

# scottish justice matters

Volume 5 | Number 2 | November 2017

ISSN 2052-7950



## **WOMEN AND JUSTICE ARE WE MAKING PROGRESS?**



# BALANCING THE SCALES

**Kenny McKay** looks at what can be done to make the Scottish justice system fair for people with learning disabilities

**THE JUSTICE SYSTEM**, with its complex processes and its own difficult language can be confusing for anyone. For people with learning disabilities, this can present an overwhelming barrier, leaving them so disadvantaged that it raises the question of their receiving fair access to justice.

Fair and equitable access to justice is a right to which people with disabilities are entitled under Article 6 of the Human Rights Act and Article 12 of the UN Convention on Rights of Persons with Disabilities: but how does it play out in practice?

## **Identification and support**

The Supporting Offenders with Learning Disabilities (SOLD) user group brings together people with learning disabilities or autism who have direct experience of the criminal justice system. It aims to raise awareness, deliver training and campaign for change. The members of SOLD Network's user group feel that the barriers they faced left them at a significant disadvantage. Every single member of the group had difficulty understanding and enacting their rights, and most also felt unprepared and under supported while in court, feeling that they were unable to fully understand the process and to express themselves clearly.

Recent research by the Equality and Human Rights Commission supports these views (EHRC, 2017). It found that people with learning disabilities in Scotland face disadvantages at every stage of the justice system, from understanding their rights at the point of arrest and during police interviews; through an adversarial court process; serving a community based or prison sentence; and finally, in coping with reintegration into society.

Although these problems are often numerous and multi-faceted, at the core is the need for support with communication and understanding. If this was considered at the earliest stage, the learning could be applied to assist throughout the whole process. For example, if we were able to improve identification and communication support in police custody, and then ensured that this is carried forward to inform professional practice and adjustments in court and during any subsequent sentence, we could make significant steps to improving the whole process for people with learning disabilities.

This was in part addressed by Lord Carloway in his review of Scottish criminal law and practice, which stated the need to ensure that “any suspect who is vulnerable: (i) is promptly identified as such, (ii) understands his/her rights; and (iii) is able to make informed decisions based on that understanding” and that “he/she understands not only the questions asked and the answers given but also the implications of what is being asked and of what he/she says in response” (Scottish Government, 2011).

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As a result of this review, action is being taken in the form of the new Criminal Justice (Scotland) Act 2016. For vulnerable defendants there are two particularly significant changes. Firstly, a statutory duty to ensure that any accused person in custody, meeting the criteria of ‘mentally disordered’, is supported to understand their rights and the process; and to facilitate their communication with the police. In practice this will mean that the support of an Appropriate Adult, which is already provided in a discretionary manner across the country, will become a statutory right.

The second significant change is that people requiring this support will, unless they expressly refuse, be required to have a solicitor present during police interviews, as opposed to a telephone consultation prior to the interview taking place. This is vital because not one of the members of the SOLD user group was able to retain or follow the advice given by the duty

solicitor over the phone when faced with police questioning, effectively leaving them without legal advice.

It still remains to be seen how solicitors will manage to amend current practice to allow them to regularly attend police interviews. One possibility will be to use the provision for police liberation, also included in the new Act, which would allow for arrangements to be made for the person to be interviewed at a later, pre-arranged date, with a solicitor present.

This additional time between arrest and interview could also, potentially, provide the opportunity to address two significant issues relating to the statutory provision of support: how do we ensure that those requiring support are correctly identified and, how do we ensure that the support provided meets the needs of the individual?

It is currently the responsibility of the police to identify suspects who are vulnerable and to arrange for an Appropriate Adult to attend. This will continue to be the case under the new Act, placing significant obligation on officers. In addressing this, the Equality and Human Rights Commission recommended that ‘screening tools on identifying a learning disability and specific support needs should be developed, delivered and rolled out in a consistent manner’ (EHRC, 2017).

A study carried out with the Metropolitan Police found that individuals who should be receiving the support of an appropriate adult were not being identified in police custody; and that it was possible to improve the identification of detainees with learning disabilities using a short, targeted screening placed within the standard custody intake questionnaire (McKinnon et al, 2015). This is an area Police Scotland are exploring, and the additional time afforded by police liberation could allow those identified by screening to undergo further assessment of their support needs.

But once the need for support has been identified, what should that support look like?

Neither the Carloway review nor the new Criminal Justice (Scotland) Act 2016 address the nature of the support provided. This is very concerning to the members of the SOLD user group, because none of them found that the support received under the current Appropriate Adult scheme fulfilled the intended goal of facilitating understanding of their rights or improving their ability to communicate effectively.

They all felt that the preparation time with the Appropriate Adult was inadequate, lasting only a few minutes, which is insufficient to carry out even the most basic communication needs assessment. Also, Appropriate Adults are unable to provide support in meetings with their solicitor or in court since they can be called to testify as a witness. These concerns were also shared by many professionals at a SOLD conference in 2016 (SOLD, 2016) and have been highlighted by the EHRC (EHRC, 2017).

The support available to defendants with learning disabilities in Scottish courts is very limited. Solicitors can request some of the special measures available under the Vulnerable Victims and Witnesses (Scotland) Act 2014, such as additional time or breaks and the accompaniment of a supporter, but this support role is only to provide a reassuring presence, and they must not speak or influence the proceedings in any way. None of these adjustments

address the fundamental difficulty faced by people with learning disabilities in court: the deficit in communication and understanding.

This is in contrast to what is now being implemented in other parts of the UK, particularly Northern Ireland, where registered intermediaries are available to accused persons as well as victims and witnesses. These intermediaries are professional communication experts who carry out an initial assessment; are present in police interviews in order to advise and assist with communication; provide a report for court about the needs of the vulnerable person advising on how best to communicate; and assist with communication when the vulnerable person is giving evidence at trial (Department of Justice, 2015).

It is uncomfortable to think that people with learning disabilities in Scotland are disadvantaged compared not only to those without a disability, but also those people with a learning disability in another part of the UK.

#### What can we do to change things?

We should build upon developments in other countries in the way Northern Ireland has learned from England and Wales, by widening the registered intermediaries scheme to include accused persons as well as victims and witnesses.

This could take the form of a fundamental review of the role of Appropriate Adults to ensure that they are actually providing the support people with learning disabilities need. Now is the ideal time for this to take place because the scheme will be undergoing amendments as it becomes a statutory right. It would be a shame for this to happen but for the changes to fall short in providing the support actually required, especially since the best way to find out what is needed is straight forward. Listen to what those with experience are telling us about what does not work with the current system and what they know could have helped.

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Department of Justice (2015) Northern Ireland Registered Intermediaries Scheme Piolet Project: Post Project Review  
<https://www.justice-ni.gov.uk/sites/default/files/publications/doj/registered-intermediaries-post-project-review-feb15.pdf>

Equality and Human Rights Commission (2017) *Experiences of people with a learning disability in the Scottish criminal justice system*  
<https://www.equalityhumanrights.com/en/publication-download/experiences-people-learning-disability-scottish-criminal-justice-system>

McKinnon I et al (2015) 'Improving the detection of detainees with suspected intellectual disability in police custody' *Advances in Mental Health and Intellectual Disabilities*, vol 9: 4pp 174-185  
[http://eprint.ncl.ac.uk/file\\_store/production/212469/5F3A5385-5A69-4A26-9159-7903B757C5A8.pdf](http://eprint.ncl.ac.uk/file_store/production/212469/5F3A5385-5A69-4A26-9159-7903B757C5A8.pdf)

Scottish Government (2011) *The Carloway Review 2011*,  
<http://www.gov.scot/Topics/archive/reviews/CarlowayReview>

Supporting Offenders with Learning Disabilities Network (2016) *Improving support for people with learning disabilities – from arrest to court*. SOLD Conference report 24.8.2016  
<https://soldnetwork.org.uk/wp-content/uploads/2016/07/SOLD-24th-August-2016-report-V3-.pdf>