range of backgrounds including: voluntary sector providers, Police Scotland, NHS, Social Work, academic institutions, Scottish Courts and Tribunals Service, Scottish Government and the Crown Office and Procurator Fiscal Service (COPFS).

SOLD aims to prevent and reduce offending and improve support in the criminal justice system in Scotland for people with cognitive and neurological impairment.

Become a member of the SOLD Network

Membership of SOLD is free and open to anyone who shares our aims, including people with learning disabilities, autism, or other communication support need due to a cognitive or neurological impairment, professionals either in the criminal justice system or providing support. To get involved, visit our website:

www.soldnetwork.org.uk

In 2015, SOLD published The Criminal Justice Pathway for People with Learning Disabilities: www.soldnetwork.org.uk

Alternatively, you may wish to keep up to date with us via twitter: @SOLDarcscot

For more information, contact Tony Bowman:
tony.bowman@arcuk.org.uk 0131-663 4444



How might
the person
be feeling?

It is important to consider the emotions the person you support might be experiencing if they become involved with the criminal justice system. The statements below represent the things people with learning disabilities and autism have said. Some of these have been documented by research, others are from what members of the SOLD user group have told us:

- I felt scared, frightened and confused
- I did not understand my rights
- I did not feel confident enough to insist on my rights
- I did not understand what was going on
- I would have liked someone to explain what was happening in a way I could understand
- I felt there was too much information to take in at the time and wished someone could have explained it to me again afterwards

In police custody:

- I did not understand why it was important to speak to a lawyer
- I did not understand I could answer 'no comment' or remain silent
- I felt worried I would look guilty if I answered 'no comment'
- I confessed to an offence I did not commit because I was intimidated and did not understand the consequences.

In court:

- I could not understand the process or the language
- I felt pressure to answer yes to questions I did not understand because I did not want to look stupid
- I did not understand who all the different people were and what their roles were
- I did not understand the rules of the court such as when to stand up and not to chew gum.

In prison:

I did not understand the forms and rules, so I missed out on things:

- Missed visits for filling in the form wrong
- Did not get what I wanted to eat for filling in the form wrong
- Missed a film showing for not being able to read the poster
- I did not get help when I asked for it.

Throughout, the most important role you are likely to have is in helping the person to understand what is happening, or going to happen, and in offering emotional support.

What skills and
knowledge do I have
that can help me to
support the person?

If the person you are supporting becomes involved with the criminal justice system you may feel overwhelmed by the challenge in front of you. However, it is important to remember that you have skills and knowledge that will allow you to provide the person with effective and critical support. Simply knowing the person will provide insight into

- the person's level of understanding for example the way they are likely to react if they become frustrated at not being able to understand
- the way they communicate for example the way they react if they become frustrated at not being able to make themselves understood
- the most effective way to support the person with communication.

This is important because people with communication support needs can easily be labelled as having 'challenging behaviour'. All behaviour is a form of communication. The person is trying to communicate something by behaving in a way that some people would call 'challenging'.

The Equality and Human Rights Commission conducted research in 2016 into the experiences of people with learning disabilities in the Scottish criminal justice system. One of their findings was that there were often positive outcomes for people who had a support package in place when they became involved with the system. Having access to emotional support and someone to explain what was happening helped to improve their experience and participation:

“

Individuals already receiving support from either local authority or third sector organisations before they were accused or convicted of crime are more likely to say that had a positive experience in relation to both their treatment within the criminal justice system, and the support they were provided with to understand and participate in the process.

”

Use the link below to view the full briefing paper:

www.equalityhumanrights.com/en/publication-download/experiences-people-learning-disability-scottish-criminal-justice-system



It is important not to underestimate the significant role you can have in supporting the person you work with to understand and participate in the criminal justice system.

(Equality and Human Rights Commission,
Experiences of people with a learning disability
in the Scottish criminal justice system)

“

Independent advocacy

Some advocacy organisations have experience and expertise in supporting people with communication support needs throughout the criminal justice system. It may be that the most effective support you can provide is to refer the person to such an organisation. However, provision of independent advocacy differs from one local authority area to another. You should check what services are available in the area in which the person lives. Guidance is given below.

If the right advocacy support is available, you should refer the person to that service. If it is not available however, the information in this guide will help you to support the person yourself.

Purpose

Independent advocacy is a support service available to people with learning disabilities, autism, mental health problems, and other communication difficulties. It is independent from statutory and other services, such as the police or social work. Independent advocacy will;

- support people to express their own needs and make their own informed decisions
- support people to gain access to information and explore and understand their options
- speak on behalf of people who are unable to speak for themselves, or choose not to do so
- safeguard people who are vulnerable or at risk of discrimination.

What are the person's rights?

People with a mental disorder as defined by the Mental Health Care & Treatment (Scotland) Act are legally entitled to independent advocacy.

Mental Health (Care and Treatment) (Scotland) Act 2003

section 259 (1) Every person with a mental disorder shall have a right of access to independent advocacy; and accordingly it is the duty of —

- a** Each local authority, in collaboration with the (or each) relevant Health Board; and
- b** Each Health Board, in collaboration with the (or each) relevant local authority, to secure availability, to persons in its area who have a mental disorder, of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services.

This includes people with learning disabilities, autism and mental health problems, but might not automatically cover all people with communication support needs. However, eligibility criteria differ across local authority areas and advocacy providers, so it is worth investigating whether there is a service available to the person you support.

What can I do to support the person?

- If there is an advocacy organisation that can provide the right support for the person, make the referral
- Contact the Scottish Independent Advocacy Alliance (SIAA) to check what services are available in the person's local authority area:
www.siaa.org.uk/find-advocate/
- Ask the person if they would like you to go with them to the first meeting with the advocate
- If the right support is not available in the person's area, the information set out in this guide will help you to support the person yourself.

Remember:

Do not act without your appropriate manager's knowledge and agreement.

Police

Purpose

The role of the police is to maintain law and order, protect members of the public and their property, and prevent, detect and investigate crime. The police have a legal duty to investigate any report of a crime being committed.

This chapter deals only with the procedure of a police investigation. Some offences are investigated by organisations other than the police for example the Department for Work and Pensions (DWP), and the Scottish Society for the Protection of Animals (SSPCA).

The Criminal Justice (Scotland) Act 2016 (CJ(S)Act2016) introduces changes to legislation and to police procedures. Among these was to abolish the separate concepts of arrest and detention, and replace them with a single statutory power of arrest without warrant where there is reasonable grounds for suspecting a person has committed an offence.

Another is the new measure of Investigative Liberation. This enables the police to release a suspect for further investigation with conditions (for up to 28 days) with the power to re-arrest.

Arrest

If the police have enough evidence that a person has committed a crime they can arrest that person, Caution & Charge them and treat them as an officially accused under section 1 of the CJ(S)Act2016.

If the police suspect that there are reasonable grounds to suspect the person committed the crime and it is necessary and proportionate for the person to remain in custody, but they need more evidence to be able to charge them, they can arrest that person as a not officially accused under section 1 of the CJ(S)Act2016 which allows them to be held for up to 12 hours as a suspect.

What is a mental disorder?

To understand the person's rights and what you are allowed to do to support them, it is important to also understand what we mean in this context by mental disorder.

Mental disorder is defined by the Mental Health (Care & Treatment) (Scotland) Act 2003 as:

s.328 Meaning of "mental disorder"

- (1) Subject to subsection (2) below, in this Act "mental disorder" means any –**
- (a) Mental illness;**
 - (b) Personality disorder; or**
 - (c) Learning disability,**

Remember:

This does include both autism and acquired brain injury, but some cognitive or neurological impairments may not be covered by mental disorder. However, the police will take into account if they believe the person will find it difficult to understand and answer questions.

What are the person's rights?

To be treated with dignity and respect, and according to their individual needs.

The person must on request provide their name, address, date of birth, place of birth and nationality. They do not have to answer any other questions.

The police have to decide if the person is fit to be questioned.

The person has the right to have intimation sent to a lawyer informing of any or all of the following: the fact they are in police custody, where they are in custody, that the lawyer's professional assistance is required, whether they are to be released from custody, and if they are not to be released, the date they are appearing at court.

The person has the right to speak to a lawyer in private. If the person can communicate effectively and understand sufficiently, the person can initially refuse a lawyer. If they do this, they can still ask to consult a lawyer at any point when the police are interviewing them.

If the person in custody is aged 16 or over and due to mental disorder, it appears that the person cannot understand sufficiently what is happening, or the person cannot communicate effectively with the police, an appropriate adult will attend and provide support.

The person cannot refuse a lawyer being present for an interview.

If the person is aged 16 or 17, they can only consent to being interviewed without a lawyer present with the agreement of a relevant person. This could be a parent or guardian, or any reasonably named adult over the age of 18 who is not connected to the enquiry, who has been sent intimation that the person is in police custody.

If the police think a person has a mental disorder, and it appears the person cannot communicate effectively and understand sufficiently what is happening to them, they must ask for an appropriate adult.

If the police believe the person will find it difficult to understand and answer police questions, they will request an appropriate adult.

Simplified summary:

If the person has a mental disorder, they are entitled to an appropriate adult. Some cognitive or neurological impairments may not be covered by mental disorder. However, if the police believe the person will find it difficult to understand and answer questions they will still request an appropriate adult.

The criteria for mandatory attendance of a defence lawyer are the same as for appropriate adults. Therefore, if the person has an appropriate adult, they must also have a defence lawyer present when they are interviewed by the police.

The person must have a lawyer with them during the interview and must have an appropriate adult because they have a mental disorder, and it appears the person cannot communicate effectively and understand sufficiently what is happening to them.


- the lawyer will give the person legal advice and protect their rights
- the appropriate adult will make sure the person understands the questions, and monitor if they are becoming distressed
- it is good practice for the appropriate adult to sit in a position where they can see the person's face. This is so they can monitor the person's level of distress. If you are present in the interview, be sure you do not impede the appropriate adult's ability to do this

The person has the right to refuse to sign an Undertaking Form, which allows the person to be released to attend Court at a later date. But this will likely mean they are kept in custody to appear at court.

The person can be rearrested at a later date for the same offence if significant new evidence emerges that requires further questioning or clarification. This will be very rare and will be known as Post Charge Questioning.

The person also has the right

- To be held in custody for up to 12 hours without charge.
This can be extended for a further 12 hours
- To know why they have been arrested, and why they are being held in custody
- To receive medical attention where required
- To receive a drink of water at any time
- To receive food: 3 meals per day between the hours of 6.00am and 7.00pm

- 
- To have a reasonably named person told they are at the police station (this must be someone who is not involved in the offence)
 - To be given a 'Letter of Rights'. This sets out the person's legal rights whilst they are in police custody. For a copy use the link www.gov.scot/Resource/0046/00468531.pdf
 - If the police suspect the person is physically or mentally unwell, they must request a medical examination
 - If the person is under 16, or aged 16 or 17 and on a Supervision Order, they must have a visit, usually from a parent or guardian. If this would not be appropriate because for instance the parent or guardian is involved in the offence, then it would be from a representative of the local authority, such as a social worker.
 - If they are under 16, to be visited by their parent or guardian (if the circumstances are appropriate: for example the parent is not involved in the offence)

The person might also have their finger prints, DNA and photograph taken.

When all enquiries are finished the police will decide if there is sufficient evidence to charge the person.

The police will decide if the person should be held in custody to attend court on the next lawful day (the next day on which the court is open) or if they should be released to appear at court at a later date. This court appearance is known as the 'Pleading Diet'.

The police will report the crime to the procurator fiscal who decide whether to go to trial or deal with the person in another way.

At the end of the interview

The person could be

- released without charge and enquiries are complete
- released without charge but the police intend to conduct further enquiries which might identify sufficient evidence to charge the person at a later date
- released on Investigative Liberation with or without conditions to allow further investigation to take place
- charged with an offence. They may be held in custody to appear at court or released to appear at court on a later date.

The role of the appropriate adult is to facilitate communication between the person and the police. If the person has a mental disorder they are entitled to an appropriate adult. Some cognitive or neurological impairments may not be covered by mental disorder. However, if the police believe the person will find it difficult to understand and answer questions they will still request an appropriate adult.



More detailed information about appropriate adults follows in chapter 9

What can I do to support the person?

There are two scenarios that will determine what support you are able to offer.

Following their release from custody you find out that the person has been arrested by the police. In this case the first stage at which you will likely be able to provide any support will be with the Procurator Fiscal Service (see Chapter 10)

You know in advance that the police want to speak to the person for example, if the person has been asked to attend a pre-planned interview, or you happen to be present by chance. In this case you can arrange to be with them.

- You should inform the police the person has a communication support need. If the person has a mental disorder, they are entitled by law to an appropriate adult.
 - The person must have an appropriate adult in the interview with them if they have a mental disorder
 - The person must have a consultation with a lawyer before they are questioned, and must have a lawyer present during the interview if they have a mental disorder
- However, if the police believe the person will find it difficult to understand and answer questions, they will request an appropriate adult. Therefore, it is important that you inform the police that the person has communication support needs.
- You should help the person understand why it is important to speak to a lawyer before answering any questions, and to have a lawyer present during the interview. The lawyer will advise the person what to say and protect their rights
 - You are not allowed to be with the person when they speak to the lawyer in police custody

- You are allowed to support the person in meetings with the lawyer outside of police custody, if the lawyer agrees
- The person might want you to support them also, because you have an established working relationship and you understand their communication support needs. The person can ask for you to be present in the interview. Again, this request must be made by the person. You must not influence the person's decision to request that support. It is at the discretion of the interviewing officer (the police officer who will be conducting the interview. See more information on the police interview below)
- You should ask the lawyer to agree that you provide support for the person where it is allowed
- You can ask the lawyer if the interview could be put back to allow the person more time to prepare
- Everyone has the right to a fair trial, and this should include adequate time to prepare a defence European Convention on Human Rights (ECHR) (article 6). It is reasonable to suggest that as a reasonable adjustment a person with communication support needs due to cognitive or neurological impairment, could be given more time to prepare.
- If the person is officially accused ask the lawyer or custody officer to make sure the procurator fiscal is informed the person has communication support needs due to a cognitive or neurological impairment.



Further information on the role of the defence lawyer follows in Chapter 8

Police interview: what can I do to support the person?

The person can request to have you present in the room when they are interviewed by the police. So, you could be allowed to sit in during the interview if the person you support requests it and at the discretion of the interviewing officer.

However, be aware the police have no knowledge of your relationship with the person or what influence your presence might have. Therefore, the interviewing officer must be satisfied that your presence will not have any coercive influence on the person.

In the police interview, you are allowed to sit in the room. This is to help the person feel more at ease. You cannot take an active part, intervene or influence the person.

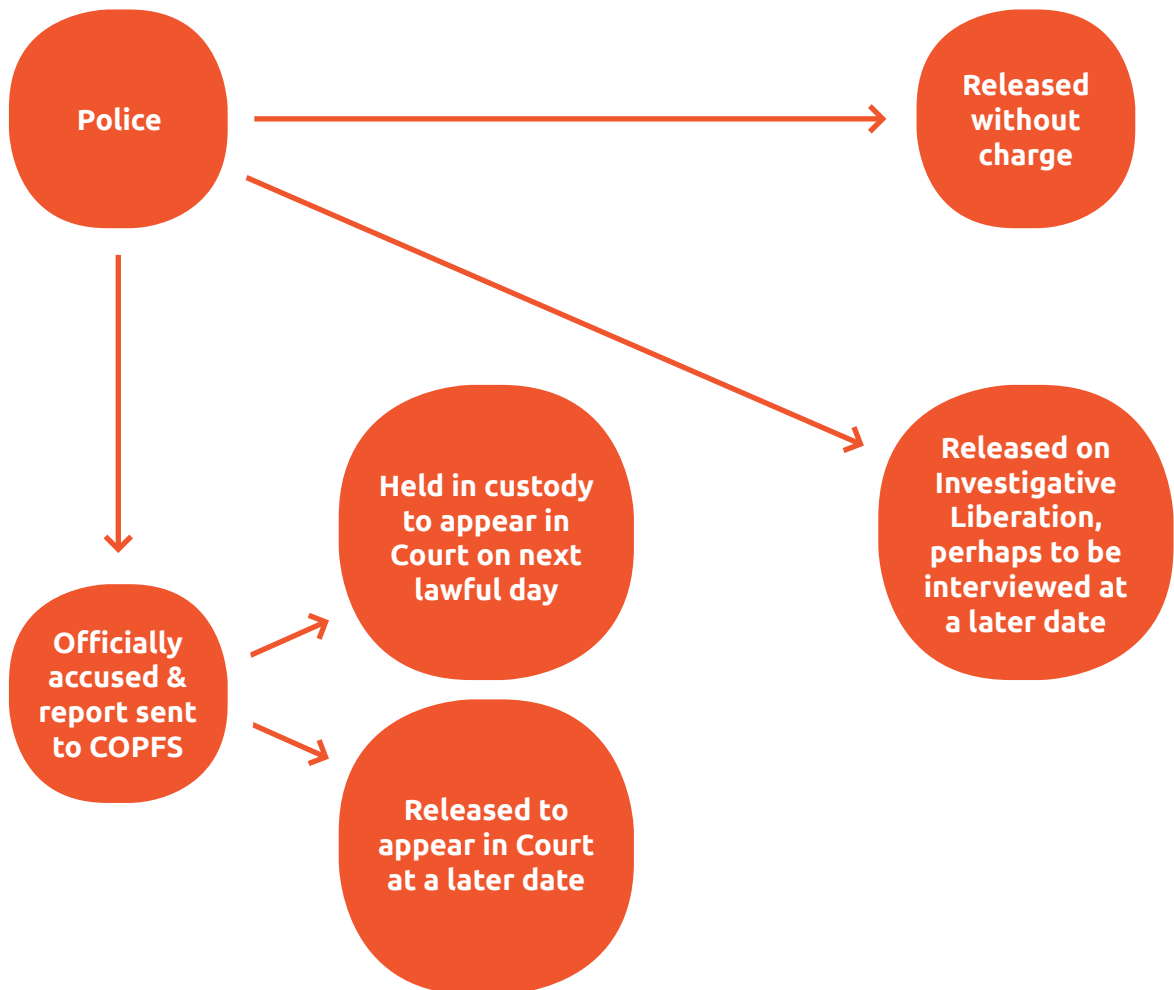
Note of clarification

Since the first edition of this guide it became clear that there has been confusion among some police officers at times about the distinction between a support worker and an appropriate adult. As a support worker you are not an appropriate adult. If the police think that is why you are there, you must be clear that you cannot perform that role. You are only there as a support worker to make the person feel more at ease.

If an appropriate adult is required, the police must request one in the usual way.

What happens next?

If the person is officially accused, the police send a report to the Crown Office and Procurator Fiscal Service (COPFS). The diagram below shows the possible outcomes.



Defence lawyer

Purpose

The role of the defence lawyer is to advise and represent the person suspected or accused of committing a criminal offence. They will give legal advice and protect the person's rights.

What are the person's rights?

If the person has a mental disorder, they must now have a defence lawyer present with them when they are being interviewed by the police. Prior to the Criminal Justice (Scotland) Act 2016, they were only required to have a telephone consultation. But the new Act makes it mandatory for a lawyer to attend in person.

Note: The criteria for mandatory attendance of a defence lawyer are the same as for appropriate adults. Therefore, if the person has an appropriate adult, they must also have a defence lawyer present when they are interviewed by the police.

Everyone has the right to a fair trial (ECHR, article 6). This should include adequate time to prepare a defence and the right to legal representation (including the right to legal aid if you cannot afford a lawyer).

Law firms have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010).

What can I do to support the person?

You *are not allowed* to be present during the defence lawyer's consultation with the person in police custody.

You *are allowed* to support the person in meetings with the defence lawyer outside of police custody, if the lawyer agrees to this. You will be subject to lawyer/client privilege and must keep details of the discussions confidential.

In general

You can support the person's involvement with the defence lawyer by

- supporting the person to tell the defence lawyer they have a communication support need due to a cognitive or neurological impairment, or get their consent to do it yourself
- asking the defence lawyer to agree that you support the person in their meetings, where this is allowed. This is so you can assist with communication, help the person understand the lawyer's advice and help the defence lawyer to understand the person's support needs.

In police custody

You can

- help the person to understand that because they have a mental disorder, they must have a defence lawyer with them when answering any police questions.
- or the person can request to have a defence lawyer with them when answering any police questions.
- help the person understand why it is important to speak to a lawyer

before answering any questions, and to have a lawyer present during the interview. The lawyer will advise the person what to say and protect their rights

- Ask the defence lawyer if the police interview could be put back to allow the person more time to prepare.

In court

You can

- Say to the defence lawyer you think the person would benefit from 'special measures' in court. These include having a named supporter who is allowed to sit with the person in court to make them feel more at ease. They must not communicate with the person in any way whilst the court is in session. This will be regarded as leading or influencing the person. The Court will rely on the defence lawyer to inform them of the person's support needs, so the more you can do to help the lawyer understand these needs, the more likely it will be that the person is able to access extra support in Court.
- Help the lawyer to understand how the person would benefit from having a supporter with them in court. They can help the person to feel more at ease and to control their emotions, to remember what was said during the court session, understand what is happening and going to happen next
- Tell the defence lawyer if both you and the person are happy for you to act as the named supporter. The request to the Crown Office and Procurator Fiscal's Service (COPFS) for a named supporter has to be made by the defence lawyer.



More information on special measures follows in Chapter 10 which details the role of the Crown and Procurator Fiscal's Service (COPFS)

Appropriate adult

Purpose

The role of the appropriate adult is mainly to facilitate communication between the person and the police, although they can have a role at other stages of the criminal justice pathway. They are independent of the police and other criminal justice agencies. It is the responsibility of the police to request the attendance of an appropriate adult in custody.

What are the person's rights?

Having a mental disorder means the person must have an appropriate adult with them in police custody. However, if the police believe the person will find it difficult to understand and answer questions, they will request an appropriate adult.

What rules apply to the appropriate adult?

The appropriate adult must make sure the person understands that their conversations are not confidential. Anything the person says that could be used as evidence, the appropriate adult must pass on to the Police.

The appropriate adult must not be alone with the person.

Criminal Justice (Scotland) Act 2016

section 42 Support for vulnerable persons

- (1) subsection (2) applies where –
- (c) owing to mental disorder, the person appears to the constable to be unable to –
 - (i) understand sufficiently what is happening, or
 - (ii) communicate effectively with the police
- (2) with a view to facilitating the provision of support...
- (3) That is, support to –
 - (a) help the person in custody to understand what is happening, and
 - (b) facilitate effective communication between the person and the police

What can the appropriate adult do?

The main responsibility of an appropriate adult is to assist with communication in police interviews. They should be present from the beginning of the arrest process to help the person understand:

- why they are being interviewed and the questions being asked
- their rights
- the Solicitor Access Recording Form
- police procedures and if needed to give informed consent for example for a physical examination

They can also help the person to feel more at ease.

The appropriate adult can be asked by the police to be present during other investigative procedures. These can include

- arrest processes
- caution and charge
- medical examination
- house or body search
- identification parade

The appropriate adult might also be asked to facilitate the person's communication:

- in court. This is not a legal duty, but can be requested by the judge or sheriff
- during an interview with a social worker for the preparation of a criminal justice social work report.

What can I do to support the person?

- You can help the person to understand the appropriate adult's role.

If you are present during the interview or any other police procedure you can support the person to understand the outcome and the reasons for it and help to make the person feel more at ease.

For more information see the Scottish Appropriate Adults Network website: www.scottishappropriateadultnetwork.co.uk/



Crown Office
and Procurator
Fiscal Service
(COPFS)

Purpose

The Crown Office and Procurator Fiscal Service (COPFS) is the public prosecutor in Scotland. COPFS will decide whether to prosecute the person in court or deal with them in another way.

What are the person's rights?

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010).

What is the process?

- A report on the person's case is received by COPFS from the police
- COPFS decide whether a crime has been committed, whether there is enough evidence to prove that the person committed the crime and whether it is in the public interest to prosecute the person
- In determining whether there is public interest in prosecuting the person, the prosecutor (on behalf of COPFS) will take account of a variety of factors: for example, the age, background and personal circumstances of the accused (including any additional support needs they may have). These are outlined in the COPFS prosecution code: www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf



- If the prosecutor decides there is enough evidence to take action then they may, for less serious offences, issue a direct measure such as a warning letter, a fiscal fine, or compensation
 - Direct measures issued to accused also include information on the consequences of accepting the direct measure (including information on how it will be recorded in terms of disclosure) or the consequences if the direct measure is challenged
 - Independent advice from Citizens Advice Scotland or a solicitor should be obtained by an accused if it is unclear what the consequences are of accepting/rejecting a direct measure
- The more serious the offence the more likely that the case will be prosecuted in court
- Diversion from prosecution is another action open to the prosecutor as an alternative to prosecution. The process for this is different across Scotland. The person could be referred to social work or to other specialist services for support and treatment with a view to addressing the underlying causes of their offending behaviour: for example substance misuse.



Diversion from prosecution is not covered in this guide.

What can I do to support the person?

- Help the person to understand that this process can take time and not to become anxious because they have not heard anything
- Support the person to understand what special measures they may be entitled to (see the information box below)
- Support the person to tell the defence lawyer if they think they would benefit from special measures to assist them in court, or get their consent to tell the lawyer yourself
- With your understanding of the person's communication support needs, advise the defence lawyer which special measures you think would be most helpful. One available measure is to have a named supporter sit with the person during the trial. The defence lawyer will need to make the request for a named supporter to be with the person in court, or any other special measure
- If a request for special measures is made, you might not hear a decision until close to the trial. This could add to the person's anxiety
- If the person insists they did not commit the offence, they might be better advised to refuse diversion, and plead their case in court. Support the person to understand this option, and to make an informed decision
- Support the person to tell the defence lawyer of their decision.

See more information on the role of a named supporter in Chapter 11

Special measures

Special measures are intended to reduce the anxiety of vulnerable people when giving evidence in court. For the accused person, these can include:

- Evidence taken by a commissioner prior to trial: a commissioner is appointed by the court to take the person's evidence. This is recorded on video
- A statement made prior to trial: a document or recording which contains the person's evidence. This could be an extract from a police interview
- Having a supporter with the person when they give evidence: the supporter, by their physical presence in the courtroom, can assist the witness to give their evidence
- Using a TV link from another room: the person sits in front of a TV set with cameras and a microphone and can normally only see the person speaking to them from the courtroom

There are two further special measures that are available only to victims and witnesses, not to the accused person. These are:

- Giving evidence behind a screen
- The court being closed to the public

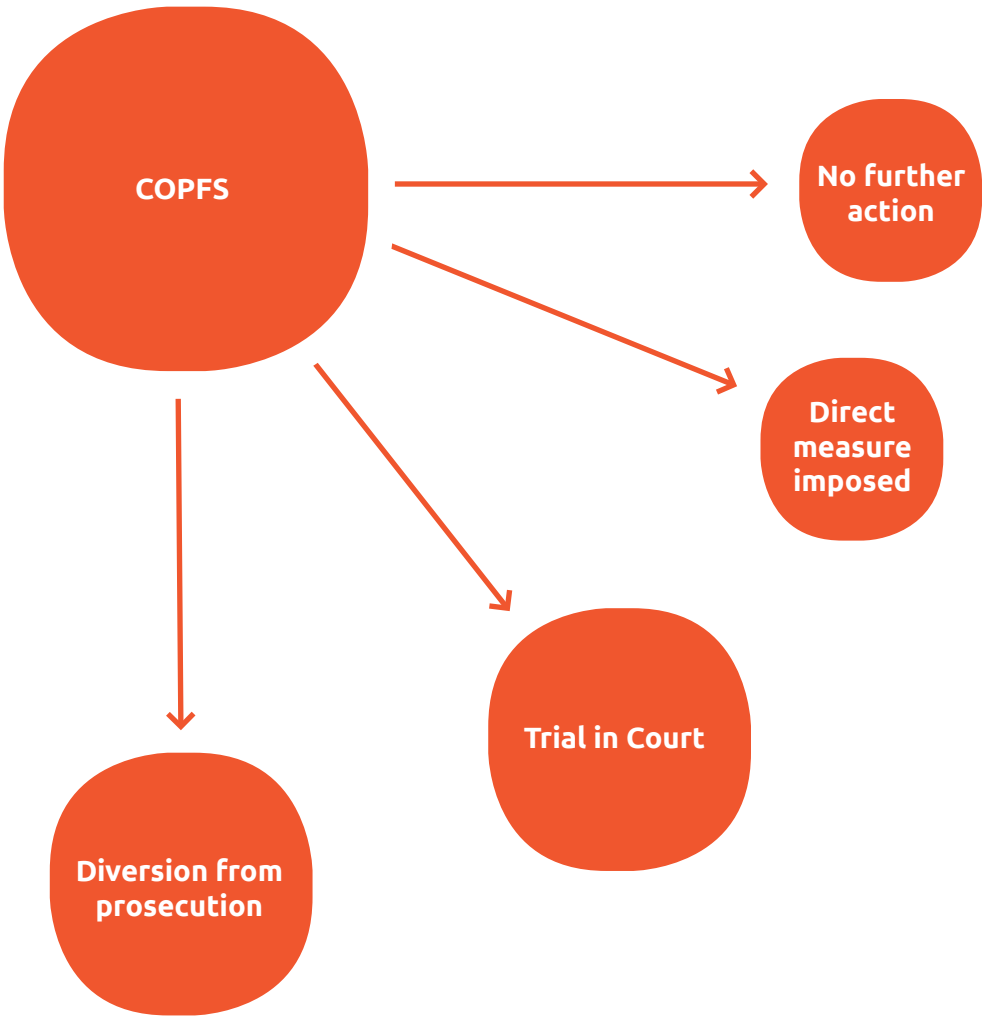
Be aware that in practice the accused person is less often given special measures, in spite of having the same entitlement as the vulnerable victim and witness. This may be because many defence lawyers do not have a good understanding of the way they can benefit people with communication support needs.

See the "what can I do to support the person?" in chapter 8 on Defence Lawyers to see how you might be able to make a difference with this.

Ref: **Vulnerable Witnesses (Scotland) Act 2004 Victims & Witnesses (Scotland) Act 2014**

What happens next?

The diagram below shows the possible outcomes.



Court

Purpose

The purpose of a criminal Court is to establish whether the accused person is guilty of actually having committed an offence.

What are the person's rights?

Everyone has the right to a fair trial (ECHR, article 6). This should include a fair and public hearing, adequate time to prepare a defence, and support to understand the language used in court.

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010):



'There is a general recognition in law that defendants must be able to understand and participate effectively in the criminal proceedings of which they are a part'

Who will be present in court and what is their role?

- Judge (High Court) – This is for very serious crimes
- Sheriff (Sheriff Court) – This is for crimes that are not as serious. The judge or sheriff is an expert in the law, and is in charge of the court. He or she will sit behind a high counter at the front of the courtroom. This is known as the bench. He or she will normally wear a wig and gown. He is addressed as 'My Lord'. She is addressed as 'My Lady'
- Justice of the Peace – This is for crimes that are not very serious. They do not wear a wig or gown, and there is not a jury in the court. He or she is addressed as 'Your Honour'



- Procurator Fiscal or Advocate Depute – This person is the lawyer who makes the case for the prosecution
- Defence Lawyer – This is the lawyer who acts on behalf of the accused person. He or she will test the evidence presented against the accused
- Court Clerk – This person looks after the court paperwork. He or she will sit in front of the judge or sheriff.
- Court Officer – This person assists the court. They will let witnesses know when it is their time to give evidence
- Witness – A person who has been asked to answer questions about the case. He or she can be called to give evidence by either the procurator fiscal or the defence lawyer. He or she will give evidence by being asked questions by the procurator fiscal and the defence lawyer
- Jury - The jury is made up of members of the public. They listen to the evidence and help decide if the person is guilty. There is not always a jury.

The Scottish Courts and Tribunals Service have produced a video for jurors which explains the different roles of people in court:

www.scotcourts.gov.uk/coming-to-court/jurors



What is the process?

- The person will attend court to make a plea of 'guilty' or 'not guilty'. This is known as the 'pleading diet'
- Legal aid can be applied for to help with the cost of legal advice and representation if the person can show that they cannot pay for this themselves

- If the person's first court appearance is from custody and they do not have a solicitor, a duty solicitor will be available in court to provide advice and representation
- If they plead guilty the judge or sheriff will decide what sentence to impose
- In some cases the court might defer sentencing to obtain court reports. A new court date will be set which the person must attend
- If they plead not guilty the judge or sheriff will set a date for a trial
- All the evidence will be presented at the trial and tested by the lawyers for the prosecution and defence
- Once the evidence has been heard, the judge or sheriff (or jury in more serious cases) will consider their verdict
- If the verdict is not guilty the person will be free to leave
- If the verdict is not proven the person will be free to leave
- If the verdict is guilty the judge or sheriff will decide what sentence to impose. This might not be done straight away. The judge or sheriff might wait for reports before making a decision. During this time, the person could be
 - placed on bail and told to come back to court at a future date
 - held on remand until sentenced. This could be stressful, especially if the person did not expect it.

What can I do to support the person?

Before the trial

- Help the person to understand what is going to happen, and that the purpose of the trial is to decide if there is enough evidence to prove they are guilty of committing the offence
- You could try to arrange a court familiarisation visit. This would allow the person to visit the court in advance of the trial to help them to feel more at ease, and is normally organised by contacting Victim Support's Witness Service:

www.victimsupportsco.org.uk/help-for-witnesses-of-crime/

However the service is normally available to victims and witnesses only. Victim Support may decide it is not appropriate for an accused person. It is also unlikely to be possible if the person is being held on remand

- Help the person to understand how they should behave in court, for example:
 - They must not wear a hat, eat, drink or chew gum
 - They should address the judge or sheriff correctly: for example 'My Lord' or 'My Lady'
 - It is in their best interest to appear respectful



See the information on special measures in Chapter 10

- Either support the person to tell the defence lawyer they have a communication support need, or get their consent to do it yourself. The defence lawyer can then ask for extra time to prepare the person's defence

See the information on special measures in Chapter 10

- Help the person to understand the lawyer's advice
- Help the person to understand they can ask for a named supporter. This is someone who is allowed to sit with the person during the trial. Help the person to understand that they can ask for you to be their named supporter and encourage them to ask for this support
- Support the person to tell the defence lawyer they would like a named supporter
 - The request for a named supporter has to be made by the defence lawyer
 - Tell the defence lawyer if both yourself and the person are happy for you to act as the named supporter

During the trial

- Help the person to understand what is happening. You can only do this outside of the courtroom
- If you are acting as the person's named supporter in court you are allowed to sit with the person to help them feel more at ease
- If you are acting as the person's named supporter you are not allowed to do anything else. You must not communicate with the person in any way whilst the Court is in session. This will be regarded as leading or influencing the person.

Note: In some parts of Scotland, appropriate adults are given jurisdiction by the judge or sheriff to actively assist in aiding the person's communication in court.

This support is not available throughout most of Scotland.

See Chapter 9 on appropriate adults

What sentence could the person receive?

Below is a list of the main sentences the person could receive. It is not exhaustive. To see the full list, with definitions, use the link:

www.scotland-judiciary.org.uk/29/0/Glossary

- Absolute discharge – no penalty imposed
- Admonition – a warning
- Community payback order – unpaid work in the community, or a programme to help change offending behaviour
- Restriction of liberty order – required to wear an electronic tag and free movement is restricted. This requires the consent of the householder: for example a parent if the person lives at home
- Drug treatment and testing order – support with addiction if this is a reason for offending behaviour
- Compensation – money paid to victim
- Fine – money paid to the Court
- Prison – detention for a length of time
- Structured deferred sentence - this option is not available in all parts of Scotland, but can be imposed on the person in advance of a final sentence decision.



Further information on structured deferred sentences is provided in Chapter 13

Social Work – Criminal Justice Social Work Report

Purpose

A criminal justice social work report (CJSWR) assists the judge or sheriff to decide on the most suitable sentence for the person. This includes advising on whether a community payback order would be appropriate rather than a prison sentence. The report will include information on the person's home life, health including whether they have a learning disability, drug or alcohol use, history of offending and attitude to the current offence: for example whether the person appears to be sorry for what they have done. It will also include a recommendation of the most suitable sentence. The report is important because it could persuade the judge or sheriff not to send the person to prison.

What are the person's rights?

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010)

What is the process?

- The judge or sheriff can ask social work to prepare a report on the person to help them decide on the most suitable sentence: for example community payback order, rather than prison
- A social worker writes to the person inviting them to attend an appointment
- A social worker interviews the person. Questions might include where the person lives and who with, and how the person feels about the offence they have committed
- The social worker submits a criminal justice social work report (CJSWR) to the judge or sheriff

What can I do to support the person?

- Support the person to understand the purpose of the CJSWR and that it is important because it could influence what sentence they are given
- Often the social worker will not want you to support the person in the interview. This is because your presence might influence the person's answers. The court can appoint an appropriate adult to support the person during the interview, but this is not a legal requirement
- *The social worker will normally want to speak to you separately to get your knowledge of the person.* You should
 - say that the person has communication support needs and advise the social worker about what support the person might need
 - advise them if you think the person will find it more difficult to cope with some sentence options: for example if an electronic tag might cause the person distress
 - advise them to put information about the person's communication support needs in the report.

Social Work – Structured Deferred Sentence and Community Payback Order

Structured deferred sentence

Purpose

Structured deferred sentences are designed to assist the judge or sheriff in making a decision about the sentence to impose on the person. The way they are administered is very similar to that of a community payback order, and is effectively a trial run. It gives the person an opportunity to demonstrate that they are willing to, and capable of, complying with a community payback order (CPO), and of benefitting from any learning programmes. Such programmes help the person to address the underlying reasons for their offending behaviour, understand why they committed their offence and develop skills that will reduce the risk of them offending again.

If the person co-operates with the social worker supervising their structured deferred sentence, complies with what they are instructed to do and engages with the work, they will be more likely to be given a CPO as their final sentence and avoid going to prison.

Note:

Structured deferred sentences are not available in every part of Scotland.

What are the person's rights?

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010).

What is the process?

- The court defers sentencing the person and refers them to criminal justice social work
- The deferment will normally be for three to six months
- The person is allocated a social worker who will supervise their progress during the deferment. The person will have regular appointments to meet with them. This involves supervision, advice and education targeted at underlying reasons for offending
- The person will also likely be referred to partner voluntary organisations that will provide offending awareness programmes. These could relate to drug and alcohol misuse, employability or domestic violence
- At the end of the deferment, social work will submit a report on the person's progress to the court
- If the person has co-operated with the structured deferred sentence, the court can decide to impose a community-based sentence at the end of the deferment period, and not send the person to prison
- The court will take this into account when deciding the person's final sentence

What can I do to support the person?

- Help the person to understand why it is important to co-operate with the social worker, engage with the supervision and education programmes
- Help the person to understand that talking about why they committed the offence is important to help them understand why they did it and to develop skills to help them reduce the risk of offending again
- Help the person understand how important it is that they do not miss appointments with their social worker or anybody else working with them as part of the deferred sentence
 - Perhaps support the person to get to appointments on time
 - Perhaps agree with the person how you should notify the social worker if they cannot make an appointment
 - It is imperative that the social worker is notified as soon as possible if the person is not able to make an appointment
- Introduce yourself to the social worker. Make it clear that you can have a role in helping the person to understand the advice and guidance they are given about their offending behaviour, and that you are keen to assist and work together. Your support to help the person comply with their structured deferred sentence will be welcomed
- Use your experience of working with the person to help the social worker understand the person's communication support needs and to create a deferred sentence that meets the person's needs and is delivered in a way they can benefit from
- Help the person to understand the advice and guidance they are receiving from the social worker and others, and reinforce it.

Community payback order

Purpose

A CPO is a community-based sentence and is imposed as an alternative to prison, meaning it is imposed on offenders who would otherwise be sent to prison. It is intended to be a constructive form of justice where offenders can pay back their debt to society by improving the communities they have harmed through doing unpaid work. Criminal justice social work will supervise the person's compliance and progress with the CPO, although they may be required to attend learning programmes with other agencies. Such programmes help the person to address the underlying reasons for their offending behaviour. These may focus on anger management or alcohol misuse. A CPO is intended to punish the person for the crime they have committed, but also to help them make changes in their life, understand why they committed their offence and develop skills that will reduce the risk of them offending again.

What are the person's rights?

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010).

What is the process?

The court can impose a CPO for between six months and three years. It can be made up of one or more of

- unpaid work or other activity. This can be for between 30 and 300 hours. Unpaid work is not flexible: the person must turn up on time
- supervision with a social worker
- compensation to the victim
- a learning programme
- mental health treatment
- drug treatment
- alcohol treatment
- a Residence Requirement
- a Conduct Requirement

The person will be contacted by their appointed case manager. This is the social worker who will supervise the CPO. The case manager will set the amount of contact the person is required to have with them. This could include

- a case management plan, which will be reviewed at regular intervals
- a learning programme such as a course on anger management. This could involve group work.

Contact will be through appointments at the case manager's office and home visits. If the person fails to keep appointments, it could be reported to the court that they have breached their order. This could lead to them being sent to prison instead.

A CPO can be discharged earlier than planned if the person makes very positive progress.

The main risk is that the person breaches the CPO by missing appointments. They are then at risk of going to prison. Please note that unpaid work is not flexible: the person must turn up on time or they will breach the CPO.

What can I do to support the person?

- Help the person to understand why it is important to co-operate with the case manager and engage with the supervision and education programmes
- Help the person to understand that talking about why they committed the offence is important to help them understand why they did it and to develop skills to help them reduce the risk of offending again

- Help the person understand how important it is that they do not miss appointments with their case manager or anybody else working with them as part of the CPO:
 - Perhaps support the person to get to appointments on time
 - Perhaps agree with the person how you should notify the case manager if they cannot make an appointment
 - It is imperative that the case manager is notified as soon as possible if the person is not able to make an appointment
- Introduce yourself to the case manager. Make it clear that you can have a role in helping the person to understand the advice and guidance they are given about their offending behaviour, and that you are keen to assist and work together. Your support to help the person comply with their CPO will be welcomed
- Use your experience of working with the person to help the case manager understand the person's communication support needs and to create a CPO that meets the person's needs and is delivered in a way they can benefit from
- Help the person to understand the advice and guidance they are receiving from the case manager and others, and reinforce it.

Prison

Unless the person is given a very short sentence (a few weeks or less), it is likely that their support package will end when they enter prison. Therefore, you should expect that your responsibility for supporting the person will end at this point and the help you can offer is limited. However, if it seems likely the person could be going to prison, you might be able to help them prepare.

This section provides a brief introduction to prison procedures that might be useful for the person to know prior to them entering prison.

Purpose

The purpose of prison is to provide custodial and rehabilitation services for those people sent to it by the courts.

What are the person's rights?

All public bodies have a legal duty to ensure a person is not disadvantaged due to having a disability (Equality Act 2010). Prisons have a duty to make reasonable adjustments to ensure offenders with communication support needs receive the same standard of service as other prisoners:

- Given written information in a format which is easy to understand
- Maintain contact with family and friends
- Receive medical treatment.

What is the process?

Reception

- Escorted from court to prison
- Possessions put into storage
- Given a prison number and a health check
- The person is entitled to make one phone call
- The person has to notify the Department for Work and Pensions, landlord, etc. that they are in prison.

Induction

Informed about rules of prison: for example

- Rules on possession of mobile phones, illegal drugs, alcohol and weapons
- Consequences of breaking the rules.

Informed about routines of prison: for example

- Meals, exercise, work, sports centre/gym, education, library, canteen/shop, time out of cell, visiting and privileges
- Complaints system
- Role of independent prison monitors
- Programmes to address offending behaviour.

Preparation for release

The link centre is a dedicated area in the prison that serves as a one-stop facility to assist planning for release. The person should get help and advice to prepare for leaving prison and moving back into the community. This could include:

- Finding somewhere to live
- Applying for benefits
- Registering with a GP.

Through-care support officers (TSOs) are specially selected prison officers trained to proactively support the person in the run-up to, and after, release. The support is for practical issues such as housing and benefits.

Public sector partnerships (PSPs) vary from prison to prison but are designed to offer targeted help on release: for example SHINE which is for female offenders. Use this link for more information:



www.shinementoring.org/

What can I do to support the person?

As already stated, your responsibility for supporting the person ends when they enter prison. Prior to the person entering prison, you might be able to:

- Take any opportunity to inform the prison that the person has communication support needs, the nature of those needs, e.g. learning disability, and that the person needs support
- Offer to inform the DWP, etc. that the person is going to be in prison
- Find out about initiatives and supports that are available in the prison
- Encourage the person to let you contact any support that might benefit them in prison, or to make contact themselves
- Encourage the person to ask for help if there is something they do not understand.

Below is a selection of supports and services that might be available to the person in prison. All of these can be contacted either by the person in prison, or by someone else on the outside.

For the person's family:

- Families Outside can help to maintain contact between the person and family members. For information on prison visiting rules and procedures, use the link:
www.familiesoutside.org.uk/faqs-jargon/faqs/
- Every prison has family contact officers (FCOs) who can be contacted directly. Some prisons will have a prison visitor centre where the family can get help and support during the person's sentence.

For the person:

- Personal officer: every prisoner is allocated a personal officer on arrival
- Chaplain: Church of Scotland, Roman Catholic and Muslim are available on request
- Various health-care professionals: health care is provided by the local NHS Board
- Social worker: service provided by the local authority

Afterword

The aim of this guide is to help support staff who find the person with communication support needs who they support in the criminal justice system. It provides information about how they can make a well-informed, constructive contribution, which is valued, not just by the person they support, but also by partner professionals in the criminal justice system.

SOLD recognises that this guide is not comprehensive in its scope. There is more work to be done: in terms of diversion from prosecution or mainstream sentencing for people with communication support needs; in terms of early intervention and preventive work to support people not to commit offences in the first place; and in terms of supporting people to avoid re-offending in the future.

The principal aim is to help ensure that nobody in the criminal justice system is at a disadvantage because they have communication support needs. It is concerned with helping to:

- ensure that people with communication support needs are supported to understand and exercise their rights to fair and equal access to justice
- ensure people with communication support needs are able to participate fully in the criminal justice system's processes
- inform support providers of their role in these processes

The intention is not to help people with communication support needs to avoid the consequences of offending behaviour, or be treated more lightly in the criminal justice system.

If the person becomes involved with the criminal justice system, you should always report this to your appropriate manager. Do not act without your appropriate manager's knowledge and agreement.

Acknowledgements

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Thanks also to our colleagues in the Scottish Government Community Justice Division, and to the members of the SOLD User group.

In addition to this one, SOLD has produced a number of other publications which you might find useful:

Arrest: an easy read guide

Guidance for using SOLD easy read guides

The Criminal Justice Pathway for people with learning disabilities

All publications can be accessed via the SOLD website:
www.soldnetwork.org.uk/publications



References

Relevant Legislation:

Adult Support and Protection (Scotland) Act 2007

Adults with Incapacity (Scotland) Act 2000

Community Justice (Scotland) Act 2016

Criminal Justice (Scotland) Act 1995

Criminal Justice (Scotland) Act 2003

Criminal Justice (Scotland) Act 2016

Criminal Procedure (Scotland) Act 1995

Equality Act 2010

Management of Offenders etc (Scotland) Act 2005

Mental Health (Care & Treatment) (Scotland) Act 2003

Prisoners and Criminal Proceedings (Scotland) Act 1993

Protection of Vulnerable Groups (Scotland) Act 2007

Rehabilitation of Offenders (Scotland) Act 1974

Social Work (Scotland) Act 1968

Victims and Witnesses (Scotland) Act 2014

Vulnerable Witnesses (Scotland) Act 2004



Useful links:

www.crownoffice.gov.uk

www.familiesoutside.org.uk/faqs-jargon/faqs

www.forensicnetwork.scot.nhs.uk

www.lawscot.org.uk

www.mygov.scot/crime-justice-and-the-law

www.sacro.org.uk

www.scotland.police.uk

www.scottishappropriateadultnetwork.co.uk

www.scotcourts.gov.uk

www.siaa.org.uk/find-advocate

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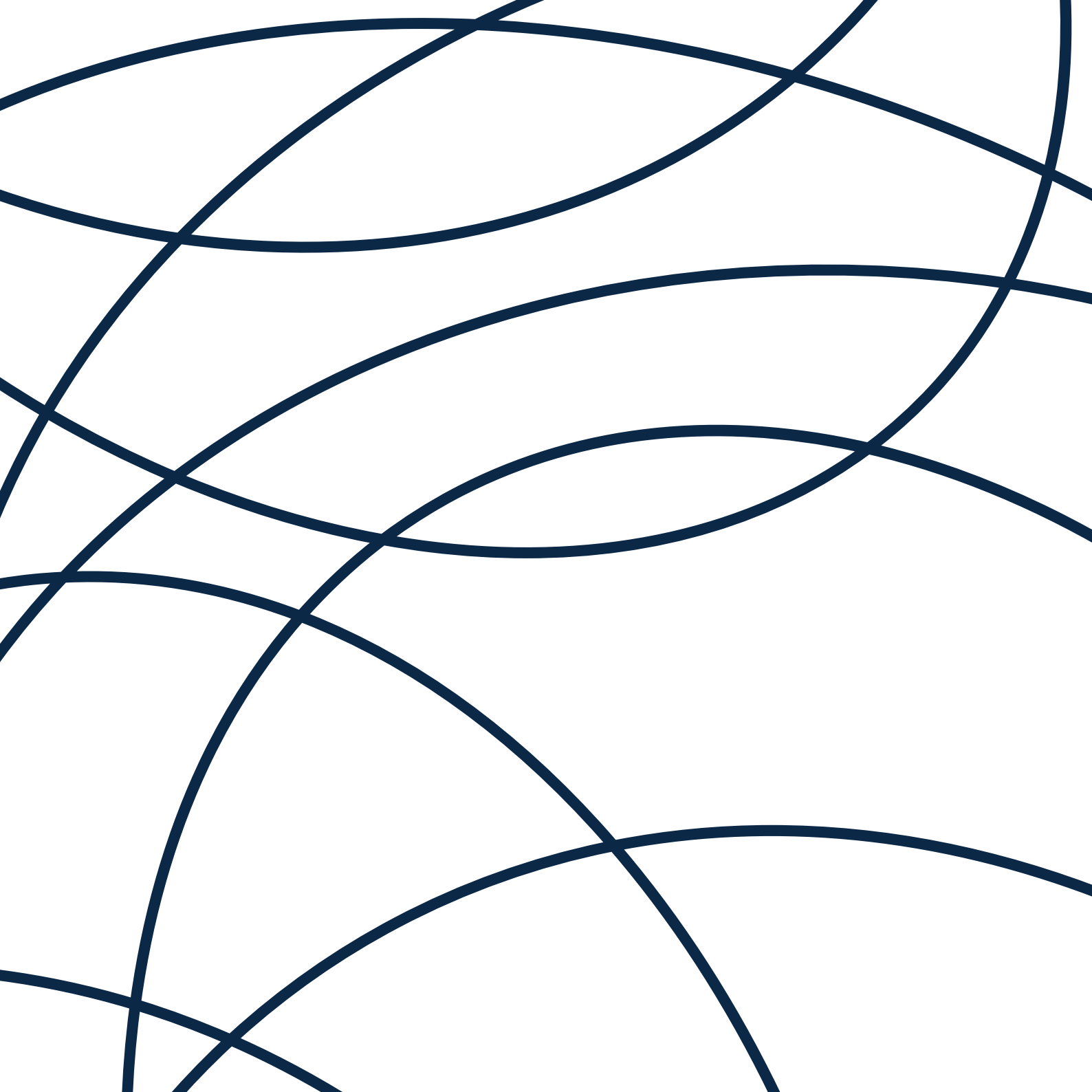
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PEOPLE FIRST
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