

**A CONSULTATION
ON THE
CPS POLICY ON PROSECUTING
CRIMINAL CASES INVOLVING
PEOPLE WITH MENTAL HEALTH PROBLEMS
AND/OR LEARNING DISABILITIES AS
VICTIMS AND WITNESSES**



CPS

A consultation on the CPS Policy on prosecuting criminal cases involving people with mental health problems and/or learning disabilities as victims and witnesses

The consultation process

The aim of this consultation paper is to seek a wide range of views to inform the policy and practice of the Crown Prosecution Service (CPS) in dealing with cases involving victims and witnesses with mental health problems and/or learning disabilities.

The CPS has responsibility for reviewing cases involving victims and witnesses with mental health problems and/or learning disabilities and applying the Code for Crown Prosecutors to decide whether or not there should be a prosecution. To assist prosecutors making that decision we intend to publish a policy statement by consulting publicly and internally on the issues raised in this document. We welcome views from everyone with an interest in the topic. This document will be widely circulated.

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1. Introduction

- 1.1 This document explains the way that we, the Crown Prosecution Service (CPS), deal with crimes which involve victims and/or witnesses who have mental health problems and/or learning disabilities.
- 1.2 We are publishing this statement because we want victims and witnesses with mental health problems and/or learning disabilities, their families, communities and the general public, to be confident that the CPS understands the serious nature of crimes against them. Safety and security, and the right to live free from the fear of crime, are fundamental human rights and go to the core of people's priorities. Feeling and being unsafe, or 'at risk', have a significant impact on people's health and sense of wellbeing and can leave them isolated and unable to participate socially and economically in their communities.
- The Disability Rights Commission's Attitudes and Awareness Survey (2003) revealed that 22% of disabled respondents had experienced harassment in public because of their impairment. Incidents of harassment were more acute among 15-34 year olds with 33% of this group of disabled people experiencing harassment (DRC, 2003).
 - Research by Mind disclosed that people living with mental health problems in the community experience 'shockingly high' rates of crime and victimisation, Seventy one per cent of respondents to their survey had been the victim of crime or harassment in the preceding two years.¹
 - Research by Mencap demonstrated that 90% of people with a learning disability had experienced bullying² and harassment. Sixty-six per cent of people with a learning disability had been bullied regularly with 32% stating that bullying was taking place on a daily or weekly basis.³
- 1.3 Securing the confidence of people who are targeted because of their perceived vulnerability as a result of their mental health problems and/or learning disabilities and also people affected by disability hate crime is an essential part of our approach to dealing effectively with such cases. We want to make sure that **all** people have equal access to justice.
- 1.4 Every person has an equal right to be protected by the criminal law and by the criminal justice agencies. Stopping crimes against people with mental health problems and/or learning disabilities and bringing perpetrators to justice must therefore be a priority for our society and for the CPS. We are determined to play our part by prosecuting cases effectively. In doing so, we want to promote greater confidence in the criminal justice system – a key aim for all agencies involved in the criminal justice system.

¹ 'Another assault'; Mind's campaign for equal access to justice for people with mental health problems, 2007.

² We recognise that the term "bullying" may involve criminal acts. For example, 33% reported physical attacks and other attacks including "being spat at, having your head hit against a wall, being called names, being stolen from and having stones thrown at them".

³ (Living in Fear, 2000).

- 1.5 The CPS is not the only agency that deals with crimes against people with mental health problems and/or learning disabilities. The police, the criminal courts, magistrates and judges and members of the legal profession all have roles to play in promoting greater confidence in the criminal justice system.
- 1.6 Due to the variety, context and prevalence of crimes against people with mental health problems and/or learning disabilities, we also recognise that we must work closely with social services, social care and health care inspection and regulatory bodies, hospitals, the voluntary sector and advocacy/other specialist agencies when handling cases. This does not relate solely to matters of investigation and charge, but includes, where appropriate, supporting people with mental health problems and/or learning disabilities when they are victims and witnesses.
- 1.7 In the CPS we are committed to promoting disability equality. We welcome the Disability Equality Duty which means that we must actively look at ways of ensuring that disabled people are treated equally (under the Disability Discrimination Act 2005) and the requirement to incorporate disability issues into our prosecution policies and practices as well as our employment policies and practices. This policy statement forms a key part of our response to the Disability Equality Duty and its development, implementation, and training to support implementation is included in our disability equality action plan. We are committed to its vigorous application, we will monitor its impact and we will report on outcomes.
- 1.8 People with mental health problems and/or learning disabilities also go to court as defendants. We are mindful of our responsibility under the Disability Equality Duty to ensure that defendants are treated fairly within the context of any disability they may have and we would expect that those working with them will consider any support and assistance they may need.
- 1.9 This policy statement has been developed in consultation with representatives from organisations working with, and representing, people with mental health problems and/or learning disabilities, along with people with professional knowledge in the fields of disabilities, crime reduction and victim and witness support. We have also consulted people with mental health problems and/or learning disabilities as well as representatives of disability and victims organisations. We greatly appreciate all input; however, the content of this document is the responsibility of the CPS alone. This policy statement will be supported by more detailed legal guidance for all CPS prosecutors and caseworkers so that they have a clear understanding of the policy and how we deal with crimes involving people with mental health problems and/or learning disabilities as victims and witnesses.

2. Terminology

- 2.1. The statement groups together people with mental health problems and people with learning disabilities because we acknowledge that these groups of people experience particular barriers to justice. Some of these barriers are similar across both groups, while others are particular to one group or the other, or to sub-groups such as people with a mental health problem that affects their decision-making capacity, people residing in institutional care settings or people with communication needs and a

learning disability or mental health problem. The terminology we use aims to be as inclusive as possible

- 2.2. We recognise that terminology for mental health can vary across different organisations. For the purposes of this policy statement, the term ‘people with mental health problems’ is used. It is an intentionally broad definition and has been used by a range of agencies including The Royal College of Psychiatrists, Mind, Mental Health Foundation and Mindout. The term “mental health problems” refers broadly to a range of conditions, including, but not restricted to, depression, anxiety, schizophrenia, bipolar disorder and personality disorder. Within the definition of “people with mental health problems”, we refer to people who have been diagnosed with a mental health problem (who may or may not use mental health services), as well as people who have not been diagnosed clinically but consider themselves to have mental health needs. It should be noted that legal definitions – such as those which make someone eligible for special measures – may differ to the terminology we use throughout the document. Where they do, this is noted in the text.
- 2.3. Similarly, we know that some people prefer the term: ‘people with learning disabilities’ and others prefer the term: ‘people with learning difficulties’. We have used the term: ‘people with learning disabilities’ in this document to reflect the language used by the Government in its policy papers and the language used by Mencap, Respond, and Voice UK in their work.

QUESTION 1a - Is the terminology used broad enough and/or acceptable?

1b - Would the policy benefit from a more lengthy discussion of the different types of ‘mental ill-health’ and ‘learning disabilities’ as can be found, for example, in the Judicial Studies Board ‘Equal Treatment Bench Book’ or ‘Achieving Best Evidence in Criminal Proceedings’?(See Annexes B and C).

1c - Are there other definitions which are more widely used?

3. What does this Policy cover?

- 3.1. People with mental health problems and/or learning disabilities can be victims of, or witnesses to, a wide range of crimes, as with any other member of the population. In fact, some research indicates that people with mental health problems and/or learning disabilities are at greater risk of becoming victims of crime⁴ and experience disproportionately high levels of harassment.⁵
- 3.2. Some crimes against people with mental health problems and/or learning disabilities may be unpremeditated but some may be deliberate. Some crimes may be committed against people with mental health problems and/or learning disabilities because the offender has a hostility towards people with a ‘mental impairment’. This particular kind

⁴ Williams,1995; Brown,Stein and Turk, 1995; Mencap, 1997; Hiday, Swartz and Swanson, 1999, Mind, 2007

⁵ Mencap, 1999

of 'hate crime' is discussed in more detail at paragraph 76 onwards and may amount to 'disability hate crime' as defined by section 146 of the Criminal Justice Act 2003.

- 3.3. There are some offences which can only be committed against people who are variously described in the relevant legislation as 'mentally disordered', 'lacking capacity' or as having a 'mental disorder impeding choice'. These offences involve ill-treatment or neglect, unlawful sexual activity and fraud by abuse of position.⁶
- 3.4. There will also be cases where people with mental health problems and/or learning disabilities are the victims of crime because of their perceived or actual vulnerability or their unequal access to safety; in other words, they are seen as 'easy targets'. We will argue that there is an aggravating feature to this type of crime which should be properly drawn to the attention of the court because of the deliberate targeting of a vulnerable victim. This deliberate targeting can increase the degree of culpability of the offender.

QUESTION 2a – Are the reasons why we are publishing this policy statement clear?

2b - Is it clear what the policy statement intends to cover?

2c - Are there any key issues missing?

4. Capacity

- 4.1. Section 53 of the Youth Justice and Criminal Evidence Act 1999 creates a general presumption of competence for all witnesses, exempting only those who are incapable of understanding questions put to them as a witness or giving answers to those questions which can be understood. The responsibility for proving that a witness is competent is on the party calling the witness whenever the issue is raised, either by a party to the proceedings or by the court. If a special measures direction has been given to assist the witness in testifying, or the court proposes to make such a direction, the witness should be treated as having the benefit of that direction for the purposes of assessing his competence.
- 4.2. The Mental Capacity Act 2005 states that a person must be assumed to have capacity unless it is established that he lacks capacity (section 1(1)). For the purposes of this Act, a person lacks capacity in relation to a matter: 'if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (section 2(1)).
- 4.3. People with dementia may experience 'fluctuating capacity' which can affect their ability to understand information and make decisions at different times. This means that not only may their capacity to understand information and make decisions change over a short period of time, it might also fluctuate in relation to different types of decisions. For example, a person with fluctuating capacity might be able to give a

⁶ Mental Health Act 1983, Sexual Offences Act 2003, Mental Capacity Act 2005, Fraud Act 2006.

witness statement but be unable to understand and make decisions in relation to taking part in the court process.

- 4.4. Where a witness is judged to lack capacity to make a decision in relation to a crime involving them, we will work with his or her appointed representative and in accordance with the principles of the Mental Capacity Act 2005. Where available and appropriate, we will work with Independent Mental Capacity Advocates created by the Mental Capacity Act 2005 to assist the witness to make decisions about giving evidence and what support they might need in order to do so.

5. The role of the Crown Prosecution Service

- 5.1. The Crown Prosecution Service (CPS) is the principal public prosecuting authority for England and Wales and is headed by the Director of Public Prosecutions. It was set up in 1986 to prosecute cases investigated by the police. The CPS is overseen by the Attorney General who is accountable to Parliament for the Service.
- 5.2. It is the responsibility of the police to investigate allegations of crime and to gather evidence about what occurred. It is the responsibility of the CPS to decide charges in all but minor and routine cases, which the police can still charge. Our prosecutors will work with the police to ensure that cases involving people with mental health problems and/or learning disabilities are identified as early as possible so that the correct charging decision may be made.
- 5.3. The criminal justice system in England and Wales is based on witnesses coming to court to give evidence about what occurred. Usually, witnesses give evidence in open court with members of the public and press there. The defendant is almost always present as well. The reporting of crime and the giving of evidence is a public duty and the key to any successful prosecution is based on the willingness of witnesses to come forward.
- 5.4. We know that people with mental health problems and/or learning disabilities are sometimes reluctant or unable to report offences, with or without support. Even if extra support is not required, we know that people may not report incidents to the police for fear of repeat victimisation, fear of the repercussions of reporting, concerns about continuing dependency on the alleged perpetrator or even being removed from their own home and being put in an institution or care home. This may also be the case where people are targeted because of their unequal access to safety or on account of the environment in which they live, for example, in a hospital, care home or in their own home. Even if incidents have been reported, people may be reluctant to give evidence if the perpetrator is prosecuted, or they may need particular support and help to do so.
- 5.5. We will do everything that we can to make giving evidence in court as easy as possible and will consider what measures are available and suitable to support victims and witnesses so that they can give their best evidence. It is important to us that crimes against people with mental health problems and/or learning disabilities are reported and prosecuted and that they have equal access to justice.

6. Making decisions about which cases go to court

- 6.1. The way in which we reach our decisions about whether to prosecute is set out in the Code for Crown Prosecutors. This document is issued by the Director of Public Prosecutions. It is updated regularly so that it reflects current practice and is a public document. We review the cases that are referred to us in line with the two stages that are set out in the Code. In those cases where the police have already charged a defendant, we have to decide whether to continue with the prosecution, reviewing the case in accordance with the Code. In both situations, the responsibility whether a prosecution should take place is ours, not that of the victim or the police.

The first stage – the evidential stage

- 6.2. Crown Prosecutors 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 bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
- 6.3. To secure a conviction in a criminal court, we have to prove the case so that the court is sure of the defendant’s guilt.
- 6.4. The evidential stage of the Code test is therefore different from the test that the court applies before it may convict a defendant. Just because a case may pass the evidential stage set out in the Code does not necessarily mean that the case will result in a conviction. Many things can happen between our decision to prosecute a case and the court’s verdict: witnesses may not attend court to give evidence; witnesses may give different evidence in court from that which they gave to the police; or the defendant may give evidence and tell a different version of events which may cast doubt upon the truth of the victim’s story. It is for the court to decide whether a defendant is guilty based upon the evidence that it hears or reads. This accounts for why not all cases that are prosecuted result in a conviction.
- 6.5. If the case does not pass the first stage of the Code test based on the strength of the evidence, it must not go ahead, no matter how important or serious it may be. This is because we have reached the view that the court is not likely to convict the defendant of the crime alleged. In such cases, it is wrong to put the defendant through the criminal justice process and it is wrong to raise the expectations of victims and witnesses when we do not believe that a conviction is likely.

The second stage – the public interest stage

- 6.6. If the case does pass the evidential stage, Crown Prosecutors must then decide if a prosecution is needed in the public interest. A prosecution will usually take place: “unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour”.
- 6.7. When considering the public interest stage, one of the factors that Crown Prosecutors should always take into account is: “the consequences for the victim of the decision whether or not to prosecute; and any views expressed by the victim or

the victim's family". We always think very carefully about the interests of the victim when we decide where the public interest lies. But we prosecute cases on behalf of the public at large and not just in the interests of any particular individual. There can be difficulties in striking this balance. The views and interests of the victim are important, but they cannot be the final word on the subject of a CPS prosecution.

6.8. Some of the public interest factors that we will consider are:

1. the seriousness of the offence;
2. the victim's injuries – physical and/or psychological;
3. whether the defendant was in a position of authority or trust;
4. whether the defendant has made any threats before or after the attack;
5. whether the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
6. whether 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
7. any marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption.

6.9. In addition, we regard any offence motivated by hostility towards a victim because of a victim's disability or perceived disability as being more serious (as set out in the Code for Crown Prosecutors at paragraph 5.9(k)). As a result, the public interest in disability hate crime cases that are referred to us will almost always be in favour of a prosecution.

6.10. The Code is a public document. Copies are available from CPS Headquarters, 50 Ludgate Hill, London EC4M 7EX or from your local CPS office, or from our website: http://www.cps.gov.uk/victims_witnesses/code.html

QUESTION 3a – Are the explanations about the role of the CPS and the Code for Crown Prosecutors clear?

3b - Is more or less detail required?

7. Credibility and reliability

7.1 Many people with mental health problems and/or learning disabilities fear that they will not be seen as a credible witness or that assumptions will be made about their ability to cope with the court process.

7.2. In fact, prosecutors have to ask the right questions of the police to ensure that sufficient information is obtained to support their decisions about the credibility and reliability of ALL victims and witnesses, including those with mental health problems and/or learning disabilities.

- 7.3. As part of this process, prosecutors must not make assumptions that a particular victim or witness may not be able to give credible or reliable evidence because they have a mental health problem or a learning disability. Instead, prosecutors should ensure that any prosecution decisions based upon issues of reliability or credibility are based on sound information rather than supposition. To this end they should ask the police to obtain relevant information to ensure that a fully informed decision can be made.
- 7.4. Prosecutors should also recognise, that, where there is a question about the ability of the witness to give reliable evidence at trial, those closest to victims and witnesses – family members, support workers or advocates – may be best placed to provide an informed view. The police have a central role in ensuring that this information is obtained in a timely fashion and provided to the prosecutor. However, in some cases, the prosecutor may decide that the best way of understanding and assessing the reliability of the evidence a witness can give is by holding a pre-trial witness interview with the witness.
- 7.5. We will investigate what support can be provided to the witness through the court process. This may include applying for special measures, such as video recorded evidence in chief, live TV links, screens and intermediaries to assist the victim or witness to give their best evidence in court. We will also look for other evidence to support the case for the prosecution.

QUESTION 4a – What sort of information should prosecutors have in order to be able to assess reliability and credibility effectively and objectively?

4b - Who are the best people to ask about appropriate support for the victim or witness?

4c - How much of this should be the responsibility of the prosecutor?

4d - Would it be practical/feasible to develop a workable aide-memoire to assist prosecutors in knowing who to ask for 'sufficient' information?

8. Support for victims and witnesses

- 8.1. We recognise that legislation, Codes of Practice and policies that provide guidance on the care and treatment of victims and witnesses during the court process variously refer to victims only, witnesses only or victims and witnesses. In this part of our Policy, we have adopted the description used in each of the source documents to maintain consistency. If, for example, there is reference to a victim, the service or support being offered is only available to victims. However, reference to witnesses should also be taken to include victims who are required to attend court to give evidence.
- 8.2. The CPS is fully committed to taking all practicable steps to help victims through the often difficult experience of becoming involved in the criminal justice system. Initiatives such as No Witness, No Justice, special measures, meetings between the

CPS and vulnerable and intimidated witnesses, reporting restrictions and Witness Support, Preparation and Profiling are all designed to increase the confidence of victims in the criminal justice system. Support may also be available at a very early stage from the police, Social Services and other support agencies which can continue throughout the life of the prosecution case.

The Prosecutors' Pledge

8.3. This is a 10-point Pledge that describes the level of service victims can expect to receive from prosecutors. The Prosecutors' Pledge should ensure that the specific needs of victims and witnesses with mental health problems and/or learning disabilities are addressed; that they are assisted at court to refresh their memory from their written or video statement; and that they are protected from unwarranted or irrelevant attacks on their character. This is particularly important when victims and witnesses face inappropriate or oppressive cross-examination about their mental health history.

8.4. The Prosecutors' Pledge can be obtained from our website:
<http://www.cps.gov.uk/publications/prosecution/prosecutorpledge.html>

The Code of Practice for Victims of Crime

8.5. The Victim's Code sets out the obligations of the CPS towards victims. An example of one of the obligations is where a prosecutor decides either that there is insufficient evidence to bring any proceedings (following a full, written, evidential report from the police), or where the prosecutor decides substantially to alter or to drop any charge. In those circumstances, the prosecutor must notify the victim. If the victim is vulnerable or intimidated the prosecutor must notify them within one working day of the decision being made; in the case of other victims, the prosecutor must notify them within five working days. For disability aggravated offences, the prosecutor will also offer to meet the victim to explain the decision. Where a prosecutor has made a decision not to charge during a face-to-face consultation with a police officer (that is, without a full, written, evidential report), the police officer must notify the victim.

8.6. Copies of the Code of Practice for Victims of Crime can be obtained from CPS Communications Branch at 50 Ludgate Hill, London EC4M 7EX or from our website:
http://www.cps.gov.uk/victims_witnesses/victims_code.pdf

Victim Personal Statements

8.7. A Victim Personal Statement is a statement made by a victim of crime explaining the effect that the crime has had on him or her. In the statement, victims can describe how they have been affected by the crime. They can talk about their wishes or needs during the case and any concerns they may have as a result of the offence, for example, about safety, intimidation or bail. They can mention support (or absence of support) for the prosecution and requests for help from any of the support agencies. In this way the court can better understand not only the crime but also the context in which it occurred. It is optional, and the victim should be asked whether or not s/he wishes to make such a statement or if s/he requires help to make a statement from a support worker or family member. This statement can be

made at any time and it is possible to make more than one statement. A victim may ask the police or their CPS lawyer for a leaflet which explains what Victim Personal Statements are and how they may be used.

- 8.8. Prosecutors may use these statements to help them make decisions about cases, for example, when deciding whether they should ask the court to impose conditions when a defendant is on bail.

Witness Care Units

- 8.9. No Witness, No Justice is a joint programme between the police and the CPS and is aimed at responding to the individual needs of victims and witnesses through the establishment of dedicated Witness Care Units.
- 8.10. We have Witness Care Units in all 42 CPS Areas and these are run jointly by the CPS and the police. Witness Care Officers provide a single point of contact and tailored support for each witness to ensure that they are able to give their best evidence. This tailored support is based on a needs assessment which should lead on to the identification of specialist support that a disabled witness may need.
- 8.11. Witness Care Officers or specialist support agencies will manage the care of the victim from the time a defendant is charged right up until the conclusion of the case.

9. Helping witnesses to give their best evidence

Special measures

- 9.1. In some cases the court may agree to allow a witness to give evidence with the help of “special measures”.⁷ Special measures were introduced by the Youth Justice and Criminal Evidence Act 1999 and are available in both the Crown Court and in the magistrates’ courts. They are available to help the following witnesses:
- children under 17 years;
 - adults (17 and over) who may be considered vulnerable because of incapacity, such as a physical or mental disorder⁸; or learning disability; and
 - witnesses whose evidence is likely to be affected because they are intimidated (for example, afraid or distressed about giving evidence).
- 9.2. Special measures can help vulnerable people give evidence in the best way and with as little stress as possible.

⁷The Code of Practice for Victims of Crime, section 7.8 states that CPS prosecutors must consider applications for special measures for potentially vulnerable or intimidated witnesses.

⁸ This includes someone who is living with a particular condition which may inhibit them from pursuing a prosecution if that fact is going to be widely broadcast.

9.3. Special measures include:

- video evidence in chief;
- the court allowing the use of screens in a courtroom to prevent a victim or other witness from seeing the defendant;
- giving evidence away from the courtroom through a live television link (but the defendant will still be able to see them);
- clearing the public gallery in sexual offence cases or cases involving intimidation;
- the use of communication aids, for example, an alphabet board, sign and signal boards, or hearing loop;
- giving evidence through an intermediary;⁹ and
- in the Crown Court, advocates and the judge removing their wigs and gowns.

9.4. In deciding whether or not special measures should be sought, we have to determine if: “the quality of evidence that the witness is going to give is likely to be diminished without the special measures that are requested”. We will positively consider special measures in cases involving people with mental health problems and/or learning disabilities. We will apply for special measures in all appropriate cases, but it is for the judge to decide, and not all special measures are available in every court. As cases proceed, individual circumstances may change so special measures may need to be adapted. Wherever possible, any application for special measures will be made before the day of the trial and the court’s decision will be communicated to the witness by their Witness Care Officer.

9.5. The need for special measures should be investigated first by the police and then by the prosecutor. The Witness Care Officer may also have an input following a needs assessment but it will be for the court to decide whether they should be granted. The Code of Practice for Victims of Crime, section 7.8, states that CPS prosecutors must consider applications for special measures for potentially vulnerable or intimidated victims who are to be called as witnesses to give evidence.

9.6. When the police officer takes a statement from a witness, they will conduct an initial needs assessment for that person which will include asking the witness if they are willing to attend court and if special measures are required. This is an opportunity for the witness to tell the police about anything that is worrying them about a possible court appearance and to discuss the options for special measures. If the witness later has to attend court to give evidence, the Witness Care Officer will conduct a detailed needs assessment. This is a further opportunity for the witness to give details of their concerns and to identify whether anything has been missed.

9.7. The following paragraphs in this section give details of the various special measures that may be appropriate in a case involving a witness who has mental health problems and/or learning disabilities.

⁹Someone, usually a specially trained and registered speech therapist, who helps witnesses communicate with the court if, for example, they have a speech impediment.

Witness Support, Preparation and Profiling

- 9.8. This initiative was pioneered by the Investigations Support Unit (ISU) of Liverpool City Council working with the CPS Policy Directorate and it has been adopted in a number of other areas.
- 9.9. The initiative aims to promote equal access to justice for witnesses with learning disabilities and (other) vulnerable witnesses by providing an in-depth support and preparation programme.
- 9.10. At the pre-trial stage, an assessment of the individual's potential to be a credible and competent witness in the trial is carried out. This detailed work is undertaken to enable the witness to be prepared to be able to give evidence and a witness profile is generated. The profile is served on the court, the prosecution and the defence in accordance with an agreed protocol.
- 9.11. Additionally, the witness profile can provide the judge with information about the witness's specific requirements, which may lead to the judge giving directions regarding any assistance that the witness may need in the courtroom.

Using intermediaries for vulnerable witnesses

- 9.12. Use of an intermediary is a form of "special measure". An intermediary is someone who is approved by the court to provide a service which enables witnesses and the court to communicate. Professional intermediaries – usually speech and language therapists or deaf intermediaries who understand deaf culture – work with witnesses to make sure they are understood and can understand the questions put to them. Intermediaries can work with defence or prosecution witnesses and assist in the initial taking of their evidence and when they are in court so that they deliver their best evidence at the trial. Intermediaries come from a range of backgrounds including social work, speech and language therapy and psychology. They will normally be a specialist by training or possibly through a unique knowledge of the witness.

Meeting between the CPS and vulnerable or intimidated victims and witnesses

- 9.13. When an application for special measures is being considered, the CPS will, in some circumstances, hold an Early Special Measures Meeting with the police officer investigating the case or the officer who has particular knowledge about the needs of the witness. This is an excellent opportunity for the reviewing lawyer and the police to discuss what support can be given to enable a victim or witness to give their best evidence. The witness may be asked, in certain circumstances, if they would like to meet with the prosecutor. The purpose of their meeting is to reassure witnesses that their needs will be taken into account and thereby help build trust and confidence. The witness does not have to attend that meeting by themselves. They can bring a relative, a carer, a friend or other supporter. In order to facilitate communication with the victim, it may be appropriate for an interpreter or other similar person, to attend the meeting. Wherever possible, the CPS prosecutor will ensure that the advocate who will be conducting the trial attends the meeting between the CPS prosecutor

and the disabled witness. If the CPS prosecutor meets the witness, they will check that the witness has been offered a court familiarisation visit.

- 9.14. Further information about meetings with vulnerable or intimidated witnesses is contained in the leaflet: “Witnesses, Your meeting with the CPS Prosecutor”.
- 9.15. This leaflet is available from CPS Communications Branch, 50 Ludgate Hill, London EC4M 7EX or from our website <http://www.cps.gov.uk/publications/prosecution/witnesseng.html>

Pre-trial witness interviews

- 9.16. Pre-trial witness interviews are interviews with witnesses which are conducted by prosecutors for the purpose of assisting the prosecutor to assess the reliability of a witness’s evidence or to understand complex evidence.¹⁰
- 9.17. They can take place at any stage of the proceedings (including before a defendant is charged) until the witness starts to give evidence at trial. However, an interview should not be conducted until the witness has provided the police with a signed witness statement or has taken part in a visually recorded evidential interview. Once a prosecutor has decided that a pre-trial interview is appropriate, it should take place as soon as reasonably practicable.
- 9.18. An interview may be conducted in any case where a prosecutor considers that it will enable him/her to reach a better informed decision about how a case should proceed. Participation in a pre-trial witness interview is entirely voluntary on the part of the witness.
- 9.19. The witness may be asked about the content of his/her statement or other issues that go to their reliability. This may include taking the witness through his/her statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witnesses account.
- 9.20. We understand that there can be particular sensitivities in conducting pre-trial witness interviews with children and vulnerable witnesses. In reaching a decision to hold a pre-trial interview prosecutors will give careful consideration to the age, degree of vulnerability and status of the witness.

Reporting restrictions (Youth Justice and Criminal Evidence Act 1999, section 46)

- 9.21. In some cases, the law allows the CPS to apply for an order preventing the reporting of certain details of witnesses in the media that may lead to their identification. This direction can be sought at beginning of a prosecution and, if made, it prevents any branch of the media publishing any information that could identify the witness. Such a direction applies not only to the length of the court proceedings but for the witness’ entire life.

¹⁰ The Code of Practice for pre trial witness interviews can be found at: http://www.cps.gov.uk/victims_witnesses/further_info.html

9.22. The court must follow a set procedure when considering such an application and must determine whether a witness is eligible and, as with special measures, whether the reporting restriction will be likely to improve the quality of the witness's evidence. The focus of all of these measures is to ensure that vulnerable and intimidated victims and witnesses are better able to give their best evidence to the court.

9.23. When deciding whether a witness is eligible, the court must take into particular account:

- the nature of the alleged circumstances of the offence to which the proceedings relate;
- the witness's age;
- if relevant, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances, and any religious beliefs or political opinions; and
- any behaviour towards the witness on the part of the defendant, members of his/her family or associates, or any other person who is likely to be a defendant or witness in the proceedings.

9.24. Once these factors are determined, the court will consider:

- whether it would be in the interests of justice to make an order; and
- the public interest in avoiding a substantial and potentially unreasonable restriction on the reporting of proceedings.

9.25. The defence and/or the media are entitled to object to any application that we may make. Where a reporting direction is made, the effect will be that no matter relating to the witness during his or her lifetime shall be included in any publication if it is likely to identify him or her as a witness in the proceedings.

Treatment at Court

9.26. The Equal Treatment Bench Book contains clear guidelines for magistrates and judges about appropriate language and behaviour, so that they can play their part in ensuring that a proper level of respect for victims is maintained. The document can be found at: <http://www.jsboard.co.uk/etac/etbb/index.htm>.

QUESTION 5 - Is this information about support for victim and witnesses clear and in the right amount of detail?

10. Disability hate crime

10.1. In April 2005, section 146 of the Criminal Justice Act 2003 (CJA) came into force. Section 146 does not create any new offences; it imposes a duty upon courts to increase the sentence for any offence (for example, assault or criminal damage) aggravated by hostility based on the victim's disability (or presumed disability). Therefore, when an offender has pleaded guilty or been found guilty and the court is deciding on the sentence to be imposed, it must treat evidence of hostility based on

disability as something that makes the offence more serious. The court must also state that fact openly so that everyone knows that the offence is being treated more seriously because of this evidence of hostility based on disability.

10.2. The CPS therefore now has a duty to ensure that evidence of such hostility is brought to the attention of the sentencing court.

Definition of “Disability” and “Disability Related Incident”

10.3. For the purposes of section 146, “disability” means any physical or mental impairment.¹¹

10.4. Section 146 is also relevant to cases where the offender has assumed a person is disabled, whether or not that assumption is correct.

10.5. There is no statutory definition of a disability related incident. However, to help us apply our policy on dealing with cases of disability hate crime, we have adopted the following definition:

10.6. “Any incident, which is perceived to be based upon prejudice towards or hatred of the victim because of their disability or so perceived by the victim or any other person”.

When will section 146 CJA apply?

10.7. Section 146 CJA applies to offences committed in either of the following circumstances:

At the time of committing the offence or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on a disability or presumed disability of the victim.

10.8. For example, an assault upon a disabled person by an offender who, immediately before hitting the victim, makes a derogatory and offensive comment about disabled people.

OR

The offence was motivated (wholly or partly) by hostility towards persons who have a disability or a particular disability.

10.9. For example, assault upon the parents of a disabled child committed by an offender where there is evidence of hostility towards the disabled child because of previous remarks.

¹¹ This definition of disability is not the same definition of disability as defined by the Disability Discrimination Act 2005 which covers people with a wide variety of disabilities, including those people living with HIV or AIDS, or who have cancer or multiple sclerosis.

10.10. It is important to note that these are alternatives. This means that in a case where a demonstration of hostility can be proved there is no need also to prove a hostile motivation, and vice versa. Motive is always difficult to prove and it is likely that more section 146 cases will relate to hostile acts than to hostile motivation.

Proving that an offence was aggravated by hostility based on disability

10.11. Not all incidents that the victim or some other person has perceived to be a disability hate crime will actually be a disability hate crime in law. For section 146 to apply, the prosecution must first prove that the offender has committed a criminal offence and then prove that that offence was aggravated by hostility based on the victim's disability. To help us to decide whether an incident reported to the police amounts to a crime and whether there is enough evidence to prosecute the case, we use the Code for Crown Prosecutors.

10.12. Further information about how we prosecute these types of crimes can be found in our 'Policy for Prosecuting Cases of Disability Hate Crime', copies of which can be obtained from CPS Communications Branch at 50 Ludgate Hill, London, EC4M 7EX on our website; <http://www.cps.gov.uk/publications/prosecution/disability.html>

QUESTION 6a - Is the information about section 146 of the CJA sufficiently clear and helpful?

6b - Does it appear at the right place in the document?

11. Deciding on the charge

11.1. We may not always be able to prove that an offence that the victim or some other person thinks is a disability hate crime (a disability related incident) is a disability hate crime in law. However, it is important that any offence which is considered to be a disability hate crime by the victim or some other person is identified as such by the police and the CPS as this will inform the way that we handle the case. All disability related incidents should be identified to us by the police and we will then monitor the way we deal with them.

11.2. We will seek further information from the police to help us decide if a case can properly be prosecuted as a disability hate crime. In some cases, we may advise the police to follow up other possible lines of enquiry. This might include looking at previous reported incidents involving the same victim, or the same suspect. It may also involve seeking information or evidence from other agencies, for example, social services, the NHS, specialist support groups and community groups working with disabled people. For example, there may be current or previous eviction proceedings by a local authority or housing association involving the parties in the criminal proceedings. In all cases, prosecutors should liaise directly with the officer in the case to make sure all available evidence has been obtained and sent to the CPS to consider when reviewing the case. This may be especially important if the situation represents repeat victimisation.

- 11.3. We aim to build the strongest possible cases to put before the court. If we are satisfied that there is sufficient evidence to prove that the offence is aggravated in accordance with section 146, we will make it clear to the defence and the court that we intend to put this in evidence before the court for sentencing purposes.
- 11.4. Where a domestic violence offence is committed against a person with mental health problems and/or learning disabilities, we will also refer to our Policy for Prosecuting Cases of Domestic Violence.¹²

Charge selection

- 11.5. The charges that we decide on in any prosecution should always reflect the seriousness of what took place, any element of pre-meditation or persistence in the defendant's behaviour, the provable intent of the defendant and the severity of any injury suffered by the victim. The charges must help us to present the case clearly and simply and they must give the court the power to impose a suitable sentence.¹³
- 11.6. The CPS and the police have agreed what are called "charging standards" for certain types of offences including assaults. These are guidelines that help us to make consistent decisions about the right charges. We use them when reviewing all cases. Examples of charging standards can be seen at www.cps.gov.uk/legal/l_to_o/offences_against_the_person/
- 11.7. If a case is being prosecuted as a disability hate crime, the charge itself will not reflect the fact that the crime is a disability hate crime. This is because section 146 does not create any specific offence but instead places a duty on courts to increase sentences for offences aggravated by hostility based on the victim's disability. We do not have to prove the aggravating factor in order for the defendant to be found guilty of the offence charged (for example, assault or criminal damage). However, we do have to prove the aggravating factor to ensure that the offence is treated more seriously by the sentencing court under section 146 CJA. .

Bail

- 11.8. After a person is charged with an offence, the police will decide, in consultation with the CPS, whether to release the person on bail, with or without conditions to attend the next available court hearing (usually within two to five days of charge), or to keep the person in custody to appear before the magistrates' court that day or the next. Once the accused appears before the court, the magistrates will make the decision about bail after hearing from the prosecution and the defence. We can appeal, in certain circumstances, against a decision to grant bail.
- 11.9. The time after an offender is charged with a crime can cause anxiety for the victim and people with mental health problems and/or learning disabilities may feel particularly vulnerable. We recognise that some people may be dependent for their

¹² Available on our website: <http://www.cps.gov.uk/publications/prosecution/domestic/index.html>

¹³ Prosecutors' Pledge: "Take into account the impact on the victim or their family when making a charging decision" and The Code of Practice for Victims of Crime, section 7.2 refers to the CPS obligation to ensure that victims are informed of charging decisions taken by the CPS.

care on the perpetrator of the crime committed against them and we will work with partners to identify support mechanisms which may be provided in the community. However, in order to protect victims and witnesses from the risk of danger or threats or repeat offences, we may ask the court to impose conditions on the bail or may ask for the defendant to be remanded in custody. The court can only refuse bail, or impose conditions on bail, if it is satisfied that one of the exceptions to granting unconditional bail applies. Such exceptions would be based, for example, on reasonable grounds for believing that the person would not attend court, would commit offences or would obstruct the course of justice, perhaps by intimidating witnesses.

11.10. Conditions that the court can impose include requirements not to approach any named person or to keep away from a certain area. In making decisions about whether to oppose bail, we will take account of information provided to us by the police about the fears of a victim or witness about harassment or repeat offending.

11.11. We will work with the police and the courts to make sure that the victim or witness is kept informed, either by the police or by us, of any change to the bail conditions or custody status of the accused person. Witness Care Units, run by the police and the CPS, provide support and information for victims and witnesses and a Witness Care Officer will keep in contact with the victim or witnesses to let them know of any changes.

12. What happens if the victim withdraws support for the prosecution or no longer wishes to give evidence?

12.1. Sometimes, a victim will ask the police not to proceed any further with the case, or will ask to withdraw the complaint. This does not necessarily mean that the case will automatically be stopped. As a general rule, we will prosecute all cases where there is sufficient evidence and where there are no factors that prevent us from doing so. If the victim has decided to withdraw support for the prosecution, we have to find out why. This may involve delaying the court hearing to investigate the facts and decide the best course of action.

12.2. We will take the following steps:

- if the victim decides to withdraw support, we will ask the police to take a written statement from the victim explaining the reasons for that withdrawal, confirming whether the original complaint was true and asking whether the victim has been put under any pressure to withdraw support; and
- we will ask the police to give their views about the evidence in the case and how they think the victim might react if they are compelled to attend court.

12.3. If the victim's statement, after withdrawing the complaint, is not the same as the earlier statement, we will expect the police to ask the victim to explain why it has changed.

- 12.4. If the victim confirms that the complaint is true but still wants to withdraw that complaint, we will consider first whether it is possible to continue with the prosecution without the evidence of the victim (the evidential test) and then, if it is possible, whether we should continue the case without the support of the victim/against the victim's wishes (the public interest test).
- 12.5. The prosecutor will want to know the reasons why the victim no longer wishes to give evidence. The reason may be because the victim lives in a place in which they feel isolated or particularly vulnerable (and we recognise that feeling isolated or vulnerable may have deterred or delayed the victim from reporting the incident in the first place), or because supporting the prosecution may place the victim at further risk of harm, such as in domestic violence cases or situations where the defendant is the victim's carer and where the victim is fearful of other consequences of giving support to the prosecution. In such cases, the prosecutor must have regard to any special measures or other support available to the victim that may help them, at least in part, to overcome their concerns¹⁴.
- 12.6. If we suspect that the victim has been pressured or frightened into withdrawing the complaint, we will ask the police to investigate further. The investigation may reveal new offences, for example, harassment or witness intimidation, or that bail conditions have been breached. If necessary, we will ask the court to delay any hearing so that a thorough investigation may take place before we decide about the future of the case. If the reason for a victim or witness's withdrawal is based on fear or intimidation, the prosecutor needs to have such evidence brought to their attention in order to consider further charges of witness intimidation.
- 12.7. We will explore all these options fully, before we decide whether to proceed with a prosecution. The safety of the victim or any other potentially vulnerable person will be a prime consideration in reaching our decision.

13. Continuing a case where the victim has withdrawn their support for the prosecution

- 13.1. Generally, the more serious the offence (because of, for example, the level of violence used or the real and continuing threat to the victim or others), the more likely we are to prosecute in the public interest, even if the victim says they do not wish us to do so.
- 13.2. In cases where we have sufficient other evidence, we may decide to proceed without relying on the evidence of the victim at all.

¹⁴ Prosecutors' Pledge: "Address the specific needs of a victim and where justified seek to protect their identity by making an appropriate application to the court" and The Code of Practice for Victims of Crime, section 7.8 states that CPS prosecutors must consider applications for special measures for potentially vulnerable or intimidated witnesses.

13.3. If we decide that the case should continue and that it is necessary to rely on the victim's evidence to prove the case, we have to decide:

- whether we should apply to the court to use the victim's statement as evidence without the victim having to give evidence in court;
- whether we can proceed with the prosecution by helping the victim to attend court through the use of special measures; or
- whether we should compel the victim to give evidence in person in court.

13.4. Background information is crucial in helping a prosecutor to make the correct decision about how to proceed in a case where the victim has withdrawn their support for the prosecution.

13.5. Some of the factors that should be considered include:

- the ability of the victim to testify;
- whether there is an ongoing relationship between the victim and the defendant, for example, where the defendant is the victim's carer;
- if there is an ongoing relationship, the history of the relationship and any instances of previous abuse;
- the possibility of the defendant offending again;
- the impact on the victim of proceeding or not proceeding with the case; and
- whether there have been any threats made to the victim since the incident.

13.6. There may be occasions when it will be necessary to call a victim or witness to give evidence against their wishes because of the seriousness of the offence or the way in which it was committed. In these cases, we have to balance the reluctance of the victim or witness to give evidence with the public interest in ensuring that those accused of serious crimes are brought to court.

13.7. Prosecutors will only make that decision after consultation with the police and possibly others with a legitimate interest, for example, the victim's doctor, health care workers and/or social workers with the safety of the victim as a prime consideration. Any decision to compel someone to give evidence will also take into account the rights an individual has under the Human Rights Act 1998.

13.8. The law allows us to use the victim's statement in court without calling the victim to give oral evidence but only in very limited circumstances. It is for the court to decide whether to allow this and it will do so only if it is in the interests of justice to do so. If the victim is the only witness to the offence, it may be difficult to satisfy the court that justice is being served when the defence cannot cross-examine the only witness in the case.

14. Sentencing

- 14.1. When a defendant pleads guilty or is found guilty, the court has to decide on the sentence to impose and can choose from a broad range of penalties. The penalties may be in the form of rehabilitative orders, community penalties, fines, “bindovers” or imprisonment.
- 14.2. Before being sentenced, a defendant is entitled to make a plea in mitigation. We will challenge defence mitigation which unfairly attacks the victim’s character.¹⁵
- 14.3. Evidence of aggravation based on disability makes a case more serious and the court has a duty under section 146 CJA to take this into account when it sentences the accused and to make it clear that it has done so. We will make sure that the court has all the information it needs to carry out this duty.
- 14.4. If the defendant pleads guilty or is found guilty of an offence but disagrees with the prosecution that the offence was aggravated by hostility based on disability, the judge or magistrates will have to decide whether the aggravating feature is proved. The prosecution must call witnesses who can give evidence about the hostility and the defence will be able to cross-examine them before the court makes a decision. This process is called a “Newton hearing”. At the end of the hearing, the court must announce whether it is satisfied, having heard the evidence, that the offence was aggravated by hostility based on disability. If so, the court must treat the offence more seriously when deciding on sentence, in accordance with section 146. If not, section 146 will not be relevant.
- 14.5. We will give the court information to help it to decide whether to make any orders it has power to make in addition to the main sentence.¹⁶ This includes making orders in appropriate cases for compensation for loss, injury or damage.¹⁷
- 14.6. In all cases, it is for the magistrates or judge alone to decide what the sentence should be. In a limited number of offences (and only when the defendant is sentenced in the Crown Court), we have the right to ask the Attorney General to challenge a sentence, if we believe it is unduly lenient. Anyone, including the victim or the victim’s family, can themselves draw the sentence directly to the attention of the Attorney General, if they consider it to be unduly lenient. There is, however, a strict 28 day time limit (from the date of sentence) within which the Attorney General must apply to the Court of Appeal.

QUESTION 7 - Is the information about sentencing clear and in the right amount of detail?

¹⁵ Prosecutors’ Pledge: “Protect victims from unwarranted or irrelevant attacks on their character and may seek the court’s intervention where cross-examination is considered to be inappropriate or oppressive.

¹⁶ The Code of Practice for Victims of Crime, section 7.12 states that the CPS must answer any questions the victim has about the sentence if the victim is referred to the CPS by the Witness Care Unit (this is if the Witness Care Unit is unable to answer the victim’s questions.

¹⁷ Prosecutors’ Pledge: “On conviction, apply for appropriate order for compensation, restitution or future protection of the victim”.

15. Recording cases involving victims and witnesses with mental health problems and/or learning disabilities

- 15.1. The CPS electronic data recording system (COMPASS Case Management System) enables us to monitor cases that meet the criteria for a 'disability incident' (cases that involve any crime where disability is perceived to be a factor, for example, disability hate crimes).
- 15.2. We will continue to record cases identified as disability related incidents by the police and monitor our performance to ensure that we are using the legislation and applying this policy consistently. We will report on our performance to communities in order to build confidence in the criminal justice system.

16. Conclusion

- 16.1. The CPS is determined to play its part in reducing crimes against people with mental health problems and/or learning disabilities by bringing offenders to justice. We are committed to improving our performance in handling cases of all hate crime and we want victims and witnesses to have confidence in the way in which we review and progress our cases.
- 16.2. We hope that this Statement allows all members of society, but particularly people with mental health problems and/or learning disabilities, to have a better understanding of what the CPS does; why it undertakes its work in the way that it does; and also some of the constraints we face.
- 16.3. If we are to build an open, tolerant and inclusive society in which all its members feel safe and confident in the way in which the criminal law operates, it must be a priority for all of us to stop crimes which target or affect particularly vulnerable members of society and, where we cannot, to arrest and to prosecute the perpetrators of such crimes firmly and effectively.
- 16.4. The CPS intends to review this policy statement regularly, so that it reflects current legislation and social changes. We welcome, therefore, any observations that enable us to do this.

QUESTION 8 – Do you think that implementation of this policy will assist people with mental health problems/learning disabilities?

QUESTION 9 – Do you have any other comments that you wish to add?

Annex A

Listed below are contact details for support organisations:

We welcome your suggestions as to which support organisations should be included in Annex A.

Annex B - Extract from: ‘Judicial Studies Board Equal Treatment Bench Book’

5.1.3 Terminology

In recommending the terminology to be used in relation to disability, it is important to acknowledge that some Acts of Parliament, particularly older ones, use terminology that would now be considered out of date and in some cases inappropriate. Some judicial office-holders will continue to work with those statutory definitions and tests until such time as the legislation is updated. Whilst their findings must continue to be phrased within the technical definitions, this does not justify the wider use of language that may offend and judges should be encouraged to converse in appropriate terms.

The commonly used terms impairment, disability and handicap are frequently treated as if they mean the same thing, but they do not. It is necessary to distinguish the differing aspects of an illness or condition. It is suggested that a correct use of the common terms is as follows:

- _ an individual may have a condition, an illness or a disorder;
- _ this may result in a disability which comprises:
 - the limitation imposed upon an individual by reason of their physical, mental or sensory impairment, and
 - the disadvantage (or handicap) which this imposes on an individual in their environment;
- _ if the disability is of a sufficient degree the individual may be treated as legally incapacitated (or incompetent) and this may be due to:
 - mental incapacity, or
 - physical inability, or
 - both.

A disability is not the same as an illness. It is a personal quality in the same way, for example, as is being tall, White, Black or short-sighted.

There are a variety of definitions or tests that may be used in different contexts and it may be important in a legal context to identify the appropriate one.

World Health Organisation definitions (1982)

Impairment

A permanent or transitory psychological, physiological or anatomical loss or abnormality of structure or function.

Disability

Any restriction or prevention of the performance of an activity, resulting from an impairment, in the manner or within the range considered normal for a human being.

Handicap

A disability that constitutes a disadvantage for a given individual in that it limits or

prevents the fulfilment of a role that is normal dependent on age, sex, social and cultural factors, for that individual.

Disability Discrimination Act 1995 definitions

Section 1(1) provides that a person is treated as having a 'disability' if he or she 'has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.'

Schedule 1, para. 4(1) states that:

An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities if it affects one of the following:

- a. mobility;
- b. manual dexterity;
- c. physical co-ordination;
- d. continence;
- e. ability to lift, carry or otherwise move everyday objects;
- f. speech, hearing or eyesight;
- g. memory or ability to concentrate, learn or understand; or
- h. perception of the risk of physical danger.

This definition is not dependent upon being 'registered disabled' with the local authority or in receipt of disability benefits under the social security system. In *Dunham v Ashford Windows* ([2005] All ER (D) 104), the Employment Appeal Tribunal held that general learning disabilities (if sufficiently serious and though not a mental illness) can amount to a mental impairment for the purposes of section 1(1) of the Act.

Annex C - Extract from: 'Achieving Best Evidence in Criminal Proceedings'

Witnesses with a significant impairment of intelligence and social functioning (learning disability)

3.19 Some witnesses with a learning disability may wish to please people in authority. Some may be suspicious of people, or aggressive, or may wish to impress the interviewer. Interviewing teams should be aware of such possibilities. Consultation with people who know the witness well should give some indication of their likely behaviour and some suggestions as to how interviewers can best interact with the witness.

3.20 Some witnesses with a learning disability may show confusion, memory loss and impaired reasoning. Properly preparing the witness for the interview may help to identify and reduce confusion, emotional distress and anxiety.

3.21 In some instances of mild and moderate learning disability, a difficulty with cognition may not be immediately apparent. The experience that many people with learning disabilities have of discrimination

towards them in society is likely to act as an incentive to conceal or minimise their disability whenever possible. Where there are concerns that a witness has a learning disability, even if the extent of the disability is considered to be relatively mild, it is essential that a great deal of care is taken in framing questions and evaluating the witness's response to them.

3.22 Some witnesses with a learning disability communicate using a mixture of words and gestures (e.g. Makaton signs/symbols when used as an augmentative communication system). While an intermediary should be considered in every case where a witness has a learning disability, the services of an intermediary are essential in circumstances where a witness communicates using a mixture of words and gestures.

3.23 Some witnesses with a learning disability do not use speech but communicate using alternative methods of communication. Such alternative methods include sign and symbol systems. Examples of sign systems include Makaton signing and Sign-a-long (these systems may be used either as an augmentative system with speech or as an alternative system without it). Examples of symbol systems include Rebus, Bliss and Makaton. The symbols may be printed on boards or cards, or contained in booklets. They vary from being iconic and concrete to being more abstract in their composition. They may be personalised and can be composed of words, pictures and symbols. While an intermediary should be considered in every case where a witness has a learning disability, the services of an intermediary are essential in circumstances where a witness uses an alternative method of communication instead of speech.

3.24 Many witnesses with a learning disability will be unable to give their evidence in one long interview. In many instances, several short interviews, preferably held on the same day (though not necessarily), would be more likely to lead to a satisfactory outcome.

3.25 Preparation of the witness for the interview and a rapport stage prior to formal questioning during the interview is essential. This will allow the witness to have some familiarity with the personnel who will be involved in the interview, including the interviewer, interview monitor and intermediary (where used).

Witnesses with a mental disorder

3.33 A mental disorder does not preclude the giving of reliable evidence. However, for many disorders there is a need to protect the witness from additional stress and provide support to enable them to give reliable evidence. The recall of traumatic events can cause significant distress, and recognition of the mental state of the witness and its effect on their behaviour is crucial. There is also the need to ensure that the type of behaviour is identified, as far as possible.

3.34 Witnesses with a mental disorder, such as schizophrenia or other delusional disorders, may give unreliable evidence through delusional memories or by reporting hallucinatory experiences, which are accurate as far as the witness is concerned but bear no relationship to reality (e.g. they might describe a non-existent crime). Challenges to these abnormal ideas may cause extreme reactions and/or distress. Interviewers should probe these accounts carefully, sensitively and in a non-judgemental way with a view to identifying which elements of the account may be delusional and which elements might have a firmer foundation in reality.

3.35 Witnesses may suffer from various forms of anxiety through fear of authority, exposure or retribution. Extreme fear may result in phobias or panic attacks or unjustified fears of persecution. Anxious witnesses may wish to please, they may tell the interviewer what they believe they wish to hear or fabricate imaginary experiences to compensate for loss of memory. The evidence given by depressed witnesses may be influenced by feelings of guilt, helplessness or hopelessness. Witnesses with antisocial or borderline traits may present with a range of behaviours such as deliberately giving false evidence. These disorders cause the most difficulties and contention in diagnosis, and require very careful assessment.

3.36 Witnesses, particularly some older witnesses, may also have dementia, which can cause cognitive impairment. A psychiatrist or clinical psychologist with experience of working with older people should be asked to assess their ability to give reliable evidence and the effect such a procedure might have on their health and mental welfare.

3.37 Witnesses with a mental disorder may show some of the behaviour seen in witnesses with a learning disability, such as confusion, memory loss and

impaired reasoning. For this reason, many of the interview practices that are likely to help witnesses with a learning disability may also benefit witnesses with a mental disorder. Properly preparing the witness for the interview may help to identify and reduce confusion, emotional distress and anxiety.

3.38 Cognition may not be an immediate difficulty, but attention to the way a statement is given and how questions are posed must always be considered.

3.39 The witness may wish to please the person in authority. They may be suspicious of the person, or aggressive, or wish to impress the interviewer. Interviewing teams should be aware of such possibilities. Consultation with people who know the witness well should give some indication of their likely behaviour and some suggestions as to how interviewers can best interact with the witness.

3.40 Confusion may be exacerbated by the use of drugs or alcohol or withdrawal from drugs. An assessment should include information as to how this is likely to affect the interview, and how long this effect is likely to last.

3.41 Preparation of the witness for the interview and a rapport stage prior to formal questioning during the interview is essential. This will allow the witness to have some familiarity with the personnel who will be involved in the interview, including the interviewer, interview monitor and intermediary (where used).

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