



MAGISTRATES ASSOCIATION CUT-OUT-AND-KEEP GUIDE TO:

Neurodiversity

Embracing inclusivity in the magistrates' courts

December 2020

What is neurodiversity?

Neurodiversity means that everyone's brains are differently connected. The term is thought to have been coined by Australian sociologist Judy Singer. It was a plea to move away from seeing diagnosis of conditions such as dyslexia and autism less as disorders with a focus on cure and prevention (known as a medical model) to a more social model of disability. The social model is at the heart of the United Nations Convention on the Rights of Persons with Disabilities, which identifies disabled people as having impairments that 'in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

This is an important approach as it considers that the negative impacts sometimes experienced may be due to context and structural settings (such as a courtroom) rather than the disability itself. Therefore, decision-makers are key to making amendments to ensure inclusivity – for example, ensuring participation and clear communication for all, regardless of any impairments.

Historically conditions such as dyslexia, dyspraxia (also known as developmental co-ordination disorder), attention deficit hyperactivity disorder (ADHD), and autism spectrum conditions (ASCs) were viewed as individual disorders. Recent research has shown these should not be considered as a binary diagnosis, in that you either 'have it or don't' but more like continuous traits such as height or blood pressure where everyone lies somewhere along a continuum, but that the impact of having one or more condition for the individual can vary substantially. Other 'umbrella' terms associated with neurodivergent conditions may include specific learning difficulties (used in education), neurodevelopmental disorders (used by health professionals), and learning difficulties and learning disabilities (used in justice settings). The varying terminology by different professionals is one of the reasons for confusion. A move to have more consistent terminology is leading to the term 'neurodiversity' increasingly being accepted across services and to accept that each person will have varying strengths and challenges.

Facts and figures

- About one in six people in the mainstream population are thought to be neurodivergent
- One in four in the unemployed population are thought to be neurodivergent
- At least one in three people moving through the justice system are thought to be neurodivergent

What comes under the neurodiversity umbrella?

- **Attention deficit hyperactivity disorder (ADHD)** – can lead to impulsivity and challenges focusing and concentrating. Strengths can include being able to see connections where others cannot
- **Autism spectrum condition (ASC) also known as autism spectrum disorder (ASD)** – can lead to challenges with social communication, interaction with others and relating to specific sensory inputs. Strengths can include being able to focus intensely on specific interests

- **Developmental co-ordination disorder (DCD) also known as dyspraxia** – can lead to challenges with physical co-ordination, handwriting, driving difficulties and organisational skills. Strengths can include higher levels of empathy
- **Dyscalculia** – can lead to challenges with maths, time concepts and managing money
- **Dyslexia** – can lead to challenges with reading, spelling and writing. Strengths can include creativity
- **Developmental language disorder (DLD)** – can lead to challenges with speaking, understanding and communicating clearly

Other conditions include Tourette's syndrome and auditory processing disorder (APD) (which affects the way that sounds are understood).

People are not in neat boxes

There is extensive research that these 'conditions' often overlap with one another (or co-occur). For example, people with ASC¹ often also have ADHD and dyspraxia. Each person's pattern of strengths and challenges will be different.

In order for someone to gain support and a diagnosis, people still often have to meet a set of criteria. This may require gaining a score on a specific test. This can end up being an 'all or nothing' approach with scores below that level not being registered as having the diagnosis.

However, the reality for many people is that they can experience challenges in a number of areas which interact and overlap, even if the challenges are not seen as severe enough to reach the criteria for a diagnosis. For example, someone may have difficulties with reading, attention and writing (challenges linked to three distinct conditions) but may not get a diagnosis of any of these specific conditions. The challenge in reading alone may not be 'bad enough' to gain a diagnosis of dyslexia but still may cause challenges for that person when trying to read legal documentation.

In addition, gaining the diagnosis may often be reliant on which professional they have been referred to and the training they have had. For example, if they see someone with expertise in ASC, the specialist may not be trained to screen for ADHD or dyslexia. Without appropriate training, a professional screening for ADHD may not consider other reasons for attention problems and not ask about the person having had traumatic brain injury (TBI), which can present in a similar manner.

Neurodiversity and the magistrates' courts

Over the last decade various publications specifically focusing on the justice sector, including *The Bradley Report* and, more recently, the review of prison education led by Dame Sally Coates, have highlighted the need for people who are neurodivergent to be identified so they can be appropriately supported. The White Paper *A Smarter Approach to Sentencing*, published this year, also specifically mentions neurodiversity and the need for greater awareness and support.

¹ This is person first language, which puts the person before their diagnosis. Some people prefer identity first language which puts the diagnosis first, for example saying autistic people instead of people with ASC.

MAGISTRATES ASSOCIATION CUT-OUT-AND-KEEP GUIDE TO:

Neurodiversity

Every person moving through the justice system will need to engage meaningfully with the professionals they meet, including the police, defence solicitors, advocates, court staff and magistrates.

The *Equal Treatment Bench Book* was updated in spring 2020. It states: 'Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood.' It goes on to say: 'Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage.'

Everyone has the right to a fair trial as set out in Article 6 of the Human Rights Act, and if the defendant is struggling to understand the process then they cannot participate effectively.

Communication and comprehension can result in lack of understanding of charges, cautions, bail conditions or court orders. For example, not being able to understand the process might affect an individual's experience of the justice system in the following ways:

- Misunderstanding questions during interview might lead to people making false admissions or 'overly honest' comments which may affect their defence (if not properly supported at interview, eg by an appropriate adult)
- If someone is not able to read written communications they might not be able to comply with them, eg receiving a confirmation of a court date by post
- Not understanding the case and evidence against them may result in the person pleading guilty (or not guilty), without being able to fully consider the effect that this may have on their case
- Nodding or agreeing without understanding what has been said can have an impact during several points of the case: including police interview, first hearing and sentencing
- Not understanding a court order will obviously have an impact on being able to comply with it correctly

Considerations in court

Not everyone will tell you that they are neurodivergent or mention their diagnosis(es) specifically for a number of reasons. Firstly, as explained above, diagnosis can be difficult or may not tell the whole picture: someone may have more than one diagnosed condition or feel their diagnosis does not fully explain their situation.

Secondly, some people may be reluctant to disclose because of past experiences of a negative response or bias against them. Thirdly, people differ in their sensitivity about disclosing their challenges; some may not view themselves as disabled or it may be that they are not comfortable disclosing personal information. Many adults will not have had a diagnosis in childhood and so not know that challenges they have are related to being neurodivergent.

Rather than focusing on diagnoses, it may be more helpful to look at behaviour and ask each individual if there are any aspects of communication that they find challenging, and then adapt the court process accordingly.

Liaison and diversion (L&D) or probation can be helpful in providing detailed, relevant information about the individual, rather than relying on self-identification in open court. You can:

- Request the L&D form if an assessment was carried out in police custody
- If not, ask for an L&D assessment if you have concerns
- Check if the pre-sentence report has any relevant information available

How can the court process be modified?

- Provide clear information about the process to manage expectations, including the likely start and finish times, what happens in a court and who people are, and explanations for some of the terms used, eg judiciary, bench, defendant
- Access to easy-read information, including a glossary of terms, and checks for the readability of any written materials provided
- Use an intermediary or communication support in court for defendants as well as witnesses
- Regular breaks to aid focus

Tips for aiding communication during the court process:

- Only ask one question at a time
- Use visual aids where possible
- Avoid use of legalese, jargon or acronyms
- Check understanding – not taking a nod of the head or affirmation to mean that the person understands: ask them to repeat back to you what they understand
- Slow the pace at which you speak
- Give a longer time for people to respond
- Repeat information if necessary, possibly rephrasing if helpful

For further information

- Read the *Equal Treatment Bench Book* and the *Mental Health, Autism and Learning Disabilities Toolkit*
- All magistrates should have completed the eDiversity e-learning modules but may wish to revisit the modules on learning disabilities and autism spectrum disorders

References

The Bradley Report, April 2009

<http://bit.ly/magistrate20156>

Inclusive justice: a system designed for all, Equality and Human Rights Commission, June 2020

<http://bit.ly/magistrate20155>

International Principles and Guidelines on Access to Justice for Persons with Disabilities, United Nations, August 2020

<http://bit.ly/magistrate20158>

A Smarter Approach to Sentencing, MOJ, September 2020

<http://bit.ly/magistrate20160>

Sentencing offenders with mental disorders, developmental disorders, or neurological impairments, Sentencing Council, October 2020

<http://bit.ly/magistrate20159>

Unlocking Potential: A review of education in prison, Dame Sally Coates, MOJ, May 2016

<http://bit.ly/magistrate20157>

Professor Amanda Kirby MBBS MRCGP PhD has an emeritus chair in Developmental Disorders at the University of South Wales. She is a GP and worked in the field of neurodiversity for more than 25 years, leading research and clinical practice. She is CEO of Do-IT Solutions, who have developed neurodiversity screening tools used in justice settings in the UK. Her company was the first in Wales to gain the Disability Confident Leader status and she sits on the Disability Confident Professional Advisors Group and is a trustee of the ADHD Foundation and advisor to other UK charities. She also has many members of her family who are neurodivergent.