



Research into CPS decision-making in cases involving victims and key witnesses with mental health problems and/or learning disabilities

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EXECUTIVE SUMMARY

Context

The Crown Prosecution Service (CPS) is fully committed to ensuring that victims and witnesses with mental health problems and/or learning disabilities (MH/LD) are well served by the Criminal Justice System (CJS), particularly by the CPS. As part of its research programme, the Policy Directorate Research Team undertook a study to explore CPS decision-making in cases that involved victims and key witnesses with mental health problems and/or learning disabilities.¹

However, obtaining a reliable picture of the number of victims and witnesses with MH/LD within the CJS is problematic, as there is no routine recording or reporting which identify cases of this type. In spite of the lack of official statistics, research indicates that people with MH/LD are at greater risk of becoming victims of crime and experiencing harassment and bullying than the general population (see Williams, 1995; Brown, Stein and Turk, 1995; Mencap, 1997, 1999; Hiday, Swartz and Swanson, 1999; Mind, 2007). To illustrate, the 1997 research by Mencap found that people with learning disabilities were twice as likely to be victims of crime than the general population; and the research by Mind in 2007 found that 71 per cent of respondents with mental health problems had been victimised in the previous two years, compared with 22 per cent of adults in the general population (Kershaw, Nicholas and Walker, 2008).

Whilst research into the criminal justice experiences of victims and witnesses with MH/LD is limited, the available evidence highlights the barriers they face when directly encountering the CJS, including reports of cases being dropped by the CPS and not resulting in a prosecution due to alleged doubts over their ability to give credible evidence (Mind, 1999). The research highlights a perception among victims and witnesses with MH/LD that the police and the CPS make unfair judgments about whether they would be able to go through the process of giving evidence in court (Mind, 2007).

¹The term 'learning disabilities' has been applied throughout this report to reflect the language used by the government in its policy papers and the language used by Respond, Mencap and VOICE UK in their work. Similarly, it is acknowledged that some people prefer to use 'people experiencing mental distress' (e.g. MIND) or 'mental illness' (e.g. Rethink, Sane), or 'mental health problems' (e.g. The Royal College of Psychiatrists). The term 'mental health problems' is applied throughout this report, as it is intended to encompass these different terms.

Between January and May 2008, the Policy Directorate Research Team undertook a research study which explored CPS decision-making in cases involving victims and key witnesses with MH/LD to identify whether there was a need for further training or information. The research was based on a review of 45 cases by an Expert Panel of CPS prosecutors; complemented by consultation with selected stakeholders whose remit included supporting victims and witnesses with MH/LD.

Summary of Key Research Findings

Application of the Code for Crown Prosecutors

- Prosecutors usually applied the Code for Crown Prosecutors appropriately in the sample of cases involving victims and/or key witnesses with MH/LD as, in all but three of the 45 cases, the Full Code Test was applied correctly; although in a further two cases the decision was not properly recorded in the file.

Type and sufficiency of information used to inform the decision-making process

- The case file review did not reveal any consistency in the type, level or source of information that was used to inform decision-making. However, the Expert Panel considered that, in ideal circumstances, a case file should contain a full assessment of the cognitive abilities of the victim and/or witness, prepared by an appropriate medical (or other) professional, and relevant to the ability of the victim or witness to take part in the criminal justice process.
- A number of barriers to accessing medical information were discovered. Stakeholders underlined the potential value of information gathered from support workers, advocates or family members relating to the potential ability of the victim or witness to give evidence at trial.

Timeliness and effectiveness of police communications

- In 38 out of 45 cases, the police were the first agency to make the CPS aware of a victim and/or key witness's potential MH/LD.
- In 12 of the 45 cases, prosecutors asked the police for more information about the MH/LD of the victim and/or key witness before making their decision.

Assessing whether there is a need for further CPS prosecutor training and/or information around victims and key witnesses with MH/LD, and what issues any training should address

- The case file review highlighted a training need for prosecutors on issues concerning understanding and awareness of MH/LD, and the effects of this (if any) on the reliability or credibility of the victim and/or key witness, and their ability to take part in a court process.
- The research supports the work that the CPS is currently undertaking to prepare a new Public Policy Statement, setting out the standards of casework and care to be applied in cases involving victims and witnesses with MH/LD.

Examining awareness amongst prosecutors of support services for victims and witnesses with MH/LD

- The case file review suggested there may be scope to improve prosecutor awareness of the relevant support services available to victims and witnesses, over and above that provided by the statutory agencies.

Identifying whether there is a need for the CPS to capture and report on a wider range of information pertaining to victims and key witnesses with MH/LD

- It proved to be difficult to identify cases involving victims and witnesses with MH/LD using CPS electronic systems.

Summary of Recommendations:

1. Prosecutors should seek specific information about the effect of the MH/LD condition on the cognitive abilities of the victim and/or witness and ensure that information on MH/LD is linked to the individual's ability to take part in a trial, and capacity to withstand the court process.
2. An aide-mémoire on charging for cases involving victims and witnesses with MH/LD should be produced to assist prosecutors in asking the right questions to support decisions regarding the credibility and reliability of victims and witnesses with MH/LD.

3. There is potential for the CPS to take on a more proactive quality assurance role, particularly in requesting more comprehensive consideration from the police of the victims' and witnesses' MH/LD status and needs.
4. The CPS should develop training materials to raise awareness and understanding amongst prosecutors of MH/LD issues.
5. Training should incorporate practical information on responding to victims and witnesses with MH/LD.
6. The CPS should consider whether it would be good practice for some aspects to be delivered by people with direct experience of MH/LD and/or of working with MH/LD individuals.
7. CPS Areas should improve their knowledge of support agencies and community groups in their Area, through closer liaison with Witness Care Units, Local Criminal Justice Boards and other CJS stakeholders.
8. The CPS should consider how to improve its data on cases that involve victims and witnesses with MH/LD.
9. The CPS should explore with other CJS agencies the possibility of a common definition in relation to mental health problems and learning disabilities, in order to improve the identification of cases; improve the support given to such victims and witnesses; and improve the accuracy and reliability of its management information.

1. INTRODUCTION

Between January and May 2008, the Policy Directorate Research Team in the Crown Prosecution Service (CPS) undertook a research study to explore CPS decision-making in cases that involved victims and key witnesses with mental health problems and/or learning disabilities (MH/LD). The research was based on a review of 45 CPS cases by an Expert Panel of CPS prosecutors; complemented by consultation with selected stakeholders. This report presents the findings from the study.

Background context

Roles and responsibilities of the CPS

The CPS was set up in 1986. It is the government department responsible for prosecuting criminal cases investigated by the police in England and Wales. In undertaking this role, the CPS:

- Advises the police on cases for possible prosecution
- Determines the appropriate charge in all but minor cases
- Keeps all cases under continuous review and decides which should be prosecuted
- Prepares cases for prosecution in court and prosecutes the cases using in-house advocates, agents or counsel to present cases
- Provides information and assistance to victims and prosecution witnesses.

The CPS is headed by the Director of Public Prosecutions (DPP). The DPP is superintended by the Attorney General who is accountable to Parliament for the Service. It is organised into 42 Areas, with each Area headed by a Chief Crown Prosecutor (CCP). A 'virtual' 43rd Area, CPS Direct, also headed by a CCP, provides out-of-hours charging advice to the police.

The CPS works in partnership with the police, courts, Home Office, the Office for Criminal Justice Reform, Ministry of Justice and other agencies throughout the Criminal Justice System (CJS). Its overall responsibility is to deliver a high quality prosecution service that brings offenders to justice, helps to reduce crime and the fear of crime and thereby promote public confidence in the rule of law.

Prosecutors, in making their decisions about whether a person should be charged with a criminal offence and, if so, what that offence should be, are bound by the Code for Crown Prosecutors ('the Code', Crown Prosecution Service, 2004), issued by the DPP. The Code sets out the general principles prosecutors should follow when they make decisions on cases, and must be read alongside the Director's Guidance on Charging (Crown Prosecution Service, 2007).

Crown prosecutors make charging decisions in accordance with the Full Code Test, which has two stages. The first is the evidential sufficiency stage. The prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. At this stage, the prosecutor is required to have regard to all the circumstances of the case and consider whether all the evidence available is admissible. The second is the public interest stage. If the case passes the evidential stage, the prosecutor must decide if a prosecution is needed in the public interest. A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those in favour.

Victims and witnesses with MH/LD and the role of the CPS

The CPS is strongly committed to supporting victims and witnesses through the criminal process. In addition to the Code, the CPS has responsibilities under the Code of Practice for Victims of Crime (Home Office, 2005) which sets out service responsibilities for each agency in the CJS. The CPS also complies with the Prosecutor's Pledge (Crown Prosecution Service, 2005), which articulates the level of service that victims can expect to receive from prosecutors and which complements the Code of Practice for Victims of Crime.

Many people worry about attending court to give evidence. Vulnerable victims and witnesses (for example, those with MH/LD) may require greater support through the process than other victims and witnesses. In these circumstances, witnesses would be eligible for special measures in order to support them in giving their best evidence in court (Home Office, 2002). Each victim or witness has individual requirements and the service provided to the victim or witness should be tailored to fit those requirements.

It is the responsibility of the police officer taking the witness statement to identify any particular witness needs using a structured process, with a set of specific questions (found on the back of the Form MG11²). The police officer should also complete a Form MG2³ as appropriate. This process is intended to ensure, amongst other considerations, that the police officer establishes whether the witness has MH/LD.

Supporting victims and witnesses with MH/LD: the use of special measures

The Youth Justice and Criminal Evidence Act 1999 contains a range of special measures designed to assist vulnerable and intimidated witnesses. Section 16(2)(a) of this Act states that vulnerable witnesses are eligible for assistance if the court considers that the quality of their evidence is likely to be diminished on the grounds of age or incapacity: see Annex A. A menu of special measures can help vulnerable victims and witnesses provide their best evidence both at the investigative and trial stages. The prosecutor can apply for a video-recorded statement to be admitted as the witness' evidence-in-chief at trial; intermediaries can assist with specific communication needs throughout the criminal justice process; and further evidence at trial can be given via a live link or from behind a screen.

The introduction of joint police/CPS Witness Care Units under the 'No Witness, No Justice' programme in 2005 means that the CPS is much more responsive to witness requirements throughout the process. There are now 165 Units across England and Wales, which provide a single point of contact for victims and witnesses from the point of charge until the conclusion of the case.

Witness care officers are required to undertake a detailed needs assessment with every victim and/or witness, once a 'not guilty' plea has been entered. The needs assessment ensures that the individual needs of victims and witnesses are identified and met so that they have all the support and information they need to enable them to attend court and give their best evidence. This may include providing transport and/or a pre-trial familiarisation visit to the court. A failure to identify a victim and/or

² Form MG11: Witness Statement.

³ Form MG2: 'Initial Witness Assessment' which provides information to the CPS for a special measures meeting in respect of any vulnerable or intimidated witness, and information for the CPS to apply for special measures to the court.

witness with MH/LD at the pre-charge decision stage may still be rectified when the witness care officer conducts the needs assessment.

Background to the research - existing evidence base

Understanding the prevalence of victims and witnesses with MH/LD

It is difficult to obtain a reliable picture of the number of victims and witnesses with MH/LD within the CJS, as there is no routine recording or reporting of cases of this type. For example, voluntary and community sector organisations have pointed to the ‘...deficit of data on crime and abuse affecting adults with learning difficulties’ and how this deficit ‘hinders policy-makers...who wish to effectively target such crime and abuse’ (Ann Craft Trust, Respond and VOICE UK, 2007). In spite of the lack of official statistics in this area, research indicates that people with MH/LD are at greater risk of becoming victims of crime and experiencing harassment and bullying than the general population (see Williams, 1995; Brown, Stein and Turk, 1995; Mencap, 1997, 1999; Hiday, Swartz and Swanson, 1999; Mind, 2007). To illustrate, the 1997 research by Mencap found that people with learning disabilities were twice as likely to be victims of crime than the general population; and the research by Mind in 2007 found that 71 per cent of respondents with mental health problems had been victimised in the last two years, compared to 22 per cent of adults in the general population (Kershaw, Nicholas and Walker, 2008).

The matter is complicated by issues of definition and terminology, as there is some ambiguity over use of terms such as: ‘mental disorder’; ‘mental illness’; ‘learning difficulties’; and ‘learning disabilities’. It is acknowledged that some people and organisations prefer to use: ‘people experiencing mental distress’ (e.g. MIND) or ‘mental illness’ (e.g. Rethink, Sane), or ‘mental health problems’ (e.g. The Royal College of Psychiatrists). The term ‘mental health problems’ is applied throughout this report, as it is intended to encompass these different terms. Similarly, it is also understood that some people and organisations prefer to use the term: ‘learning disabilities’ while others prefer to use the term: ‘learning difficulties’. The term: ‘learning disabilities’ has been applied throughout this report to reflect the language used by the government in its policy papers and the language used by Respond, Mencap and VOICE UK in their work.

It is also important to state that mental health problems cover a broad spectrum of conditions and illnesses. The severity of symptoms and effects on the individual can, therefore, vary considerably. This is also true of learning disabilities, which represent many different types of conditions affecting cognitive, neurological, psychological and/or social development of an individual. In addition, a person may have both a mental health problem and a learning disability.

Understanding the criminal justice experiences of victims and witnesses with MH/LD

Research into the experiences of victims and witnesses with MH/LD is limited. Academic studies have tended to concentrate on people with learning disabilities rather than mental health problems, with the focus primarily on their experiences in court as witnesses (see Clare and Gudjonsson, 1993, 1995; Milne, Clare and Bull, 2002; Kebbell, Hatton and Johnson, 2004). The available research highlights the barriers that victims with MH/LD may face when encountering the CJS, with reports of cases being dropped by the CPS due to doubts over the ability of a victim to give credible evidence (Mind, 1999), and a perception that once an incident had been reported, the police and the CPS made unfair judgments about whether the victim would be able to go through the process of giving evidence in court (Mind, 2007).

The previous research draws attention to concerns that witnesses with MH/LD are unfairly perceived by CJS agencies to have low credibility, which results in fewer cases progressing to trial and ultimately obstructs fair access to justice. The present study was designed to address such issues.

Research aims and objectives

The overall aim of the research was to explore CPS decision-making in cases that involved victims and key witnesses with MH/LD, focusing on cases that did not proceed to trial. The research was designed to address two key aims and a number of underpinning objectives.

Aim 1: Examine the CPS decision-making process in cases that involved victims and key witnesses with MH/LD and did not proceed to trial.

Objectives:

- Review whether prosecutors appropriately applied the Code for Crown Prosecutors in these cases.
- Ascertain what information prosecutors used to assess the credibility and reliability of victims and key witnesses with MH/LD, and whether this information was sufficient to inform the charging decision.
- Explore whether there were different reasons for the charging decision (that is, why the CPS recommended ‘No Prosecution’⁴ [previously known as No Further Action] or discontinued the case after it was charged), and if this was related to whether the victim and/or key witness had a mental health problem or a learning disability.
- Explore the timeliness and effectiveness of police communications with the CPS regarding the MH/LD status of victims and/or key witnesses.

Aim 2: Inform the need or otherwise for further CPS training or information.

Objective:

- Assess whether there is a need for prosecutor training around victims and key witnesses with MH/LD and, if so, identify what issues any training should address.
- Review awareness amongst prosecutors of support services for victims and key witnesses with MH/LD.
- Identify whether there is a need for the CPS to more effectively capture information about cases that involve victims and key witnesses with MH/LD.

The research was designed to provide fresh insight and a clearer understanding of how the CPS responds to victims and witnesses with MH/LD.

Report structure

The remainder of the report is structured as follows:

- Chapter 2 provides an explanation of the approach and methodology adopted for the research, and outlines the methodological limitations; and

⁴ The term “No Prosecution” was recently introduced by the CPS and is used to describe cases which for evidential, public and other reasons lead to ‘No Prosecution’ decisions by the prosecutor or the police.

- Chapter 3 presents the findings from the research with specific reference to the research aims and objectives.

Supplementary information is provided in a number of annexes:

- Annex A Definition of vulnerable and intimidated victims and witnesses.
- Annex B Detailed methodology.
- Annex C Table A: Reasons for 'No Prosecution' cases, by MH/LD; and
Table B: Reasons to discontinue cases, by MH/LD.
- Annex D Profile of cases included the research sample.

2. METHODOLOGY

The research used qualitative methods in order to explore and address the research aims and objectives. There were three key strands to the research: case file identification; case file review; and consultation with stakeholders. A brief summary of each strand of the methodology is provided below. More detailed methodological information is provided in Annex B.

i) Case file identification

CPS case files provide a written record of the discussions, events and decisions relevant to a case. Historically, the CPS used paper files but in 2004 an electronic Case Management System⁵ (CMS) was introduced and much work is now undertaken using this system. Prosecutors have access to CMS terminals at many remote court offices and police stations but at present, in all but a few police stations, there is not a link with police computers. Therefore, in most Areas, CMS is not used to store evidence so statements and exhibits will usually be in the form of paper copies in the file. Details of pre-charge decisions, initial, summary trial or committal reviews and the indictment should be stored on CMS. However, copies of these documents must also be printed for the paper file.

A sample of finalised CPS cases was identified by using pre-defined criteria to search CMS (see Annex B for full details). Additionally, selected organisations and groups supporting victims and witnesses with MH/LD⁶ were invited to identify any relevant cases of which they were aware.⁷ A target of at least 40 case files was sought as this number was considered to be achievable and sufficient to provide insight into the research aims.

The sample comprised only 'No Prosecution' and discontinued cases and so did not include cases where the victim and/or key witness attended a trial. This was intentional and in accordance with the findings of the existing research base, which

⁵ COMPASS CMS is a national case management system and management information system. It enables better preparation and presentation of the prosecution case by helping CPS staff to manage case information from the time the CPS receives the case file to final disposal. It also supports CPS prosecutors' provision of charging decisions to the police.

⁶ These organisations included: Mind, Respond, Victim Support and the Liverpool Witness Profiling Scheme, an initiative of the Investigations Support Unit at Liverpool City Council which provides an in-depth support and preparation programme for witnesses with learning disabilities.

⁷ Despite instigating a number of lines of enquiry, no cases were submitted. A frequently reported barrier was that information on individual cases was not centrally recorded by the (national) organisations selected.

suggest that many cases involving victims and witnesses with MH/LD may be dropped before they proceed to trial (Mind, 1999; 2007).

Paper case files were requested from the CPS Areas where they were stored; 34 were submitted.⁸ Of the 34 case files, 29 were subsequently found to be appropriate for inclusion in the research.⁹ In order to meet the desired sample size of at least 40 cases, detailed Form MG3s¹⁰ from 16 of the cases files that were not made available within the timeframe of the research were collected electronically and included in the case file review.

ii) Case file review

The 29 paper case files and 16 detailed Form MG3s were passed to an Expert Panel of CPS prosecutors, so that panel members could review these cases and assess the extent to which the decisions and the process of reaching those decisions were correct and informed. Efforts were also made to obtain supplementary information (for example, Witness Contact Logs and detailed Needs Assessment Forms from Witness Care Units, where available) in order to ensure that the Panel was able to see as much information pertinent to each case as possible.

Members of the Expert Panel were selected because of their experience in prosecuting cases involving victims and witnesses with MH/LD. Expert Panel members recorded their findings on a data collection template¹¹ and undertook a peer review of each other's comments in order to increase the reliability of their findings. The Panel also participated in focused discussion around the key findings of the case file review, in order to highlight any issues that could not be captured by the data collection template.

iii) Consultation with stakeholders

⁸ In line with the CPS targets to encourage the use of the electronic filing, not all Areas keep paper files for 'No Prosecution' cases. As such, a number of Areas only keep electronic files relating to the 'No Prosecution' cases in the sample.

⁹ Reasons why case files were not appropriate for inclusion in the research included: the victim had died before the case reached court; the case was dismissed by the court (not discontinued); and it was unclear whether age or mental health was the main reason why the case was discontinued.

¹⁰ Form MG3: Report to crown prosecutor for charging decision, decision log and action plan.

¹¹ A copy of the data collection template can be obtained from the Policy Directorate Research Team.

The case file review was complemented by informal consultation with representatives of selected organisations, government departments and agencies whose remit includes supporting victims and witnesses with MH/LD, notably: VOICE UK; Respond; Ann Craft Trust; the Department of Health; and the Association of Chief Police Officers (ACPO). Consultation took the form of face-to-face meetings, steered by an interview topic guide. Findings from the consultation are interspersed with the main findings presented in the results section of the report.

Limitations of the methodology

There are a number of limitations that need to be acknowledged.

(i) Cases where MH/LD has not been identified are not addressed by the research

The research does not include any cases where the MH/LD status of the victim or key witness was not recognised or recorded in the file. Issues concerning identification and concealment of MH/LD are complex and significant, and go beyond the remit of the present research.¹²

(ii) Research does not explore potential for inequalities at other junctures in the criminal justice process

There are a number of points in the CJS at which decisions are made about a case. The research addresses decisions taken by the CPS. The research was not designed to consider issues relating to the reporting and investigation of cases, as these are matters for the police. Both unreported crimes and crimes that are reported to police but not passed to the CPS (that is, where police take the decision not to proceed further with the case¹³) are beyond the remit of the CPS, and so are not addressed in the research.

(iii) Narrow selection criteria used for case file sample

¹² For further research and discussion surrounding the issue of stigma associated with mental health problems see Crisp et al (2000); Ramsay et al (2002); Thornicroft (2006); and Department of Health (2008).

¹³ Less serious offences will not necessarily be referred to the CPS as police are able to directly dispose of these types of crimes by way of issuing a caution (or reprimand or final warning if the offender is aged 17 and under) or a fixed penalty notice. The CPS is not involved in cases in which the police issue a fixed penalty notice and is not usually involved in cases where the police issue a caution.

There is not a dedicated flag or marker on CMS that can be used to identify cases that involve victims or witnesses with MH/LD. As such, the present study used fixed selection criteria to identify suitable cases to be included in the research: see Annex B for a more detailed description of the case selection process. It was, therefore, possible that some cases involving victims and witnesses with MH/LD were excluded by the selection criteria for the research.

(iv) Small sample size

Due to anticipated difficulties in identifying relevant cases, a sample size of 40 cases was deemed to be sufficient to address the aims of the research and provide insight into CPS decision-making in cases of this type. The research used qualitative methods and the sample was not intended to be statistically representative of all CPS cases, nor of all cases involving victims and witnesses with MH/LD. Indeed, it is not possible to obtain a representative sample of all cases that involve victims and witnesses with MH/LD since the overall number of cases of this type is not currently known.

The research aims to provide an insight into prosecutor decision-making in the cases in the sample. Whilst the sample size is small, the research process was supported by the experience offered by the Expert Panel in reviewing these cases, and by wider consultation with organisations and groups that support victims and witnesses with MH/LD.

(v) Variability of the content of case files

Whilst case files can offer a comprehensive source of information about the decision-making process in a case, their content can be variable: see HMCPSI (2008). The absence of documents and forms is not necessarily indicative of the information that was available to the CPS at the decision-making stage(s). For example, information passed on orally might not always be adequately recorded in the case file, and therefore, would not have been available to be considered by the Expert Panel in the present research.

3. RESEARCH FINDINGS

This section presents the results from the research, ordered according to the original aims and objectives of the research.

Aim 1: Examine the CPS decision-making process in cases that involved victims and key witnesses with MH/LD and did not proceed to trial.

Application of the Code for Crown Prosecutors

The following analysis considers the extent to which prosecutors appropriately applied the Code to the cases in the research sample.

Prosecutors are bound by the Code in making their decisions whether a person should be charged with a criminal offence and, if so, what that offence should be. The Code must be read alongside the Director's Guidance on Charging.

Evidential stage

The two stages of the Full Code Test must be applied. The first is the evidential stage. The prosecutor must be satisfied that there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge. This means that a jury or a bench of magistrates or a judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the alleged charge. If the case does not pass the evidential stage, it must not go ahead, no matter how important or serious the offence may be.

Public Interest stage

The second part of the Full Code Test is the public interest stage. If the case has passed the evidential stage, the prosecutor must decide if a prosecution is needed in the public interest. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence, the circumstances of the suspect or the impact on the health of the victim and/or key witness.¹⁴ The Code provides that, as a general rule, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those in favour, or

¹⁴ A list of common public interest factors can be found at paragraphs 5.9 and 5.10 of the Code for Crown Prosecutors.

it appears more appropriate in all the circumstances of the case to divert the person from prosecution. In reaching the decision the prosecutor must balance factors for and against prosecution carefully and fairly. Amongst the factors in favour of a prosecution, that are relevant to the research, are:

- The victim of the offence was vulnerable
- The offence was motivated by any form of discrimination against the victim’s ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation or the suspect demonstrated hostility towards the victim based on any of those characteristics
- There is a marked difference between the actual or mental ages of the defendant and victim, or there is any element of corruption.

Amongst the relevant factors against prosecution is:

- A prosecution is likely to have a detrimental effect on the victim’s physical or mental health, always bearing in mind the seriousness of the offence.

Turning to the research findings, Table 1 below shows that nearly half of the cases in the research sample (20 out of 45) did not pass the evidential stage of the Full Code Test.¹⁵

Table 1: Breakdown of cases according to each stage of the Full Code Test

Pass/failure at each stage of the Full Code Test	Number
Cases that failed the evidential stage	20
Cases that passed the evidential stage but failed the public interest stage	12
Cases that passed both the evidential and public interest stage	13
Total	45

In summary, 32 cases resulted in ‘No Prosecution’, and 13 cases were subsequently discontinued.

Evidential stage – research findings

The Expert Panel judged that the evidential stage of the Full Code Test was properly applied in all but two of the 45 cases. In these two cases, ‘No Prosecution’ decisions

¹⁵ For a detailed breakdown of evidential and public interest reasons, see Table A and Table B at Annex C.

were made on public interest grounds without sufficient consideration of the evidential stage. There were a further two cases where the decision made at the evidential stage was not properly recorded in the file.

Public interest stage – research findings

Twenty cases did not pass the evidential stage of the Full Code Test. The public interest stage was automatically applied to the 25 cases that remained. The Expert Panel judged that the public interest stage was properly applied in 24 cases. In the 25th case, the ‘No Prosecution’ decision seemed to hinge on the credibility of the victim and/or key witness and, as such, was an evidential issue, rather than a public interest issue.

In summary, of the 45 cases in the sample, in all bar three cases, the Full Code Test was applied correctly, while in a further two cases the decision was not properly recorded in the file.

Type and sufficiency of information to support decision-making

Without sufficient information on the MH/LD status of the victim and/or witness, there is a risk that a prosecutor may make assumptions about the credibility and reliability of the individual, or their capacity to withstand the court process; an issue that has previously been highlighted by research (Mind, 2007). The Code for Crown Prosecutors provides guidance on issues that prosecutors should consider when assessing the reliability of the witness, including the impact of factors such as the witness’ age, or level of understanding. Questions that prosecutors should address when considering the credibility of the witness include whether the witness has any relevant previous convictions, and whether there is further evidence which may support, or detract from, the account given by the witness.

Type of information

The majority of cases in the sample (35 out of 45) contained information recorded either in the Form MG3 or elsewhere in the case file to indicate that the MH/LD of the victim and/or key witness was brought to the attention of, and taken into account by,

the prosecutor at the pre-charge decision stage.¹⁶ The most common sources of information were provided by the police (mainly in the form of the written communication on the Form MG3, and also a written record of an oral briefing), which demonstrates the pivotal role of the police in the early identification of victims and witnesses with MH/LD, and underlines the importance of effective and timely communication channels between the police and the CPS.¹⁷

Among the 35 cases, a variety of sources and materials was used by prosecutors at the pre-charge decision stage to assess the reliability and credibility of the victim and/or key witness, including:

- Written information provided by police on the Form MG3 (30 cases);
- Information from the victim and/or key witness, such as a statement (10 cases);
- Written record of an oral briefing with the police officer in charge of the investigation (7 cases)
- Statement or report from a medical professional (7 cases)
- Statement from a close relative or support worker of the victim and/or key witness (7 cases)
- Statement or report from a non-medical professional (3 cases)
- Form MG6¹⁸ (4 cases)
- Form MG2 (1 case)
- 'Other'¹⁹ (7 cases).

In many of these 35 cases, more than one source of information was identified by the Expert Panel. In 12 of these cases, three or more sources of information were identified as being used by the prosecutor to support their decision-making process in respect of the reliability and credibility of the victim and/or key witness with MH/LD.

Sufficiency of information

¹⁶ Of the remaining ten cases, four cases did not provide any evidence to show consideration of the MH/LD status, despite being alerted at the pre-charge stage. In a further four, the MH/LD status of the victim and witness was only identified at the post-charge stage; and in two cases, there was insufficient information in the files to determine whether any consideration was given by the CPS to MH/LD at the charging/initial review stage.

¹⁷ See subsequent findings for detailed consideration of issues concerning effective and timely communication with the police.

¹⁸ Form MG6: 'Case File Information' form which is designed to advise the prosecutor of all relevant background information and assist in considering evidential and public interest criteria in the Code for Crown Prosecutors.

¹⁹ Includes local police forms and notes from intermediary.

The case file review also sought to consider the extent to which this information was sufficient to inform prosecutors' decisions.

While the analysis indicates that the MH/LD status of the victim and/or key witness was taken into account in 35 cases at the pre-charge stage, in approximately half of these cases (17), the Expert Panel judged that the information was less comprehensive than in the remaining 18 cases. The case file review did not enable any conclusions to be drawn regarding the type, level, or source of information that could be considered sufficient to inform prosecutor decision-making. However, the Expert Panel deemed that, in ideal circumstances, a case file would at least contain a full assessment(s) of the cognitive ability of the victim and/or witness, prepared by an appropriate medical (or other) professional. This was considered to be a valuable information source that was missing in at least eight out of 17 cases.²⁰

This finding suggests that information from a relevant professional is an important contribution to the decision-making process in cases involving victims and key witnesses with MH/LD. Given that prosecutors are not trained to undertake any form of assessment of the MH/LD status of the victim or key witness, especially in relation to the likely impact on their ability to take part in a court process, the importance of information from a relevant professional in this respect is clear. However, not all people experiencing MH/LD will have a diagnosis, or access to medical and/or statutory support. In these circumstances, obtaining medical or other professional information on the nature of the MH/LD status of the victim and/or key witness may prove difficult, and may not always be practical or possible.

In the case file sample, there were examples of a number of barriers to effective information-gathering which prevented or delayed prosecutors from gaining sufficient information to inform their judgment. In one case, the police requested hospital records but the victim did not consent to these being made available. In another case, the prosecutor attempted to obtain further information from the Officer-in-Charge (OIC), but this was not received. In a further example, the prosecutor

²⁰ Specific types of information included psychiatrists' reports, psychologists' reports and Statements of Special Educational Needs (SEN),

requested a psychiatric report, which was not made available until several months after charge and then did not answer the questions raised by the prosecutor.

When discussing potential barriers to accessing information from a relevant professional, the Expert Panel raised the point that other sources of information could also be relevant. In particular, it was felt that the victims' and/or witnesses' support worker, advocate or family member could also provide vital information about the potential ability of the individual to give evidence at trial (on the understanding that they are not the defendant or a witness themselves). In addition, it was noted that, where an intermediary²¹ is engaged, a copy of the intermediary's report could be useful. While it would not focus on cognition and is, therefore, not a substitute for a psychiatrist's or psychologist's report, an intermediary's report can nonetheless provide an insight into the communication skills of the victim and/or witness, which might help the prosecutor in the charging-decision process.

The case file review suggests that there is scope for improvement in respect of information-gathering for cases involving victims and key witnesses with MH/LD. The review suggests it is important that attempts are made by the prosecutor to ensure pertinent information is obtained, wherever possible, so that the charging decision is fully and accurately informed by the victim's and key witness' MH/LD status. Awareness of that status will also be relevant to the prosecutor's view of the individual's ability to take part in the court process. Whilst this may not always be a feasible option, the prosecutor should consider the available options and ask the right questions.

Recommendations

1. Prosecutors should seek specific information about the effect of the MH/LD condition on the cognitive abilities of the victim and/or witness and ensure that information on MH/LD is linked to the individual's ability to take part in a trial, and capacity to withstand the court process.

²¹ Intermediaries are professionals from a range of backgrounds such as speech and language therapy, psychology and social work who can help witnesses give evidence in court. For more information see: http://frontline.cjsonline.gov.uk/_includes/downloads/guidance/victims-and-witnesses/Intermediary_Procedural_Guidance_Manual.pdf

2. An aide-mémoire on charging for cases involving victims and witnesses with MH/LD should be produced to assist prosecutors in asking the right questions to support decisions regarding the credibility and reliability of victims and witnesses with MH/LD.²² This should provide a comprehensive list of points to consider, such as:
- Are you satisfied that all the available information has been gathered?
 - Do you have enough information to ensure that the victim care issues can be comprehensively assessed (e.g. Form MG11 and Form MG2)?
 - Does the MH/LD condition affect the ability of the witness to recollect events accurately?

Differences in the reasons for the charging decision, and relationship to whether the victim and/or key witness had a mental health problem or learning disability

The following section considers whether there were differences in the reasons cited for the charging decision (that is, why the CPS recommended 'No Prosecution' or discontinued the case after it was charged), and if this was related to whether the victim and/or key witness had a mental health problem or whether the victim and/or key witness had a learning disability.

Of the 45 cases in the sample:

- 25 cases contained information in the file that suggested that the victim and/or key witness had a mental health problem
- 16 cases contained information in the file that suggested that the victim and/or key witness had a learning disability
- Information in three cases suggested that the victim and/or key witness had multiple needs in that they were identified as suffering both mental health disability and learning disability
- One case contained information which failed clearly to identify whether the victim had either a mental health problem or a learning disability (or both).

²² To avoid duplication, CPS should ensure that this work links into and complements existing good practice.

Table 2 showing the range of conditions identified in the case files, grouped by ‘mental health problem’ and ‘learning disability’

Mental health problem	No of cases	Learning disability	No of cases
Depression(b)	6	Autistic Spectrum Disorder	2
Dementia	4	Non-specific learning disability(a)	3
Schizophrenia(b)	3	Down’s Syndrome	1
Bi-polar disorder	1		
Sub-total	14	Sub-total	6
Unclear/not detailed	12	Unclear/not detailed	10
TOTAL	26(c)	TOTAL	16

Notes: (a) Non-specific learning disabilities which provide some indication of the cognitive ability of the victim/witness.

(b) It is possible that victims and witnesses could have more than one condition. One case recorded that a victim had both schizophrenia and depression; which are individually recorded in the table.

(c) One case contained information to show that the victim/witness had two mental health conditions. These conditions are recorded separately, leading the total number of conditions to add up to 26, out of 25 cases where the victim and/or key witness had mental health problem(s) in the sample.

In addition to the cases detailed in Table 2, three further case files contained information to suggest that the victim and/or key witness had *both* mental health problems and learning disabilities. None of these three cases were specific about the type of MH/LD condition of the victim and/or key witness. For example, one of these cases contained reference to “borderline mental health issues/learning disabilities”.

There was one additional case in the sample which contained insufficient information to identify whether the victim had a MH or LD (or both), stating that the victim and witness had “huge difficulties”.

Consideration of MH/LD status in the decision-making process

From the total of 25 cases which involved a victim and/or key witness with a mental health problem(s), there were: 21 cases where the mental health status of the victim and/or key witness was identified during the pre-charge stage; and a further four cases where the mental health status was not disclosed and/or identified until the post-charge stage. Of the 21 cases, Expert Panel members found evidence in 17

cases to show that the mental health status was taken into consideration by the prosecutor to inform the pre-charge decision-making. In comparison, all of the 16 cases which involved a victim and/or witness with a learning disability contained evidence demonstrating that the learning disability status of the victim and/or witness was identified during the pre-charge stage. Of these 16 cases, Expert Panel members found information in 14 cases to reveal that the learning disability status was taken into consideration by the prosecutor in the pre-charge decision-making.

Overall, it would appear that there was little difference between cases on the basis of whether the victim and/or witness had a mental health problem or learning disability. In the majority of cases in the sample, information about MH/LD appeared to have been considered by the prosecutor, where available, at the pre-charge stage.

Reasons for ‘No Prosecution’ cases

The research data were also interrogated to explore whether there were any links between the reasons for a ‘No Prosecution’ or discontinued case and the type of disability (either MH or LD).

There were 32 ‘No Prosecution’ cases in the sample. Looking first at the reasons for ‘No Prosecution’ cases, 15 (out of 25) cases that involved a victim and/or key witness with a mental health problem resulted in a ‘No Prosecution’ decision, compared to 14 (out of 16) cases that involved a victim and/or key witness with a learning disability.²³

Evidential issues pertaining to the reliability and/or credibility of the victim and key witness were the most frequently reported type of reason for a ‘No Prosecution’ decision. Public interest reasons were also commonly identified, whereby the prosecutor was informed either by the victim and/or key witness, or a professional (psychiatrist or social care manager) that it would be detrimental to the health of the victim/key witness for them to have to give evidence at a trial. Overall, the variety of different reasons cited for ‘No Prosecution’ were fairly evenly spread across mental health and learning disability categories in the sample.

²³ Two further cases involved a victim and/or key witness with both a mental health problem and learning disability; and one additional case did not contain sufficient information to identify whether the victim and key witness had either a mental health problem or learning disability, or indeed both.

However, some exceptions were observed (for further detail see Table A at Annex C). Notably, four cases resulted in a ‘No Prosecution’ decision and the reasons provided were:

- “CPS informed by police that prosecution would cause increased trauma” (two cases)
- “Expert advised witness was suggestible and may give contradictory answers in court” (one case)
- “Delay in waiting for information from police” (one case).

All these reasons were cited for cases involving victims or witnesses with learning disabilities only. In comparison, four cases that involved a victim and/or witness with mental health problems resulted in ‘No Prosecution’ where the reasons cited were:

- “CPS informed by professional that prosecution would increase trauma to the victim/witness” (three cases)
- “[CPS] concerns over the victim’s mental capacity to give evidence in court” (one case).

Reasons for discontinued cases

Public interest factors were common reasons for discontinued cases, often following information or advice from the victim and/or key witness, or a medical professional that it would be detrimental to the health of the victim/key witness to give evidence at trial. For a detailed breakdown of the reasons given for discontinuing cases in the sample, see Table B at Annex C. Further reasons were identified in cases where the victim and/or key witness withdrew their support for the case and did not wish to proceed to trial. Two cases involving victims with mental health problems were discontinued for evidential reasons, resulting from issues concerning the reliability and/or credibility of the key witnesses (who did not have any reported MH/LD).

Of the 13 cases that were discontinued, ten involved a victim and/or key witness with a mental health problem, and one involved a victim and/or key witness with both a mental health problem and learning disability. Only two cases involved a victim and/or witness with a learning disability, and both these cases ended because the victim and/or key witness indicated that they would not give evidence at the trial. In light of the small number of discontinued cases involving a victim and/or key witness with MH/LD, it is not possible to form any firm conclusions.

Timeliness and effectiveness of police communications

The police play a vital role in the identification of victims and witnesses with MH/LD. Prosecutors do not usually have any direct contact with victims and witnesses at the investigative and pre-trial stages²⁴, and prosecutors usually rely on information supplied by the police when providing charging advice or reviewing a file following a police decision to charge. As such, prosecutors are dependent on the police specifically to inform them of any disability or vulnerability detected or suspected in any victim or witness involved in the investigation.

It is often at the investigation stage that MH/LD are first apparent, and it is vital that such information is passed on to the CPS at the earliest possible stage to inform charging and the subsequent prosecution progress. Early effective communication with the police is important in order to:

- Assist the prosecutor in making an informed pre-charge decision
- Ensure that the correct support is provided to the vulnerable victim and/or witness from the outset.

The research reviewed whether the police made the CPS aware of the victim's and/or key witness' MH/LD status at the pre-charge stage; and whether the CPS requested further information of the police to inform their decision. Consultation with ACPO provided further general insight into police-CPS communications in cases involving victims and witnesses with MH/LD.

Timeliness

In most cases, the police were first to make the prosecutor aware of the potential MH/LD of a victim and/or key witness.²⁵ In all these cases, this information was provided at the pre-charge advice stage.

²⁴ The recent introduction of Pre-Trial Witness Interviews (PTWI) enables prosecutors the opportunity to conduct a pre-trial interview with key witnesses in order to reach a better informed decision about any aspect of the case. As such, some victims will meet the prosecutor at the pre-trial stage. For further detail, see CPS (2008).

²⁵ Thirty eight out of 45 case files reviewed indicated the police were the first agency to make CPS aware of any potential mental health problem or learning disability relating to the victim and/or key witness.

In three further cases, an agency other than the police alerted the CPS to a potential MH/LD. In two cases, a Witness Care Unit alerted the CPS, and in the third case, the victim's psychiatrist alerted the CPS (subsequent to a witness summons).²⁶ Whilst this latter case is an example of case-pertinent information being received late in the process, it may not necessarily reflect a police-CPS communication problem as the reasons for the apparent delay are unknown. All three cases were subsequently discontinued on public interest grounds on the basis of the detrimental effect a trial would have on the victim's and/or key witness' mental health.

However, the extent to which conclusions can be drawn in relation to the timeliness of police communication with the CPS are limited by the case selection criteria used in the present study; whereby relevant cases to be included in the research were identified by an initial scrutiny of Form MG3s: see Annex B for methodological details. As Form MG3s are completed by the police, this means that the cases in the sample could have been biased towards those where the police *did* provide initial information about the MH/LD status of the victim and/or key witness to the CPS.

Effectiveness

In 12 of the 45 cases in the research, prosecutors requested more information from police about the MH/LD of the victim and/or key witness, indicating that the police did not always provide the CPS with sufficient information at the outset. Examples of information requested by prosecutors include medical records, psychiatric reports, statements from carers and video interview evidence. This emphasis on information from (medical) professionals clearly resonates with earlier similar results in relation to the sufficiency of information to support decision-making.

In addition, consultation with ACPO clarified that the different levels of experience of police officers could have some bearing on the way that issues relevant to the MH/LD of the victim are recorded and presented to the CPS. It was felt that this could be counterbalanced by the CPS playing a greater role in quality assurance, for example, being firm in requesting that the necessary information is provided on Form MG2s and Form MG3s, to inform prosecution decision-making.

²⁶ In an additional two cases it was unclear how the CPS first obtained information relating to the victim's MH/LD.

Recommendation

3. There is potential for the CPS to take on a more proactive quality assurance role, particularly in requesting more comprehensive consideration from the police of the victims' and witnesses' MH/LD status and needs.

Aim 2: Inform the need or otherwise for further CPS training or information

Additional training and/or information requirements

An important focus of the research was to examine the extent to which further training and awareness was required in the CPS in relation to victims and witnesses with MH/LD. The case file review suggests there is a training need for CPS prosecutors on issues concerning their understanding and awareness of MH/LD, as some cases revealed a low level of knowledge of MH/LD.

For example, in one case, the relevance of a witness' learning disability was not adequately explored by the police or the CPS. Upon the advice of the OIC, a 'No Prosecution' decision was made on public interest grounds on the basis that the witness would not be able to cope with giving testimony in court. This decision was taken despite there being no medical or other evidence to support this conclusion and despite the fact that the witness was a mature adult living almost independently. The Expert Panel queried on review whether, with appropriate support, the witness could have participated in the court process.

This case is one of a number where the Expert Panel deemed that the MH/LD status of the victim and/or key witness was taken into account but where greater consideration of the issues was needed before a decision was made. In these cases, there were examples where the victim and/or key witness was referred to as having 'mental health issues' or 'learning difficulties' without any attempt to better define the issues or address in specific terms the effect of this (if any) on the reliability or credibility of the victim and/or key witness, or their ability to take part in the court process. This point accords with earlier findings in this report regarding the

'sufficiency' of information used to support decision-making, whereby the Expert Panel deemed that, in ideal circumstances, the file should contain a full assessment of the cognitive ability of the victim and/or witness, prepared by an appropriate professional.

The research therefore supports the work the CPS is currently undertaking to prepare a new Public Policy Statement, setting out the standards of casework and care to be applied in cases involving victims and witnesses with MH/LD.

Ten of the 45 cases in the sample were found by the Expert Panel to contain information to suggest that the CPS considered whether relevant agencies or organisations could support the victim and/or key witness. The extent of the consideration varied from case to case. For example, in one case, there was evidence in the file that there had been a great deal of input from local social services. In contrast, in another case, whilst there was information to indicate that support was offered, the Expert Panel felt that more could have been done, for example, the use of an intermediary or referral to appropriate counselling.

Evidence from these ten cases also revealed that consideration of support services focused on statutory agencies rather than community groups. Notably, social services were considered and/or already involved in supporting the victim and/or key witness in nine of the ten cases.²⁷

In six cases, the Expert Panel deemed that it would not have been appropriate to involve external agencies to support the victim and/or key witness with MH/LD. Again, reasons around why external agencies should not be involved varied from case to case but included the fact that the case was not seen to have progressed far enough for this to be relevant.

In the remaining 29 cases, there was not any information in the Form MG3 or elsewhere in the case file to indicate that the prosecutor had considered relevant support services or community groups aimed at helping victims and witnesses with

²⁷ The use of an intermediary was considered in the remaining case.

MH/LD. This finding suggests that there is scope to improve prosecutor awareness of the relevant support services available to victims and witnesses.

Recommendation

4. The CPS should develop training materials to raise awareness and understanding amongst prosecutors of MH/LD issues²⁸, including:
 - Overview of the types (and prevalence) of MH/LD conditions and how these can be identified
 - Effect of MH/LD conditions on cognitive ability and how this can affect the way that language is expressed and understood
 - Use of special measures, intermediaries and other techniques and approaches to support victims and witnesses with MH/LD at court
 - Overview of specific offences against victims with MH/LD (such as: sexual victimisation, robbery and assault [Marley and Buila, 2001]).
5. Training should incorporate practical information on responding to victims and witnesses with MH/LD.
6. The CPS should consider whether it would be good practice for some aspects to be delivered by people with direct experience of MH/LD and/or of working with MH/LD individuals.
7. CPS Areas should improve their knowledge of support agencies and community groups in their Area, through closer liaison with Witness Care Units, Local Criminal Justice Boards and other CJS stakeholders.

Improving CPS reporting systems

It is not possible to obtain reliable data that show the number of victims and witnesses with MH/LD in the CJS. Whilst CMS contains a flag or marker to identify

²⁸ Given that some issues may overlap with the issues that relate to mentally disordered offenders, there may be value in combining training to address both victims and witnesses and offenders.

cases that meet the criteria for a 'disability incident'²⁹, this flag does not distinguish between different types of disability (mental or physical).

Difficulties in identification

As there is not a dedicated mental health or learning disability flag on CMS, it proved difficult to identify relevant cases for the purposes of the research. A search using the electronic flag of closest relevance to the present research ('disability incident') produced a relatively low number (55) of 'No Prosecution' and discontinued cases for the time period with which this research is concerned (1 July to 31 December 2007), and only a small number of these (16) involved victims and/or key witnesses with MH/LD, with the remainder involving physical disabilities.

In the absence of a dedicated flag, the research had to rely upon other potential identifying categories to select cases that were relevant to the research aims: see Annex B for further details of methodology. In order for the CPS to be able more reliably to identify and monitor cases involving victims and witnesses with MH/LD, consideration should be given to improving the ability to record these cases accurately.

The research detected inaccuracies in the allocation of some cases to particular categories, which further compounded the difficulty in identifying appropriate cases for purposes of the research. This may reflect confusion amongst CPS staff regarding the definition of mental health problems and learning disabilities. It would therefore be beneficial if the CPS explored with other CJS agencies the possibility of agreeing a common definition in relation to mental health problems and learning disabilities.

Recommendations:

8. The CPS should consider how to improve its data on cases that involve victims and witnesses with MH/LD.

²⁹ All cases which involve any crime perceived to involve disability as a factor should be recorded under this flag, for example: disability hate crimes.

9. The CPS should explore with other CJS agencies the possibility of a common definition in relation to mental health problems and learning disabilities, in order to improve the identification of cases; improve the support given to such victims and witnesses; and improve the accuracy and reliability of its management information.

ANNEXES

Annex A – Definition of vulnerable and intimidated victims and witnesses

The Youth Justice and Criminal Evidence Act 1999 contains a range of special measures designed to assist vulnerable and intimidated witnesses. Section 16(2)a of the Act defines vulnerable witnesses who are eligible for assistance on grounds of age or incapacity thus:

“(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—

- (a) if under the age of 17 at the time of the hearing; or
- (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—

- (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the [1983 c. 20.] Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
- (b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

(5) In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the

questions put to the witness and can be understood both individually and collectively.”

Annex B – Detailed Methodology

Annex B provides more detailed methodological information about the case file identification process; and case file review method adopted in the research.

i) Case file identification

The sample of case files was identified using pre-defined criteria to search CPS electronic data systems (COMPASS Management Information System [MIS]³⁰). Acknowledging different clerical arrangements in CPS Areas, cases were deliberately over-sampled in order to compensate for an anticipated low return of case files. In addition to probing MIS, selected organisations and groups³¹ that support victims and witnesses with MH/LD were invited to nominate any relevant cases of which they were aware. However, despite instigating a number of lines of enquiry, no appropriate cases could be identified. A frequently reported barrier was that information on individual cases was not centrally recorded by the selected (national) organisations, who needed to contact regional and local staff members directly to request nominations, relying on anecdotal reports. This was considered to be a resource-intensive process for the organisations to undertake within the short timescales of the research. Whilst one organisation submitted details of two cases, upon further investigation, neither case was appropriate for inclusion in the research: one involved a defendant (not a victim or witness) with MH/LD and the other case had never been brought to the attention of the CPS. Another organisation was able to provide details of one potentially appropriate case; however, despite making enquiries with the relevant CPS Area, it was not possible to secure the case file within the timescales of the research.

³⁰ MIS is an electronic application used by the CPS to report on case-related data entered into CMS. The MIS reports provide the CPS with real-time reports of the work being handled by each unit, allowing CPS managers to obtain a clear picture of how their Area or unit is performing.

³¹ These organisations included: Mind, Respond, Victim Support and the Liverpool Witness Profiling Scheme, an initiative of the Investigation Support Unit at Liverpool City Council which provides an in-depth support and preparation programme for witnesses with learning disabilities.

In the absence of a dedicated MH/LD flag or marker to identify cases that involved victims or witnesses with MH/LD, MIS was searched for cases that were finalised between 1 July and 31 December 2007 and which fell into one of the following three categories:

- Cases flagged as 'disability aggravated'³²
- Cases that had an unsuccessful outcome (that is, the case resulted in 'No Prosecution' or was discontinued) where the given reason was code 'P12 – effect on victim's physical or mental health'
- Cases flagged as involving a 'vulnerable/intimidated victim', within the meaning of the Youth Justice and Criminal Evidence Act 1999.

It is not possible to separate out the nature of disability (physical or MH/LD) in any of the categories on MIS; therefore, it was necessary to scrutinise each case on the COMPASS case management system (CMS) to determine with a greater level of accuracy whether the case was appropriate for inclusion in the sample. This was achieved by reviewing the Form MG3s and letters of discontinuance stored on CMS and looking for evidence to suggest that the victim and/or witness had a mental health problem and/or a learning disability.

Seventy five case files were requested from CPS Areas, but only 34 were submitted. Of these 34 case files, only 29 were subsequently found to be appropriate for inclusion in the research sample.³³ In order to meet the desired sample size of at least 40 cases, detailed Form MG3s from 16 of the cases files that were not made available within the timeframe of the research were collected electronically and included in the case file review.

ii) Case file review

The 29 paper case files and 16 detailed Form MG3s were passed to an Expert Panel of CPS prosecutors, in order for panel members to review these cases and assess the extent to which the decision-making was sound and informed. Efforts were also made to obtain supplementary information (for example, Witness Contact Logs and

³² Since interrogating MIS in January 2008, the 'disability aggravated' flag has subsequently been renamed 'disability incident'.

³³ Five case files were found not be appropriate for inclusion in the research for reasons including: the victim died before the case reached court, the case was dismissed by the court (not discontinued), and the link between age and mental vulnerability was too tenuous.

detailed Needs Assessment Forms from Witness Care Units, where available) in order to ensure that the Panel was able to see as much information pertinent to each case as possible.

There were ten members of the Expert Panel, comprising CPS prosecutors (including Disability Hate Crime Co-ordinators) with experience of handling cases involving victims and witnesses with MH/LD, a C2 prosecutor and the CPS Senior Policy Adviser for victims and witnesses. The Expert Panel recorded their findings on a data collection template³⁴, which was used as the main basis for analysis. The Panel also participated in focused discussion around the key findings of the case file review, in order to highlight any issues that could not be captured by the data collection template.

Annex C – Detailed reasons for ‘No Prosecution’ and discontinued cases, by MH/LD

Table A: Breakdown of reasons for ‘No Prosecution’ cases, by MH/LD

Reason for ‘No Prosecution’ cases	MH	LD	MH/LD	Unclear	Evidential/ Public Interest
Unable to prove a legal element/legal element missing	4(a)	1	1	-	Evidential
Victim’s account showed inconsistencies	3(a)	2	-	-	Evidential
CPS decision that prosecution would cause increased trauma	1	2	-	1	Public interest
Victim did not wish to proceed the case	2	1	-	-	Public interest
CPS informed by professional that prosecution would cause increased trauma to the victim/witness	3	-	-	-	Public interest
Lack of independent support for allegation	-	2	1	-	Evidential
CPS informed by police that prosecution would cause increased trauma to the victim/witness	-	2	-	-	Public interest
Victim not thought to be	1	1	-	-	Evidential

³⁴ A copy of the data collection template can be obtained from the Policy Directorate Research Team.

Reason for 'No Prosecution' cases	MH	LD	MH/LD	Unclear	Evidential/ Public Interest
reliable as (CPS) concerns that victim is unable to identify assailants					
Victim not thought to be credible as has made previous (false) allegations	1	1	-	-	Evidential
(CPS) concerns over victim's mental capacity to give evidence in court	1	-	-	-	Evidential
Expert advised witness was suggestible and may give contradictory answers in court	-	1	-	-	Evidential
Delay in waiting for information from police	-	1	-	-	Evidential

Notes: (a) One case (mental health) reported two reasons which are counted separately: the victim's account showed inconsistencies and unable to prove a legal element.

Table B: Breakdown of reasons to discontinue cases, by MH/LD

Reason to discontinue	Mental Health (MH) disability	Learning Disability (LD)	MH & LD	Total
Health care professional advised victim was not fit to attend court	4(a)	-	1	5
Victim/witness did not want to proceed and retracted/refused to make statement	2(a)	2	-	4
Victim/witness unable to attend trial	2	-	-	2
Issues concerning credibility/reliability of key witness (non MH/LD)(b)	2	-	-	2
Witness' close relative advised not appropriate to put witness through the court process	1	-	-	1

Notes: (a) One case (mental health) cited two reasons which are hence counted separately: that the victim retracted their statement, and a Doctor's letter was received to advised that the victim was not fit to attend court.
(b) In one case, the witness on whom the case relied (who did not have MH/LD) was found to have previous convictions. The CPS prosecutor felt that this undermined the credibility of the witness to such an extent that there was no realistic prospect of conviction. In the other case, both key witnesses (non MH/LD) retracted their statements, and the credibility of one of these

witnesses was very seriously undermined, so compelling the witness was not deemed an option.

Annex D – Profile of cases included the research sample

i) Breakdown of CPS Areas

CPS Area	Number of cases reviewed in the sample
Avon & Somerset	1
Cheshire	2
Derbyshire	2
Devon & Cornwall	1
Durham	3
Essex	2
Gloucestershire	1
Greater Manchester	3
Hampshire & IOW	2
Kent	1
Lancashire	3
Leicestershire	2
Lincolnshire	1
London	8
Northumbria	1
Staffordshire	1
Suffolk	1
Sussex	3
Thames Valley	1
Warwickshire	1
West Mercia	2
West Midlands	3
Total	45

ii) Profile of cases by type of allegation³⁵

Type of allegation	Number of cases
Violence against the person (for example, reported offences of assault, battery)	22
Sexual assault/sexual abuse	14
Theft/burglary	6
Criminal damage	3
Verbal abuse/harassment	2
Breach of Court Order	2
TOTAL	49(a)

³⁵ Note that these are not official categories, but formulated by the Policy Directorate Research Team based on information gleaned from the case files and Form MG3s in the sample.

Notes: (a) The total number of cases is greater than the number of cases in the sample because a small number of cases involved more than one allegation. In particular, Court Order Breaches were reported alongside another allegation.

iii) Breakdown of cases by type of setting (institutional or non-institutional setting)³⁶

Institutional/non-institutional	Number of cases
Non-institutional	32
Institutional	12
Unclear	1
TOTAL	45

iv) Gender of victim and/or key witness

Gender	Number of cases
Female	28
Male	17
TOTAL	45

v) Age band of victim and/or key witness (where known)

Age band	Number of cases
Below 10 years old	0
Between 11 to 16 years old	4
Between 17 to 21 years old	3
Between 22 to 31 years old	2
Between 32 to 41 years old	1
Between 42 to 51 years old	1
Between 52 to 61 years old	3
Between 62 to 71 years old	0
Between 72 to 81 years old	2
TOTAL	16

³⁶ 'Institutional' refers to a care home, hospital or other supported residential care setting.

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