

Neurodiversity 101



Neurodiversity: humanity's range of innate neurocognitive functioning.



Neurotypical: describes 'typical' neurocognitive functioning.



Neurodivergent: describes 'atypical' neurocognitive functioning.



Neurotype: a form of 'brain wiring'.

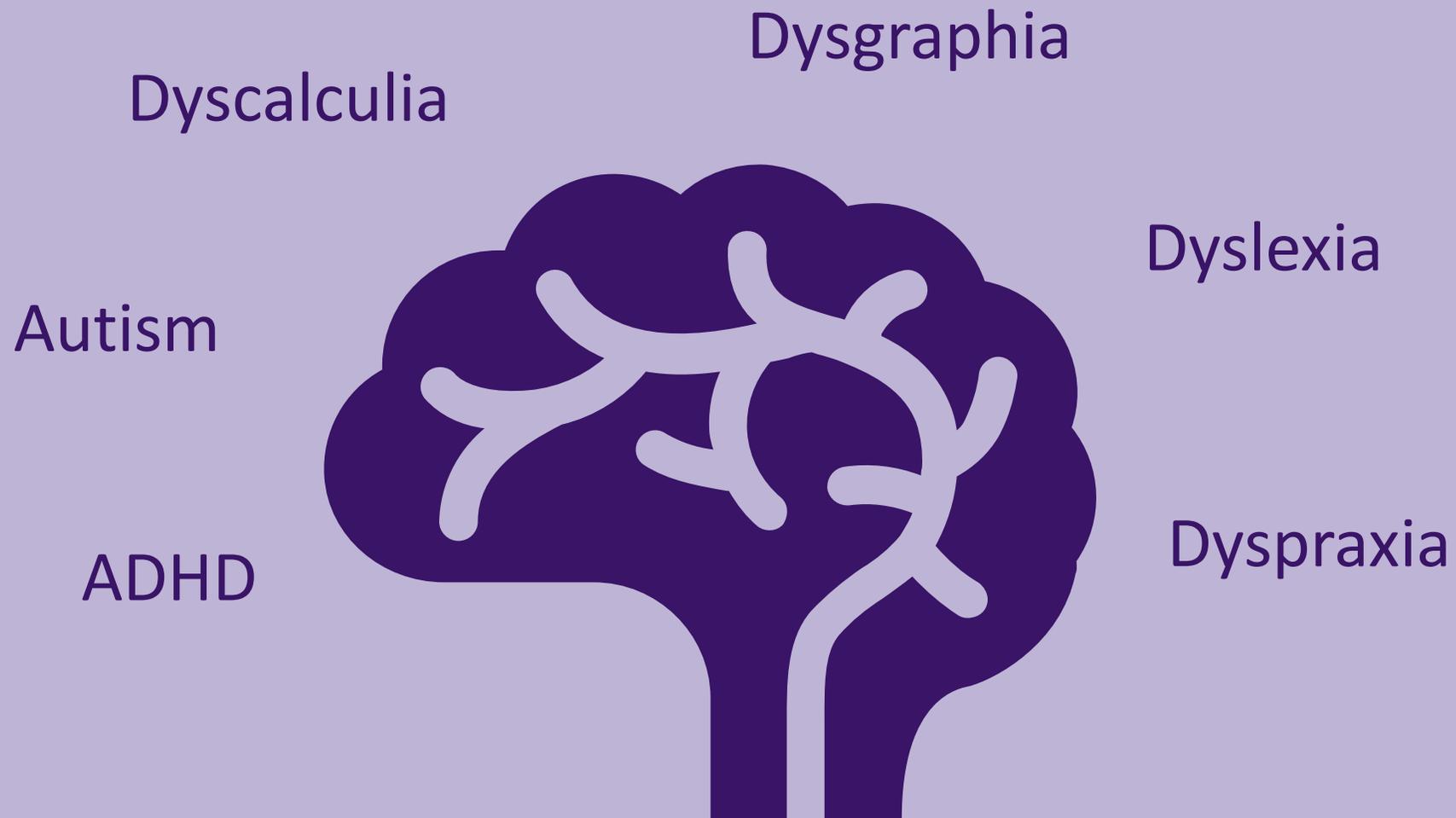


Neurodiverse: describes a group consisting of different neurotypes.



Neurominority: a minority group in terms of shared neurotype who face oppression and discrimination because of it.

Neurodivergent neurotypes

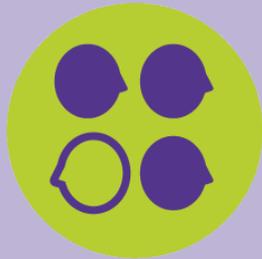


ADHD in Custody

A Guide to Police Custody for ADHDers

Information on ADHD and legal rights in police custody.

Why ADHD?



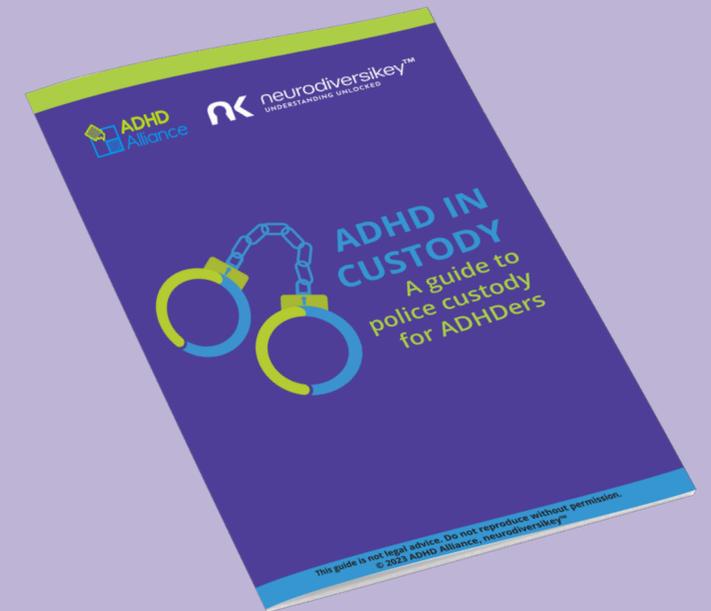
1 in 4 people in the CJS are ADHDers^{1 2}



ADHD medication can reduce criminality.³



ADHD costs the CJS £11.7m a year.⁴



ADHDers are more likely to:



Make false confessions.⁵



Go along with what others say or do.⁶



Have other neurodevelopmental differences.²



Struggle to acclimatise to custody and react disruptively.²



Reply “don’t know” in police interviews.⁶



Find police interviews difficult practically and emotionally.⁷



Cope with stress in unhelpful ways.⁶



Give vague answers in police interviews which could be misconstrued as being dishonest, avoidant, or uncooperative.⁶

Intersectionality



How an individual's different social identities overlap and impact one another.⁸



Unique barriers, injustice, and discrimination.

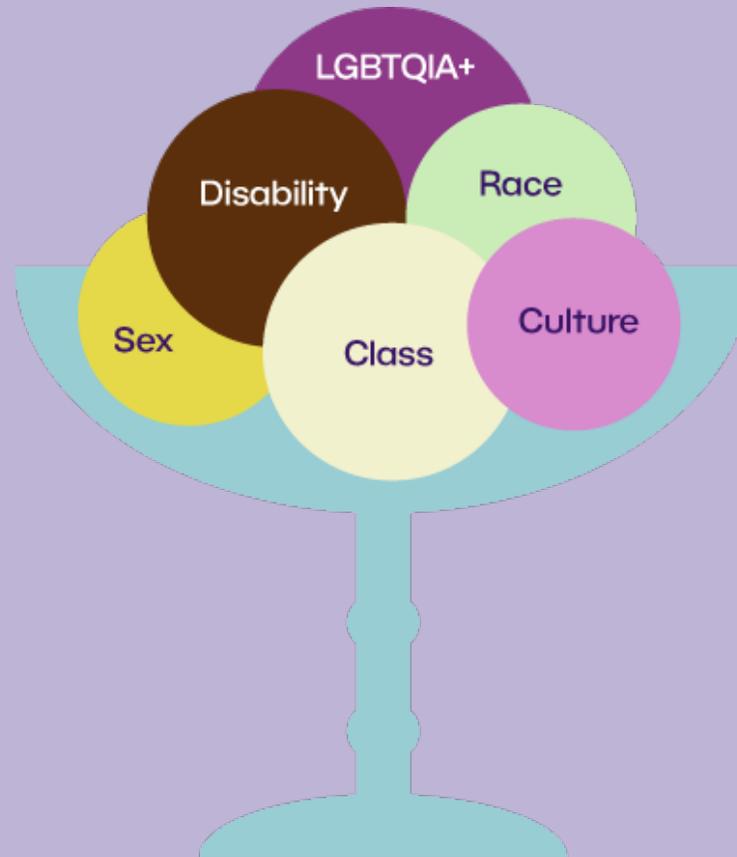


Layers of injustice or discrimination - 'injustice squared', 'injustice cubed' etc.⁹

What is the relevance to ADHD?

The compounded injustice and discrimination faced by ADHDers in a CJS context.

Disparities in
ADHD diagnosis
and support.



Disparities in
policing and
the CJS.

References

- 1 **Young, S., Moss, D., Sedgwick, O., Fridman, M., Hodgkins, P.** (2015) “A meta-Analysis of the prevalence of attention deficit hyperactivity disorder in incarcerated populations.” *Psychol Med.* ;45:247–58.
- 2 **Young, S., Cocallis, K.** (2021) “ADHD and offending.” *J NeuralTransm* 128, 1009–1019 (2021).
- 3 **Lichtenstein et al.** (2012) “Medication for attention deficit-hyperactivity disorder and criminality.” *N Engl J Med.* 2012 Nov 22;367(21):2006-14.
- 4 **Young et al.** (2018) “The economic consequences of attention-deficit hyperactivity disorder in the Scottish prison system.” *BMC Psychiatry.* 2018 Jun 25;18(1):210.
- 5 **Gudjonsson, G.H., Gonzalez, R.A., Young, S.** (2021) “The Risk of Making False Confessions: The Role of Developmental Disorders, Conduct Disorder, Psychiatric Symptoms, and Compliance.” *J Atten Disord.* 2021 Mar;25(5):715-723.
- 6 **Gudjonsson G.H., Sigurdsson J.F., Bragason O.O., Newton A.K., Einarsson E.** (2008) “Interrogative suggestibility, compliance and false confessions among prisoners and their relationship with attention deficit hyperactivity disorder (ADHD) symptoms.” *Psychol Med.* 2008 Jul;38(7):1037- 44.
- 7 **Gudjonsson, G.H.** (2010) “Psychological vulnerabilities during police interviews. Why are they important?” *Legal and Criminological Psychology*, 15: 161-175.
- 8 **Hill Collins, P. & Bilge, S.** (2020), *Intersectionality*, Second, fully revised and updated edn, Polity Press, Cambridge, UK.
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Representing neurodivergent children in the youth justice system

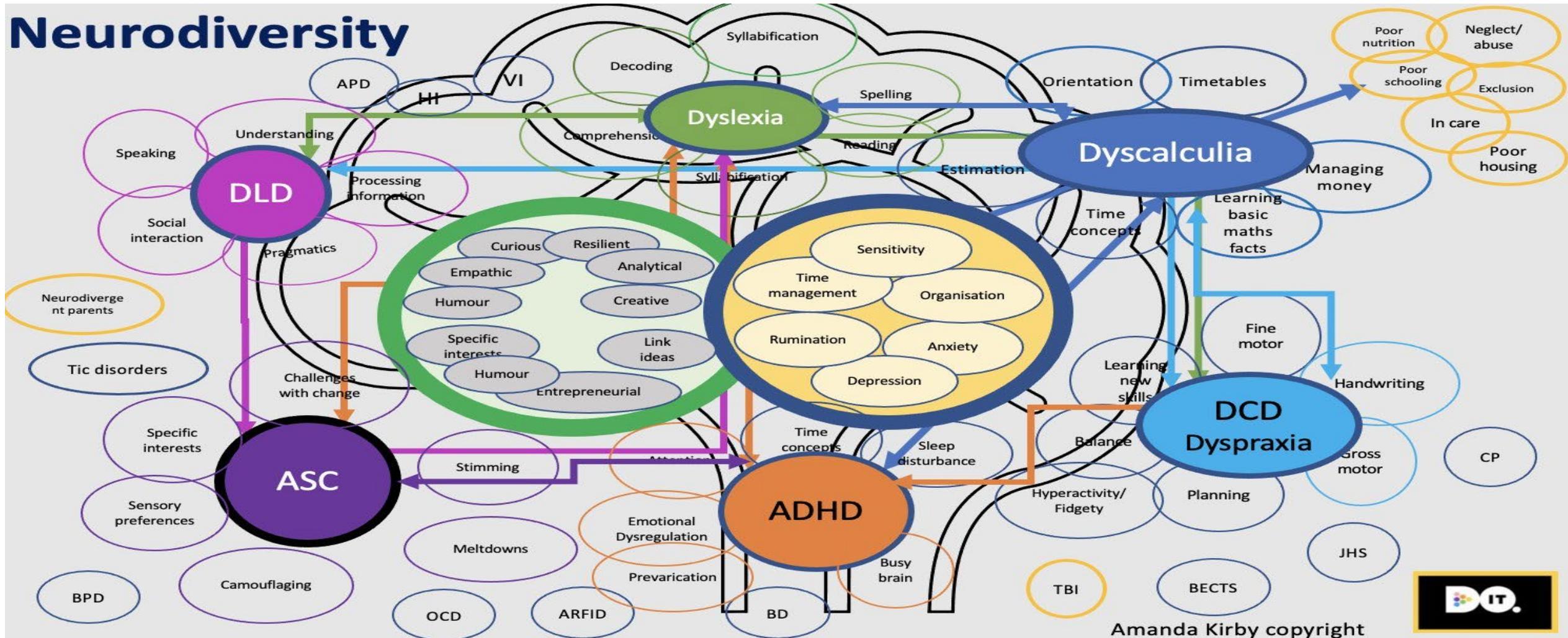
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What we will cover.....

- Why use the term neurodivergent/ neurodiversity?
- Legal protections
- So what? Myth de-bunking
- The over-representation of children in the YJS
- The Police Station, Courts and Custody
- Examples of good practice/ further resources
- What do I need to consider as a solicitor?

Why use the term 'neurodivergent' or 'neurodiversity'?

- Amanda Kirby (2021):





Legal protections - the right to 'effective participation' and reasonable adjustments

- The Equality Act 2010
- Article 6 of the ECHR and Article 40 of the UNCRC guarantees the right to a fair trial, which includes being able to 'participate effectively in a criminal trial' (Stanford v UK 1994). The scope of 'effective participation' remains unclear (Owusu-Bempah, 2018) which has led to concerns that the law cannot effectively safeguard this right for children in the youth courts (Ibid, 2018; Sixsmith, 2024).
- What does effective participation mean for children – a child must be able to follow their trial and understand what's going on. They must also be able to express their views, and the judge must properly take their views into account.
- During a recent review of the Youth Justice System Charlie Taylor concluded, when considering the youth court, that:
- 'Too often children are the passive recipients of justice and do not understand the process to which they have been subjected. In addition, the way children are currently dealt with in the criminal courts does not provide sufficient opportunity to understand the causes of their offending' (Taylor, 2016: 29).

Legal protections – the right to ‘effective participation’

- When focusing on neurodivergent children, The United Nations Convention on the Rights of the Child (UNCRC) states that children with developmental delays or neurodevelopmental disorders or disabilities ‘should not be in the child justice system at all’ (Hughes, Sheahan, Williams, & Chitsabesan, 2020: 163).
- The Sentencing Council Guidelines for Children and Young People state that upon sentencing the court should consider ‘any speech and language difficulties and the effect this may have on the ability of the child....to communicate with the court, to understand the sanction imposed’.
- The recent case of *ZA v R* (2023) reaffirmed this stating that when sentencing a child this means taking care to explain the reasons for it to them in words that they understand.

Myth-busting

- **‘It’s a fashionable excuse to excuse for poor behaviour’**

Oh my. ND children tend to display disruptive or challenging behaviour when they are triggered in some way – ie overstimulated, stressed, overwhelmed in their environment. At this point, we need to consider HOW and WHY the environment and interactions may be triggering challenging behaviours.

- ***‘The same set of adjustments will be helpful for all neurodivergent children.’***

Every neurodivergent person has their own unique story. We all struggle with different things, and excel at others. Like all people, we also have traits that might seem contradictory. For example, people with dyslexia and ADHD may be able to hyper-focus on certain tasks, but equally, we might take a while to get started and struggle to concentrate on difficult tasks. What helps one person won’t necessarily help another.

- ***“We’re all ‘on the spectrum’ somewhere.”*** Autism is a neurodiversity, a different way of the brain being wired. You are either Autistic, or not; so no, you can’t be *“A little bit Autistic.”*
- ***“There is an Autism epidemic.”*** Oh dear... The ‘evidence’ for this is the seemingly ‘rapid’ change in the statistics around Autism and children. It wasn’t that long ago that these suggested 1 in 100 children were Autistic, that changed to 1 in 68, a more recent study by the Department of Health in Northern Ireland suggests it may be nearer to 1 in 22 (4.5%). Is this an ‘epidemic’? No. Is it better Autism understanding, awareness, diagnosis etc? Absolutely.

The over-representation of neurodivergent children in the CJS

- The data tells us that this is a significant challenge facing the criminal justice systems in England and Wales.....
 - At least one in three people in the criminal justice system in England and Wales may be neurodivergent (Cruise et al, 2011), and that this rate is even higher for children with ADHD and speech and language difficulties (Kirby, 2021: 10). For example, up to 90% of children in custody met the diagnostic criteria for a communication disorder (Hughes and Peirse-O'Byrne, 2016).
 - Children and young people involved with the YJS have significantly higher rates of mental ill health, cognitive/ neuro disabilities and/ or complex support needs than the general population of children.
 - Associated impairments are significantly higher amongst justice-experienced children such as ASD (autistic spectrum disorder), ADHD (attention deficit hyperactivity disorder), SLCD (speech and language communication difficulties) and traumatic brain injury (Hughes et al, 2012, 2015, 2017; Anderson et al, 2016; Baldry et al, 2015).

We can therefore conclude that this group of people are significantly over-represented in criminal justice systems.

At the Police Station

Police not equipped to meet complex needs of kids (Goldson et al, 2021). Custody suite processes deeply unsettling for neurodivergent people, resulting in some challenging behaviours being misinterpreted by the police as non-compliant and thus rendered them less likely to be diverted away from the criminal justice system and more likely to be criminalised (CJJI, 2021: 12).

Other issues at the police station included the failure to provide an appropriate adult (Talbot, 2008), meaning that neurodivergent adults did not have the assistance of someone to help with understanding police processes or advocating on their behalf (CJII, 2021).

Courts

- Evidence to support that all children struggle to understand the court processes that they are subject to (Haines et al, 2012).
- Carlile Inquiry 2014 – review of Youth Courts in England and Wales – noted that children’s mental ill health / neuro developmental disability further hinders the understanding and there is no way to identify these.
- More likely to be refused bail because they cannot understand the conditions, or a lack of support to help them comply with the conditions (Gray et al, 2009; Hepworth, 2011), or overly stringent conditions that they cannot comply with (setting them up to fail).
- At court, neurodiverse adults were more likely to be remanded in custody before trial (CJII, 2021); over a fifth did not understand what was going on in court or why they were there (Talbot, 2008); and neurodiversity was not considered in sentencing decisions (CJII, 2021).

Custody

Custody itself can also be extremely harmful to a child's mental health – restraint, segregation, isolation exacerbating/ triggering mental ill health/ self harming/ suicidal thoughts (Day, 2022).

Behaviour management regime - children with ADHD placed disproportionately on 'Basic' leading to isolation in cell for up to 23 hours per day – impact on mental health, increase in frustration, producing negative behaviours - placing children in a vicious cycle (Day, 2022).

Lack of knowledge from wing prison staff about how to interact with children with mental ill health/ neuro disability/ SEND (Day, 2021a report).

Examples of good practice/ ideas/ resources

- Intermediaries – Youth Justice Legal Centre [Intermediaries For Child Defendants \(yjlc.uk\)](https://www.yjlc.uk) – advice on how to determine if a child needs one and how to apply.
- Effective Participation and Fitness to Plead – Youth Justice Legal Centre - [Effective participation and fitness to plead \(yjlc.uk\)](https://www.yjlc.uk)
- Advocates Gateway – good practice guidance when preparing for trial – toolkits 5, 6, 7 and 8 particularly useful for children - [Toolkits | Advocate's Gateway \(theadvocatesgateway.org\)](https://theadvocatesgateway.org)
- NAS report – ‘reasonable adjustments’ – National Autistic Society Report - [Youth Justice Report \(autism.org.uk\)](https://www.autism.org.uk)
- Nottinghamshire Police and Nottingham University - [Resources - The University of Nottingham](https://www.nottingham.ac.uk)

What do I need to consider as a solicitor?

- Communication – questions in advance, social stories, chunking information.
- Check, double and triple check that the child understands key messaging – they will just say ‘yes’ for the traumatic experience to be over with.
- Sensory experiences – is a child overloaded and cannot interact with you – quiet, calm, non-triggering environment.
- Ask their parents (where appropriate)! They are the experts.
- Do they have an EHCP/ SEN Support Plan in education? If so, get hold of it and think about how similar adjustments could be made in the criminal justice environment.
- Ground Rules Hearings ‘are required in all trials where an intermediary is used, with the intermediary present, and -are good practice ‘in all young witness cases and in other cases where a witness or defendant has communication needs’. More guidance here - [YJLC-Guide-CPD.pdf](#) – Criminal Practice Directions Youth Justice Legal Centre.





Thank you for your time



University of
Salford
MANCHESTER

How an Autistic Defendant May Present During Court Proceedings and How it Could be Misperceived by Jurors/Judge

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Some of the common features of ASD that might make a defendant with ASD appear evasive, remorseless, lacking in empathy and guilty

- Difficulty with making or maintaining eye contact
- Echolalia or repetitive vocalisations
- Issues with time to respond
- Misinterpretation or lack of understanding of repetitive interests or behaviours

- **Issues with memory**
- **Lack of outward emotional expression**
- **Inappropriate expressions or behaviours**
- **Unusual ways of speaking**
- **Issues with compliance**
- **Presence of paranoia**
- **Impaired social communication and interaction**

Issues with Memory

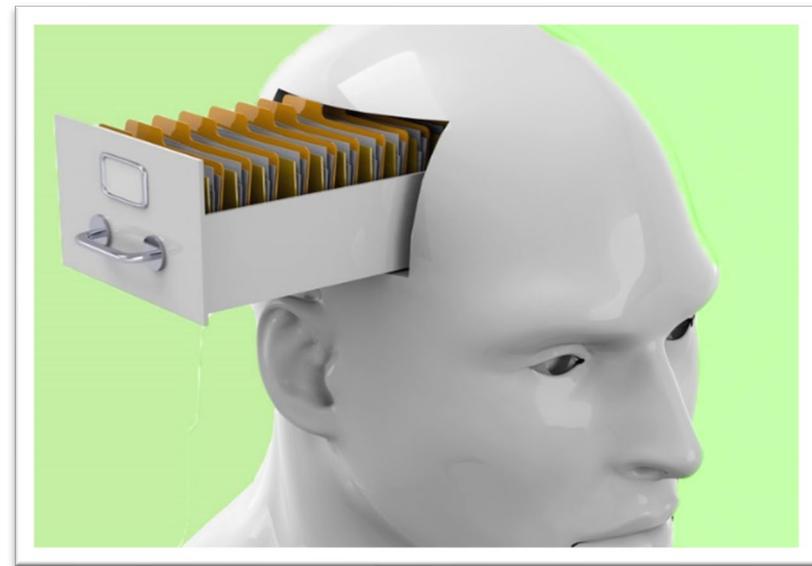
- Research has identified that memory impairments may be present in individuals with ASD which may make them more vulnerable during interrogation such as in a court room or police investigative interview (e.g., Bowler, Matthews, & Gardiner, 1997; Bigham et al., 2010; Boucher, Mayes, & Bigham, 2012; Maister et al., 2013).
- Difficulty in consciously recollecting events has been found in many individuals with ASD.
- Compared to individuals with no ASD, individuals with ASD have a tendency to rely on feelings of familiarity in order to guide their memory (e.g., Bowler, Gardiner & Grice, 2000; see also Bowler, Gardiner, & Grice, 2000; Bowler, Gardiner, & Gaigg, 2007; Maras & Bowler, 2012; Johnson, Goodman, & Mundy, 2018).
- Most people know that the capital of England is London. However, only a small number would actually be able to remember when or where we learnt this particular piece of knowledge. These two instances form two types of memory. One is knowledge-based information (e.g., names of capital cities) referred to as **semantic memory**. The other is memory for an event or a specific episode which is referred to as **episodic memory**.

Issue with Memory

- Individuals with ASD are typically unimpaired in their memory for semantic and general information (knowledge-based information) while, on the other hand, much more prompting is often needed in order to retrieve specific episodes (memory for specific events/episodic memory) (Crane & Goddard 2008; Bigham et al., 2010; Crane & Maras, 2018).
- Compared to individuals without a diagnosis of ASD, individuals with ASD often have difficulties in recollecting or remembering past personally experienced events and tend to remember fewer of them and also take more time to do this (e.g., Crane et al., 2012).
- An individual with ASD may be able to remember the details of the event but not when it happened. For instance, an individual with ASD may have memory for what they were wearing on a particular night but have difficulty in recalling other aspects, such as the timing of events.
- Such a profile in memory may be considered by the police, and ultimately the court, as suggestive of guilt.

Impairment in Ability to Recall Events in a Sequential Manner

- Individuals with ASD can be perceived erroneously as being uncooperative and non-responsive as they often exhibit impairments in their ability to recall events in a sequential manner and with sufficient detail - they often cannot recall a clearly sequenced narrative of events (Kroncke, Willard, & Huckabee, 2016).
- ASD may also impact on an individual's perception of time and they can exhibit a difficulty with determining 'how long' specific events were (The Advocate's Gateway, 2016).



Lack of Outward Emotional Expression

- Given that individuals with ASD are often impaired in their ability to appreciate the subjective experiences of others they may not display any outward expressions of empathy or intersubjective resonance.
- This can lead observers to assume that they are cold, calculating and remorseless. This apparent lack of emotion or remorse displayed by the defendant with ASD can be detrimental to them. It can make the court perceive them to be arrogant or having no interest in the court proceedings (Archer & Hurley, 2013; Allely & Cooper, 2017).
- These outward expressions may not be reflective of what the individuals with ASD is actually feeling or thinking internally (Allely & Cooper, 2017).



Inappropriate Expressions or Behaviours

- Individuals with ASD often display awkward or inappropriate facial expressions or behaviours.
- A defendant with ASD may laugh or smile during court proceedings.
- However, this outward expression may not be reflective of what they are feeling internally (Allely & Cooper, 2017). Instead, it is a form of coping strategy they employ because they do not know what to do in the situation they are in (or understand or know what is expected of them).



Unusual Ways of Speaking

- An odd or pedantic manner of speaking is often found in individuals with ASD.
- For instance, unexpectedly speaking at an increased volume or very low volume. They may suddenly and unexpectedly shout out unrelated words or phrases which can often be considered to be rude. These sudden or unexpected utterances can be very loud which can make others perceive them to be aggressive or angry when this might not be the case (McCann & Peppé, 2003).
- If a defendant with ASD talks during court proceedings in a monotonous tone of voice, with no emotional intonation and a lack of emotional expressions they would be considered cold or standoffish which has obviously negative implications (Allely & Cooper, 2017).



Issues with Compliance

- In some contexts, individuals with ASD may exhibit exaggerated levels of compliance, eagerness to please and avoidance of confrontation (e.g., North et al., 2008; Chandler, Russell, & Maras, 2019).
- Given that individuals with ASD are often more compliant, fearful and deferential when they are asked questions by persons in authority (Freckelton, 2013a), when compared to individuals without ASD, they may be at increased risk of complying with interrogative pressures.
- During court room proceedings, this feature can lead the individual with ASD to make statements which are erroneous and self-incriminating (Gudjonsson, 2003) or respond compliantly to the interviewer's requests and demands, despite not actually holding this information as being accurate (Maras & Bowler, 2012).

Presence of Paranoia and Mistrust

Individuals with ASD can be more mistrustful of others to a point bordering on paranoia when compared to individuals without ASD. This not so surprising when you consider how the social and change-coping difficulties that individuals with ASD experience during their lifetime might result in them being more inherently anxious (Maras & Bowler, 2012).

Freckelton and List (2009) - compared to individuals without ASD, individuals with ASD can be more mistrustful of others to a point bordering on paranoia. Some factors for this:

- Being significantly interpersonally isolated, confused or perplexed about social rules
- Being limited in their appreciation of some matters that take place around them (e.g., being unable to recognise and appreciate expressions of emotions)
- Having difficulties in making causal attributions to others' mental states
- Having a limited understanding and recognition of social cues (e.g., Blackshaw et al., 2001; Freckelton & List, 2009; Maras & Bowler, 2012).

Impaired Social Communication and Interaction

- Impairments in social communication and interaction are found in all individuals with ASD. Some of the features of this include: poor understanding of nonverbal communication; social vulnerability and gullibility; inflexible thinking, social passivity and black and white thinking.
- Language skills may be well developed but there may be an impairment in the ability to engage in turn-taking in conversations resulting in conversations being very one-sided. They would not appreciate or recognise during these one-sided conversations that the listener is bored and/or is wanting to get away.
- They may also interrupt the person speaking during court proceedings with no understanding or appreciation of the negative reactions to such behaviour by others.
- Such behaviour during court proceedings would make them appear evasive, rude, arrogant and not willing to cooperative.
- There may also be impairments in the use of gestures, personal space, timing, topic selection and difficulties with understanding non-literal language, metaphors, irony, sarcasm or humour (Allely & Cooper, 2017).



AUTISM
AND THE
CRIMINAL
JUSTICE
SYSTEM

Get in Touch!

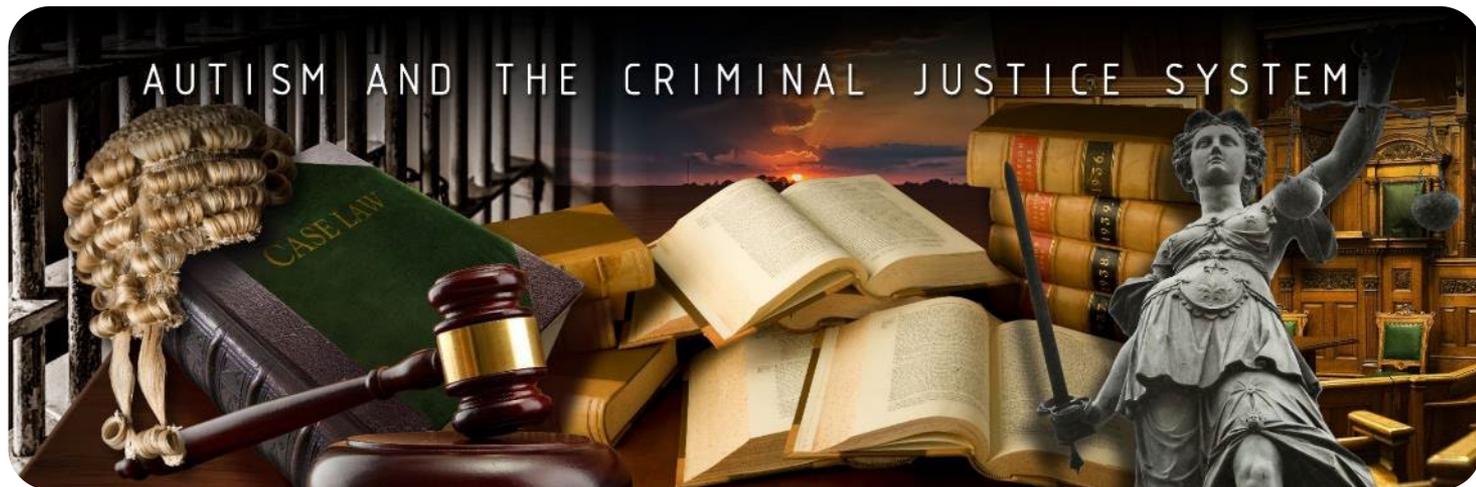
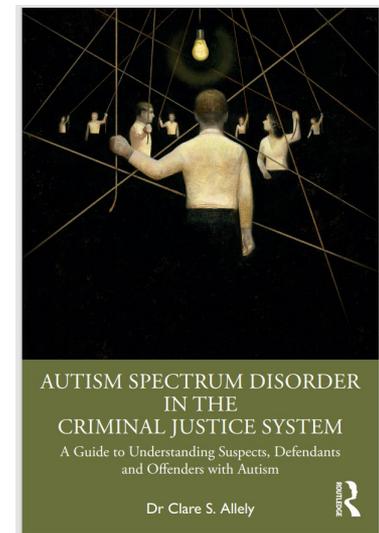
Clare Allely

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Researchgate:

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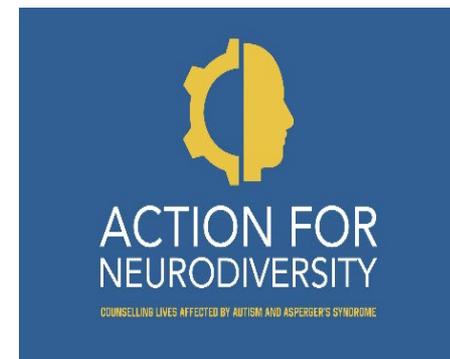




“Neuro-diverse disabled peoples’
courtroom accessibility and
inclusion.” November (2023) – Garden Court
Chambers, London event entitled: “*Neurodiversity
Webinar Series: Part 2 - Representing Neurodiverse
Clients.*”

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Neurodiversity, Registered charity 1148790
www.actionforneurodiversity.org





What we will cover:

1) Hidden neuro-diverse **disability awareness** and stigma faced by neurodiverse court users.

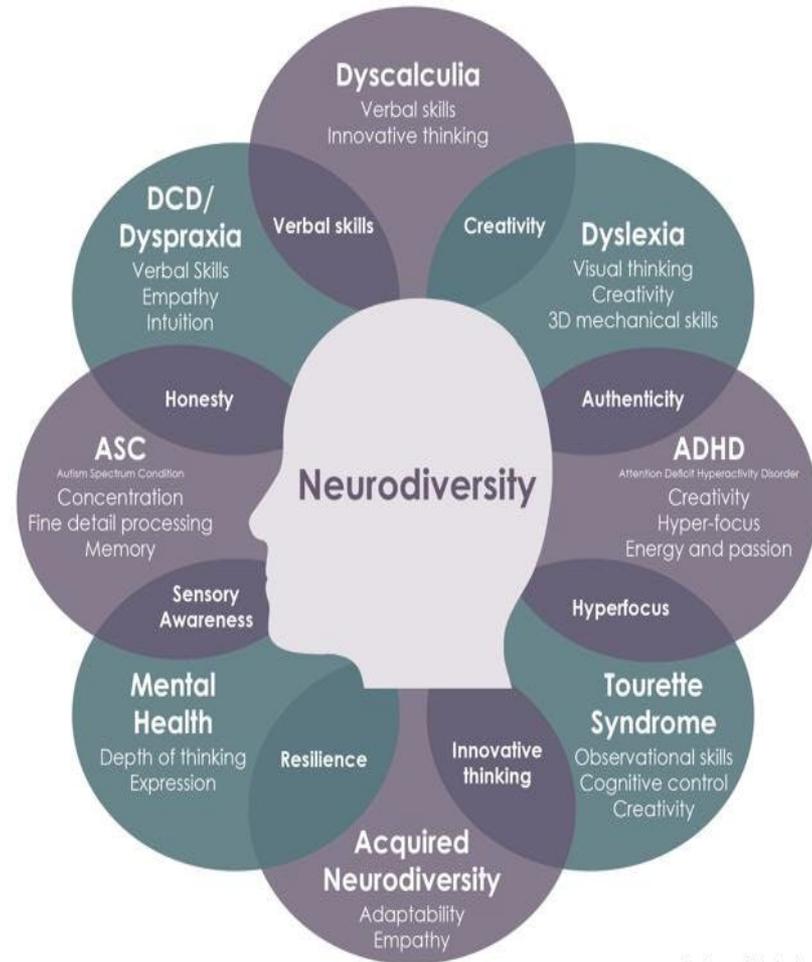


2) Managing the negotiation and agreement of **reasonable adjustments for courtroom users** (defendants) to enhance their access/inclusion in the **Criminal/Civil Justice System**.



3) **Courtroom (sentencing) communication best practice** for neuro-diverse disability courtroom users.

Neuro
diversity
wide
breadth
and
strengths

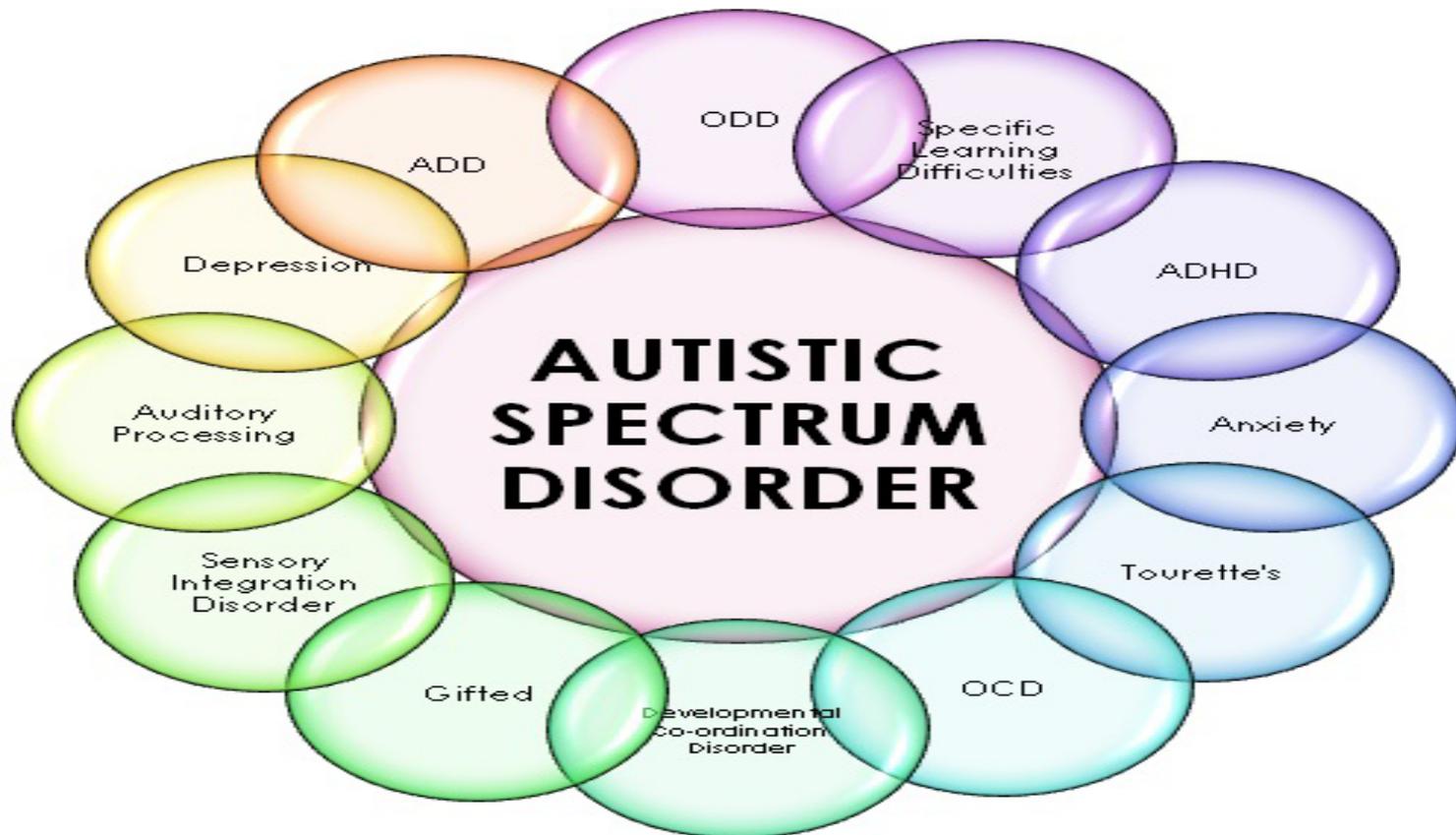


Dr Nancy Doyle, based on the work of Mary Colley

Dr Nancy Doyle, 'The Overlapping Strengths of Neurodiversity': The World Needs Neurodiversity: Unusual Times Call For Unusual Thinking, Forbes, USA, March 2020. Available online at:

<https://www.forbes.com/sites/drnancydoyle/2020/03/24/the-world-needs-neurodiversityunusual-times-call-for-unusual-thinking/?sh=22cf51776db2> [accessed Feb 2023]

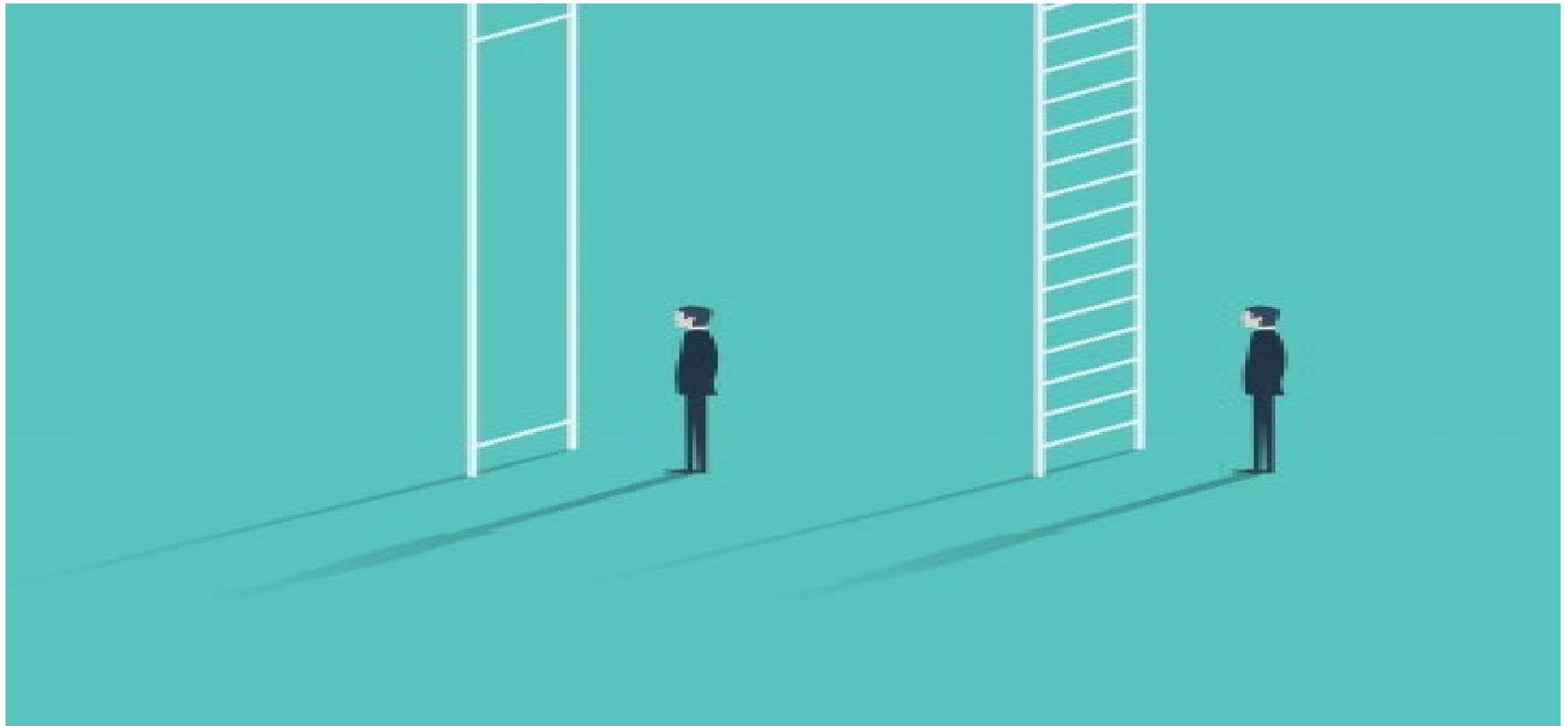
Autism **inter-related** neuro- diverse disabilities



Source: WeCapable (2021) - <https://wecapable.com/autism-spectrum-disorder-disability-symptoms-causes/>



Reasonable adjustments (RAs) means? (Court Service User)



Source: ESPHR (2017) 'Disability discrimination – reasonable adjustments?' - <https://esphr.co.uk/news/disability-discrimination-reasonable-adjustments->



Reasonable adjustments means?

(Courtroom/Client handling perspective)

- 1) How **effective** the change would be.
- 2) How **practical** it is to implement the change.
- 3) The **cost** of implementing the change.
- 4) The **resources** that the service has.



Source: PeopleHR (2021) - <https://www.peoplehr.com/blog/2019/05/15/where-to-start-when-making-reasonable-adjustments-at-work/>

Autism range of challenges exhibited within the courtroom

- **Judge/jury and lawyer misperceptions may include on ASD people:**
- “Memory impairments/emotional explanation difficulty (alexithymia)
- Lack of (or reduced) outward emotional expression (inc. eye contact)
- Inappropriate expressions or behaviours
- Rigid literal cognition of information and compliance
- Repetitive interests and behaviours (echolalia vocalisations)
- Paranoia and mistrust
- Issues with time to respond based on cognition impairment
- Difficulties with an unstructured environment such as a courtroom setting
- Unusual body movements.”

Neuro-diverse disability RAs in the courtroom

Neuro-diversity disability	Possible Challenges	Possible Solutions
Dyslexia – (affects reading, writing and speech)	<ul style="list-style-type: none"> 1) Difficulty reading, speaking, spelling and grammar 2) Slow and labour-intensive reading and writing⁷ 	<ul style="list-style-type: none"> 1) Ensure their speaking task/requirements within the courtroom are clearly and logically structured and are explained succinctly. 2) Offer 1:1 support with comprehension in the courtroom, where reading assistance is requested.
Dyspraxia – (affects motor skills, planning and organisation)	<ul style="list-style-type: none"> 1) Trouble learning new skills, inc. writing and keyboard use 2) Organization and planning problems⁸ 	<ul style="list-style-type: none"> 1) Planning can be assisted with clear guidance on what is to be expected and when within the courtroom. 2) Offer 1:1 support in court, including extra time to assist with tasks expected of the courtroom user.

Adapted from Lowenstein, M. (2021) 'Guide for editors working with contributors (authors) with neuro-diversity disabilities.' Available online at: https://us.sagepub.com/sites/default/files/guide_for_editors_working_with_contributors_authors_with_neuro-diversity_disabilities.pdf (Accessed March, 2023)

Neuro-diverse disability RAs in the courtroom

Autism – *(affects social functioning and communication)*

- 1) Deficits in language comprehension
- 2) Problems with two-way conversation⁹

- 1) Use plain language, structured logically and sensitively to literal interpretations of case facts.
- 2) Offer 1:1 supervision & support with comprehension of courtroom processes such as unclear lawyer questioning.

ADHD – *(affects daily functioning of attention focus causing impulsivity and restlessness)*

- 1) Organization and planning problems
- 2) Task focus and multi-tasking limitations¹⁰

- 1) Offer 1:1 support and a recommended timescale to assist in the courtroom.
- 2) Drip feed and simplify tasks to complete bit by bit for the courtroom user.

Adapted from Lowenstein, M. (2021) 'Guide for editors working with contributors (authors) with neuro-diversity disabilities.' Available online at: https://us.sagepub.com/sites/default/files/guide_for_editors_working_with_contributors_authors_with_neuro-diversity_disabilities.pdf (Accessed March, 2023)

📄 Courtroom (sentencing) communication best practice for neuro-diverse disability

- 1) S. 52 Sentencing Act (2020) duty to explain sentencing in *'ordinary language'* means for your client? Judges are aware and will make reasonable adjustments as requested, see JOs Equal Treatment Benchbook (2023) - <https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/>
- 2) Adult and youth sentencing explanations are complex, globally significant and has a **disabled courtroom user impact:**

• **Adult denunciation (-)**

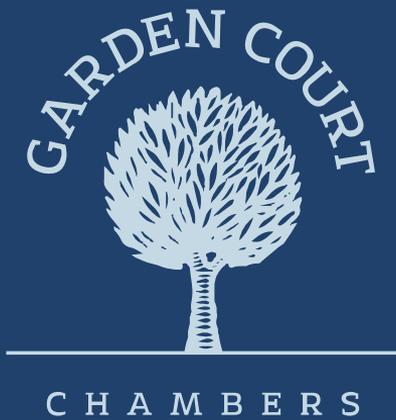
<https://journals.sagepub.com/doi/10.1177/1748895812441942>

VS Youth moral re-education (+)

<https://journals.sagepub.com/doi/full/10.1177/14732254211004764>

📄 Courtroom (sentencing) communication best practice for neuro-diverse disability

- **3) Sentencing Council's Equality impact assessments for robbery, theft, dangerous dogs, sexual offences sentencing guidelines** - [Search Results for "equality" – Sentencing \(sentencingcouncil.org.uk\)](#)
- **4) Sentencing Council's 'Equality and Diversity Report and Response'(2023)** - [Equality and diversity in the work of the Sentencing Council – Sentencing](#)
- A) reviewing the use and application of aggravating and mitigating factors and expanded explanations in sentencing guidelines
- B) reviewing the Imposition of community and custodial sentences guideline, which is looking at whether and when sentencers request pre-sentence reports and so receive all the information needed about an offender
- collecting data in magistrates' courts and the Crown Court that will provide further information for research
- conducting user testing of our digital guidelines, to explore how sentencers use the sentencing guidelines, including how they use the expanded explanations.





Vulnerable witnesses /parties in family proceedings

Amanda Weston KC and Amanda Meusz

Garden Court Chambers

25 January 2023



GARDEN COURT CHAMBERS



@gardencourtlaw

Overview

1. Law, procedure and guidance
2. Essential Cases
3. Strategies for communication



Law, procedure, guidance



GARDEN COURT CHAMBERS



TOP TIER SET
2023



Garden Court Chambers



@gardencourtlaw

Legislation

- Equality Act 2010 – ‘judicial functions’ are exempt from the prohibition on discrimination in the exercise of public functions, but this exemption appears to cover only the core adjudicative and listing functions. Ancillary functions, such as employment or managerial functions not exempt: *Engel v Joint Committee for Parking and Traffic Regulations Outside London* (PATROL) 0520/12 EAT 13
- Domestic Abuse Act 2021 – courts required to make arrangements for QLRs to conduct XX of complainant where alleged abusive party unrepresented – need to identify vulnerabilities BEFORE involvement of QLR
- Human Rights Act 1998 – article 8 procedural safeguards, article 14 discriminatory failure to protect rights on an equal footing, absence of justification for differential treatment – grounds of appeal:



Procedure

- FPR - Vulnerable Persons: Participation in Proceedings and Giving Evidence.
 - Part 3A
 - PD 3AA
- The Overriding Objective – FPR r. 1:
 - (a) ensuring that it is dealt with expeditiously and fairly;
 - (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
 - (c) ensuring that the parties are on an equal footing;**
 - (d) saving expense; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.



The Overriding Objective (cont'd)

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes–

- (a) setting timetables or otherwise controlling the progress of the case;
 - b) identifying at an early stage–
 - (i) the issues; and
 - (ii) who should be a party to the proceedings;
 - (c) deciding promptly –
 - (i) which issues need full investigation and hearing and which do not; and
 - (ii) the procedure to be followed in the case;
 - (d) deciding the order in which issues are to be resolved;
 - (e) controlling the use of expert evidence;
 - (f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
 - (g) helping the parties to settle the whole or part of the case;
 - (h) encouraging the parties to co-operate with each other in the conduct of proceedings;
 - (i) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (j) dealing with as many aspects of the case as it can on the same occasion;
 - (k) dealing with the case without the parties needing to attend at court;
 - (l) making use of technology; and
 - (m) giving directions to ensure that the case proceeds quickly and efficiently.
- (1) Nothing in the overriding objective undermines the principles provided by section 1 of the Welsh Language (Wales) Measure 2011(1) that the Welsh language has official status in Wales or by section 22 of the Welsh Language Act 1993(2) that in any legal proceedings in Wales the Welsh language may be used by any person who desires to use it.
- (2) The parties are required to assist the court to put into effect the principles set out in paragraph (1).



Guidance

- Advocates Gateway Toolkits
- Equal Treatment Bench Book, Guide to Judicial Conduct (Bangalore Principles)
“independence, impartiality, integrity, propriety, **ensuring equality of treatment**, and competence and diligence”
- Specialist Resources - see list – Good Practice Guidance
- Essential takeaway – court’s tendency to see ‘vulnerability’ as a single concept leads to injustice – ‘vulnerabilities’ are a context and person-specific constellation of effects on effective participation and courts need to be pressed to adopt person-centred, flexible and bespoke solutions to ensure access to justice and recognize that communication needs may be affected by a range of factors holistically not just diagnosed MH or LD issues.



-
- Courts are expected to make reasonable adjustments to remove barriers for people with disabilities, including specific learning difficulties (Judicial College, 2018, Equal Treatment Bench Book), mental disabilities, specific learning difficulties and mental capacity, giving effect to the Equality Act 2010).



Equal treatment (Bench Book)

- Emphasises the importance of equal treatment and adapting practices to enable a fair hearing
- In the 2013 Toulmin Lecture, the Lord Chief Justice, Lord Judge, said that:
 - Just because a change does not coincide with the way we have always done things does not mean that it should be rejected....Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective'.²³
- These principles have been reflected in criminal and family appellate decisions. For example:
 - 'When necessary, the processes have to be adapted to ensure that a particular individual [in this case, a defendant with complex needs] is not disadvantaged as a result of personal difficulties, whatever form they may take'.²⁴
 - A judge's general duty to manage all cases to achieve targets 'cannot in any circumstance override the duty to ensure that any litigant... receives a fair trial and is guaranteed what support is necessary to compensate for disability'.²⁵ In this case, the Court of Appeal found a breach of article 6 rights where, despite a report recommending special measures, a father of 'limited capacity' gave evidence in family proceedings with only 'unsatisfactory makeshift' arrangements.
 - M (A Child) 2012 EWCA



Essential Cases



GARDEN COURT CHAMBERS



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A Local Authority v Mother & Ors [2021] EWHC 2794 (Fam)

- Costs hearing following abandoned hearing due to deficiencies in the services of an unqualified/inexperienced intermediary.
- 42. Intermediaries perform an extremely important function in ensuring a fair trial for highly vulnerable people in the family courts, usually parents. It is of great importance that they do that job to a professional standard and their role is properly considered and monitored, both at the stage of their appointment and during the conduct of the relevant hearings. Although intermediaries, certainly in the family courts, are not subject to any regulatory scheme, they are part of the justice system, and they are paid for their services by HMCTS. As such, they should be subject to professional standards appropriate for the role they are being paid to undertake. It would undoubtedly be helpful if these were set out in one document in a similar manner to the MoJ Guidance in relation to intermediaries in the criminal courts.

43. This case well illustrates how the lack of clear guidance on the use and roles of an intermediary makes it difficult to ensure an understanding by the person who puts themselves forward as an intermediary is competent to perform that role. The lack of such guidance also means that there is no definition on who may be appropriate to act as an intermediary, what training or qualifications they have, or what checks a judge or solicitor should undertake. This makes the appointment and conduct of the intermediary ripe for the kind of problem that arose in this case.
- 44. However, in my view, what went wrong in this case was the result of misrepresentation by DM and not a lack of guidance, or any default, by the Judge or the Father's solicitors. In his email to the Father's solicitors on 14 July he said that MH had acted as an intermediary for XX "numerous times" and that she was "competent". In fact, she had acted in one trial and DM had little or no basis for saying she was competent. He had not told her to read the Advocates Gateway, and self-evidently he had not checked whether she had understood it, or even in the widest sense understood her role.



W v H [2022] EWFC 150

- Contested divorce proceedings
- H was obstetrician, recently diagnosed with Level 1 ASD postdating issue of divorce proceedings
- “These proceedings are, I think, an exemplar of how a Court needs always to be mindful of the need to consider an assessment for an intermediary even where the surrounding circumstances may not immediately alert the court to this. At first blush, he is not typical of Court users who are assessed for the support of an intermediary.” [7]
- No expert evidence sought, judge felt able to proceed based on TAG and ETBB.

79. I am satisfied, having heard the evidence and considered the reference material I have named, particularly the ETBB, that the Husband's autism is likely to have had a significant impact upon the manner he has behaved throughout the marriage (and where relevant, before the marriage). In so far as there was a period the Wife did not know of the diagnosis of autism it may be understandable that she may have reacted badly to aspects of the Husband's behaviour. Once, though, the Wife (as a trained and qualified social worker) was put on notice of the diagnosis, either formally or otherwise, it is appropriate to expect her to make such allowances or adjustments as are reasonable. Rather than making simple allowances, my view is that the Wife has sought to capitalise upon the Husband's autistic traits as evidence of behaviour to attempt to satisfy the test. I am not suggesting that any type of behaviour from someone who is autistic has to be tolerated; that would make a nonsense of the way the Court of Appeal has directed the test should be applied. I am looking at this marriage and this Petitioner and this Respondent. Here we have a marriage between a doctor and a social worker; both professionals who can reasonably be expected to show a level of empathy and professional understanding of the personalities of the other within the marriage they have committed to.



Re N (A Child) [2019] EWCA Civ 1997

- The absence of an intermediary for M led to FF decision being set aside.

51. In my judgment, Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.

60. In my judgment, it would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance, but the necessity for there to be a fair trial must be at the forefront of the judge's mind. In such a case, whether there should be a retrial must depend upon all the circumstances of the case, not only, or principally, upon the likely outcome of a rehearing. I set out again for convenience, the observation of the ECHR in P, C and S v UK:

61. "There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Art 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy." In my judgment, there was undoubtedly a fundamental breach of the mother's Article 6 rights and she was denied a fair trial. Put another way, the decision was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" per CPR 52.21.(3)(b).

62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children."



Re S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8

Duty extends to all parties

38. These comprehensive provisions are of fundamental importance to the administration of family justice. As paragraph 1.3 of PD 3AA makes clear, the court's duty to identify any party or witness who is a vulnerable person arises not only under the express provisions in Part 3A of the FPR but also under the overriding objective provisions in Part 1. (It is notable that the equivalent, albeit more succinct, provisions subsequently inserted in the Civil Procedure Rules are specifically contained within the overriding objective provisions in Part 1 of those rules supplemented by Practice Direction 1A.) The duty is to identify such persons "at the earliest possible stage", an obligation reinforced in proceedings under Part IV of the Children Act by the requirement in the Public Law Outline in Practice Direction 12A to consider the need for directions as to special measures and intermediaries at the initial case management hearing.
39. It is equally clear that the duty to identify any party or witness who is a vulnerable person, and to assist the court to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished, extends to all parties to the proceedings and their representatives. It will almost invariably be one of the parties or their representatives, rather than the court, who first identifies that a party or witness is or may be vulnerable. We consider that good practice requires the parties' representatives actively to address the question of whether a party is vulnerable at the outset of care proceedings. Indeed, as social workers will as a matter of course be looking for vulnerabilities in families as part of their practice, it is to be hoped that this issue will be identified before care proceedings are started. We recognise, however, that it is often not easy to identify vulnerabilities and that professionals dealing with urgent and difficult situations in families will have to contend with a large number of issues. For that reason, we consider that, to comply with the obligation under rule 3A.9, the judge conducting the case management hearing at the start of care proceedings should as a matter of course investigate whether there are, or may be, issues engaging Part 3A of the rules and that the parties' advocates should as far as practicable be in a position to respond. Furthermore, rule 3A.9 stipulates that the court's duty continues to the end of the proceedings. There will therefore be other points at which the court may have to address the issue – for example, where another party is joined to the proceedings.



A Local Authority v A Mother & Others [2022] EWHC 2793 (Fam)

- Application to re-open FF hearing where prior vulnerable party assessment indicated Ground Rules

which are subsequently shown to be inapt to provide a fair hearing/departure from Ground Rules during evidence

– whether case management decision should be appealed? What if the problems are not clear until evidence is being given? Relevance of post-decision evidence including transcripts.

53. The decision of HHJ Cove was fairly and squarely on the issue of whether Ms Smith's intermediary report demonstrated the fact-finding hearing was procedurally unfair. No transcript of the decision was available, only the order. It does not appear that that decision was the subject of any appeal, and so the current application is in essence in part an attempt to re-litigate an issue already determined with only limited further material different to that which was considered by HHJ Cove. The heart of the additional argument is that the transcript suggests the mother did not understand aspects of the questioning including the concept of the pool of perpetrators or the local authority case that if it was not the father it was her, that inadequate breaks were implemented in her evidence and during the evidence of others. Although Mr Feehan may be right that technically the court retains an unlimited discretion to reconsider applications which have already been made and determined, the circumstances in which the court will do so are limited and usually involve a material change in circumstances or fresh evidence which calls into question the reliability of the original decision. It is not open to the mother simply to re-argue the application based on the intermediary assessment. However, whether the transcripts create a different situation I shall consider.



'A Mother' cont.

56. It is clear then that the afternoon session does not seem to have complied with the breaks Ground Rule and the impression from this session is of the quality of the mother's evidence deteriorating over this session to some degree. I have considered whether this apparent failure to comply amounts to a sufficient departure from the Ground Rules on its own to warrant a conclusion that the mother's ability to participate fairly and appropriately was compromised to a degree that justifies reaching the conclusion that the non-compliance amounted to a procedural irregularity then lead to an unjust result or in alternative terms whether the non-compliance rendered the hearing of the mother's evidence materially unfair. **On a fairly fine balance I do not think that this alone did.** However together with the concerns over the lack of compliance with the Ground Rules about breaks in relation to the medical evidence, in particular Professor Stivaros and Mr Richards and Mr Morrison (see below) I think the **overall combined effect in relation to the mother was that there was non-compliance with the identified Ground Rules which was material, and which thus affected the overall fairness of the hearing.** Thus, I accept that the evidence from the transcript demonstrates sufficient additional evidence which shows that the Ground Rules identified by HHJ Backhouse were not implemented sufficiently in respect of the mother and warrant a conclusion that they alone demonstrate that the **hearing was unfair to the mother.** It is a relatively fine balance as the breaks alone form only part of the Ground Rules and in other respects, in the use of simple language and questions, the impression from the transcripts is one of in the main compliance. But I am conscious that the mother's cognitive assessment showed a lower level of functioning than the father's and that the intermediary report of Ms Smith contains a detailed set of recommendations based on her assessment to promote fair participation and having regard to this non-compliance with the Ground Rules clearly creates a real risk of adverse impact. **The judgment of HHJ Backhouse identifies the mother as a more credible witness but not one whose evidence is sufficiently reliable to allow the judge to say, on balance, she was probably not a perpetrator. A material change in the mother's credibility arising from fuller compliance with Ground Rules clearly might make a significant difference to her.**



GK v PR [2021] EWFC Civ 106

- M appealed FF decision dismissing wide range of allegations of domestic abuse made against F. Appeal allowed
- [32] Peel J was troubled by, *inter alia*, the fact no ground rules hearing took place before FF where vulnerability issues would have been raised, no reference to Part 3A in judgment, M's medical condition exacerbated by stress which resurfaced following stress of giving evidence, no though given to different process of XX, F was able to to see M throughout her evidence, M was able to see F through camera as sat behind counsel (arrangements "not appropriate")
 - "The anxiety for a woman giving evidence in court against a former partner, alleging abusive conduct, and in the context of seeking to (as she sees it) protect her child, cannot be underestimated." [32(iv)]

33. Further, in my judgment the judge nowhere considers the impact of GK's vulnerability on her giving evidence. He refers to her oral evidence appearing pre-prepared and "dissociated" without considering whether or to what extent trauma induced vulnerability may have caused or contributed to her presentation. Again, in my judgment the subsequent GP letter casts more light on this for me. If GK was indeed subject to extreme stress, caused by revisiting traumatic episodes, that may in part have n contributed to what the judge perceived as the unconvincing way in which she gave her evidence.

...

44. I am satisfied that the judge's findings cannot stand. The failure to consider Part 3A, GK's vulnerability, and appropriate special measures severely undermines the judgment, particularly in the light of the subsequent GP letter. I cannot be confident that GK was able to give evidence in the best possible way.



Re S (Vulnerable Parent: Intermediary) [2020] EWCA Civ 763

- Appeal against decision that intermediary assessment was not necessary or proportionate.
- Appeal allowed
 - court had to adapt to the needs of lay parties – where party/witness has an LD, that adaptation had to be sufficient to ensure they were genuinely able to participate effectively in the hearing, both in and out of the witness box
 - use of remote technology had additional implications for parties and witnesses with LD
 - removed many of the visual cues that were so valuable to individuals with a cognitive impairment
 - had been necessary to step back from the detail of the FPR and look carefully at the likely experience of M as a vulnerable parent (complex format of hearing, prospect of removal of baby hanging over her)
 - intermediary could assist to negotiate the process of being questioned remotely and participate in hearing to the fullest possible extent



J v K and another (EHRC intervening) [2019] EWCA Civ 5

- Appeal from the EAT
- Dicta of Underhill LJ, [32] onwards. At [39] offers guidance:
- (1) The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time or medical reports produced for other purposes.
- (2) If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, and was indeed the basis on which the applicant failed in *O’Cathail* (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential.³¹ It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.
- (3) If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.



Re M (A Child) (Fact Finding: Appeal) [2021] EWHC 3225 Fam

- Appeal following FF hearing as to allegations of rape and domestic abuse. (Judd J)

59. It does not appear from any of the orders that the question of participation directions was considered or determined by the court. The provision that the mother and father should attend court on different days to give evidence appears from the wording to have been made in order to meet the restrictions on too many parties being in one room as a result of Covid.

62. The mother was fully represented throughout the proceedings, but the obligation to consider vulnerability is upon the court. I entirely accept Mr. Tyler's submission that counsel for the mother (and possibly the father too) would be expected to remind the judge(s) of this, and that (as privilege has not been waived) we cannot know whether or not there was a conscious decision not to ask for special measures. These points do not, however, relieve the court of the responsibility it has been given under the rules. Whilst I also take note of the dicta of May LJ in Jones v MBNA Bank [2000] EWCA Civ 514, as cited to me, there is a fundamental difference between the situation there and this one.

66. It must be clear from the matters I have set out above that this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself. The purpose of the rules and Practice Direction is to avoid the quality of the evidence being diminished. Here, the need for directions went beyond the need to consider whether the parties should not come into physical contact in the court room or building. Matters, such as whether the mother should be visually shielded from the father as she gave her evidence, and what topics should be covered in cross examination, were highly relevant.



Re M cont

67. It was inevitable that the mother would have to answer very personal questions, but the questioning should have been restricted to what was necessary for a fair trial. An example of a line of questions which may not have been necessary is apparent from the start of her cross examination. She was taken to explicit material from her days six years earlier as a 'cam girl' to demonstrate she knew the meaning of some swear words. **There might have been a different way of achieving this goal.** At the start of the hearing there was a discussion about the possibility of playing some excerpts of the explicit videos to the parties in court if the need arose although this did not actually happen. It does not need much imagination to think that this might have had a deleterious effect on someone who was a victim of intimidation and/or abuse. I say all this to illustrate that it is not an academic point but wish to be absolutely clear that counsel is not to be criticised. Cross examining on such matters is difficult yet very important, and counsel benefit from a ground rules hearing as well.

72. I should make it clear here that whilst there is a continuing obligation upon the court to apply the rules, this judge came to the case fresh at the fact finding hearing. The matter was not raised by anyone including counsel at earlier hearings before different judges. **What happened here is a stark reminder to us all that these matters need to be addressed to avoid the risk that the integrity of the trial will be undermined.**



D and E (Parent with Autism) [2020] EWFC B18

118. In the judgement of the Court, the diagnosis of Autism Spectrum Disorder was highly significant. Dr Suleman identified that many of the features of the mother's presentation that gave rise to concerns on the part of the Local Authority identified in the Local Authority parenting assessment, including a lack of eye contact, a lack of recognition of emotional cues and social cues, giving short answers, having a blank expression and having rigid routines, were all features of Autism Spectrum Disorder. The Court accept the powerful submission made by Miss Geddes on behalf of the mother, that the mother is entitled to appropriate and targeted support to assist and support her in parenting her children, having regard to the diagnosis of Autism Spectrum Disorder.

119. Regrettably, it cannot be said that adjustments of the type recommended by the professionals were adopted consistently during the assessments of the mother undertaken at the residential assessment centre. **Further, the Local Authority in its dealings with the mother did not adopt special measures particular to her needs.** Whilst it had been highlighted some time ago that the mother may have signs of autism, the mother was not formally diagnosed until February 2019. By that time, the mother had already undertaken a lengthy residential assessment and was part way through her community-based assessment.

125. The Court attempted during the final hearing to adopt the reasonable adjustments highlighted in the opening paragraphs of this judgment and having regard also the specific guidance provided by the intermediary relating to the mother, which set out a focused list of adjustments specific to her needs. It was unfortunate, however, that prior to the final hearing, **this case did not benefit from judicial continuity**, the parties appearing before four different tribunals since the application was issued. The well-established principle of good practice, that case management of a complex case should be conducted by one Judge, was not achieved. In the family jurisdiction in particular, judicial continuity serves to ensure the identification of a Judge responsible for the conduct of all case management and interim hearings and the early identification of the Judge to conduct the final hearing. The many benefits to be achieved through allocation to a single Judge are well rehearsed. The relevant issues in the case are easier to identify. Only one Judge need read the case papers. Firmer judicial control can be exercised over a case and case management is more consistent with interim applications being heard by the same Judge. Experience has also shown that Judges to whom cases are allocated are able to accept a greater responsibility for the progress of cases and urgent applications heard in a timely manner. The aspiration of judicial continuity was ever more important in this case, having regard to general the guidance that autistic people may experience difficulties if the same Judge is not involved throughout the proceedings and having regard to the specific needs of the mother identified by the professionals, including the need to limit the numbers of people working with the mother to as few as possible.



D & E cont.

130. In the judgement of the Court, the absence of suitable, targeted and attuned assessment, having regard to the mother's Autism Spectrum Disorder meant that the Court could not attach sufficient weight to the community-based assessment or indeed to the social worker's parenting assessment, such that the Court could not be confident that final decisions could be made in respect of the children D and E without further evidence, necessary to assist the Court in concluding the proceedings justly. The Court did not accept the suggestion of the social worker and Children's Guardian that, as the mother's Autism Spectrum Disorder was diagnosed as being 'mild,' the impact of her autism on the assessment process should be disregarded. Whilst the Court accepted that the mother's Autism Spectrum Disorder is only a part of her psychological profile, in the judgement of the Court, it was an integral part of her psychological make-up that could not be ignored or its impact minimised.

131. In the judgement of the Court, there was patently insufficient reliable evidence to conclude that the welfare of D or E demanded separation from their mother. Further information was necessary to support and assess the mother's parenting and her ability to implement and maintain advice in respect of her parenting on a consistent and sustained basis. The mother required targeted assistance to overcome the deficiencies in the existing assessments. That evidence should be obtained through an Independent Social Worker with specialism in Autism Spectrum Disorder, in accordance with the mother's Part 25 application made during the Final Hearing.



Macdougall v KE and others [2022] EWHC 2479

- Adjournment for intermediary refused - context specific recommendations needed
- Father involved in separate criminal proceedings and an intermediary appointed in the criminal trial which had been adjourned.
- Father had LD and was on the autistic spectrum.
- Lieven J considered intermediary's recommendations "*are matters that a judge, properly informed and acting appropriately, would ensure in a case such as Mr MacDougall's in any event*" [10].
- "*In my view, trying to look at this case as a whole, I do not accept the need for Mr MacDougall to have an intermediary in the family proceedings. Family proceedings are not the same as a criminal trial, both in terms of the formality of the proceedings, the nature of the questioning and the degree to which it is appropriate for the judge to intervene to ensure that questioning is done on a level, and in a way that may be, to quote from another document, "Not an Old Bailey type cross-examination".*" [14]



Strategies for communication



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Vulnerability

- Duty of all advocates to identify vulnerability at and early stage in the proceedings
- No definition of Vulnerability
- Need to look beyond ASD ADHD LD



Spotlight on PTSD

Royal college of psychiatrists

- PTSD can be experienced by those who have suffered chronic adverse childhood experiences, professionals understanding of PTSD has expanded.
- The numbers needing treatment for PTSD has increased and of course services have reduced.



Physical disabilities / Medical conditions

- **How might chronic pain and discomfort impact on participation?**

The Advocates Toolkits

- <https://www.theadvocatesgateway.org/toolkits-1-1-1>



Preamble to every Toolkit

- The Advocate's Gateway toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair.
- Effective communication is essential in the legal process.
- **'Advocates must adapt to the witness, not the other way round.'** Lady Justice Hallett in R v Lubemba; R v JP [2014] EWCA Crim 2064, para 45.
- The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.



Communication needs

The most significant factor in effective communication with a vulnerable person or somebody with communication needs is the questioner's ability to adopt an appropriate manner and tailor questions to the needs and abilities of the individual (Agnew et al, 2006; Bull, 2010; Powell et al, 2013), enabling the person to understand questions and give answers that he or she believes to be correct.

No two people will have the same profile of communication strengths and weaknesses.

Obtaining a full picture of the individual's communication capabilities is essential and an intermediary can help with this,

Always consider assessment of a vulnerable witness by an intermediary (**Youth Justice and Criminal Evidence Act 1999**, section 29) if the person is unlikely to be able to recognise when they do not understand something, or tell you that they have not understood, or has some other communication difficulty.



Duty to consider vulnerability

- According to Lord Reed, in *Osborn v Parole Board* [2013] UKSC 61: '[Justice] is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.' (para 68) And fairness 'depends on the circumstances' and it is 'impossible to lay down rules of universal application' (para 80).
- 1.2 Vulnerability is not the same as unreliability. With the necessary support, most people including those who are deemed vulnerable, can give reliable evidence.
- 1.3 Advocates and judges should be proactive in identifying the need for an assessment of potential vulnerability and responding to it. Vulnerabilities in a witness or a defendant may be identified by a range of professionals and practitioners, including, for example, police officers, liaison and diversion services, instructing solicitors, court staff and victim support. It should not, however, be assumed that a person's vulnerability will have been



Vulnerability in family cases

- Toolkit 13
- Vulnerability should be identified at the earliest possible stage and information-sharing is key to achieving this.
- The Family Procedure (Amendment No. 3) Rules 2017 ('FPR') came into force on 27th November 2017. They are supplemented by Practice Direction ('PD') 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence.



Identification of the vulnerable client

- Sometimes this will be obvious as your client will have a diagnosis
- Advice from the law society in identifying vulnerable clients
- Targeted Toolkits
- ASD
- Learning disability
- Hidden neurodisability



Cloak of Competence

- **Term used by Dr Parsons in [Re N \(A Child\) \[2019\] EWCA Civ 1997](#); [2019] 4 WLR 154**
- Referred to by King LJ in her judgment Dr Parsons noted that a feature of the mother's presentation is that she initially presents as far more cognitively able than is the case. This is a phenomenon referred to as "the cloak of competence" and should, Dr Parsons says, not be seen as deception on her part, but as an adaptive skill developed by a person to help cope with daily life.
- Many clients will appear very competent especially if they are employed and appear to live a "normal" life (save for being involved in proceedings)
- Clients will not have the adaptive skills to negotiate proceedings
- May not recognise they do not understand or may be too embarrassed to let you know
- Risk factors which indicate vulnerability "may not be apparent and, even if they are, identification of vulnerability is poor. Even when identified, vulnerability is not always acted upon (Gudjonsson 2010; Young et al 2013)."



Cloak of Competence (cont'd)

- **‘Self-reporting’ is often unreliable as individuals may choose not to disclose for fear of discrimination, ridicule or a more punitive response.**
- An advocate who suspects a witness or defendant might be vulnerable should consider asking questions of that person, asking appropriate others to make enquiries and/or seek expert advice.



Prevalence of learning difficulties

- Studies have reported that a high number of parents in care proceedings have learning disabilities
- Masson et al 2008 Reported 12.5%
- Booth 2004 Reported 1/6 of cases
- Old research and likely to be outdated and we can suppose number is higher
- The evidence indicates parents with learning disabilities are often unsupported in involvement with CSC and courts
- Re L (Care Threshold Criteria) [2007] 1FLR 2050 *“society must be willing to tolerate very diverse standards of parenting including the eccentric, the barely adequate and the inconsistent ... it is not the provenance of the state to spare children all the consequences of defective parenting”*



Learning disabilities

- Toolkit 4 useful starting point
- Overview of types of Learning disability
- Need to look out for clients with
- Borderline LD IQ of around 70 and
- Mild learning disabilities IQ of 50-70



People with borderline learning disability...

- may not have been formally diagnosed and may be difficult to identify.
- are often independent in caring for themselves and conducting everyday tasks.
- may have comprehension difficulties that are not obvious and may be disguised by coping strategies and efforts to hide areas that the person is struggling with.
- may repeat language without fully understanding it.
- may have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.
- usually have skills in reading and writing.
- are able to engage in conversation and communicate experiences, needs, wishes and feelings.



People with mild learning disability

- may not have been formally diagnosed.
- are often independent in caring for themselves and conducting everyday tasks.
- may have problems and need support with abstract concepts and ideas such as time, duration and distance, the handling of money and personal organisation, and planning and sequencing ideas.
- usually have basic skills in reading and writing.
- usually are able to engage in conversation and communicate experiences, needs, wishes and feelings.



Learning disability and associated conditions

- ASD is more common in people with learning disabilities than in the general population
- Depression and anxiety panic attacks are more common in people with learning disabilities
- One condition may hide another leading the person's needs not fully recognised



How learning disability can affect communication

No two people with a learning disability will have exactly the same profile of strengths and weaknesses and each person's capabilities will differ (this should be assessed by an intermediary)

Typically, however, a person with a learning disability is likely to:

1. have weak listening and processing skills;
2. experience difficulty and delay between hearing something, understanding it, and in
3. working out how to respond.
4. have a limited concentration span;
5. be prone to suggestion and compliance (a nod or answering 'yes' does not necessarily indicate full understanding);
6. have limited insight and ability to identify emotions or intentions behind their own or someone else's speech or actions, or see someone else's point of view;
7. experience heightened frustration, stress and anxiety.



How learning disability can affect communication (cont'd)

Within proceedings in and out of the court arena frustration, anxiety and stress commonly occur as a result of:

1. poor communication by those interacting with the person who has learning disability (especially in an unfamiliar context, outside of everyday routine and experience);
2. the person who has learning disability not knowing what is going to happen;
3. people and surroundings being perceived as intimidating by the person who has
4. learning disability;
5. Responses to frustration, anxiety and stress may include:
6. feelings of panic and mental overload, leading to total shutdown;
7. outbursts of aggressive or frustrated behaviour;
8. the urge to provide any answer, simply to bring questioning to an end.



How ASD can impact on communication

- Useful resources NAS website
- Approximately 1 in 100 people are thought to have autism.
- It can be a hidden condition and may not be obvious
- Underdiagnosed in the female population
- Co occurs with Learning disability, epilepsy and anxiety and depression

- Toolkit 3



Communication needs (ASD)

NB – no two people with ASD will have the same communication needs

Behaviour and presentation

People with autism may display unusual behaviours that may reflect their own specific interests, anxiety, or difficulties about knowing what is socially appropriate in given situations. These behaviours are at risk of being misconstrued by the courts and professionals.

For example, a person with autism may;

- avoid eye contact;
- change the topic of conversation to a ‘preferred topic’;
- laugh at inappropriate moments;
- have an odd, monotone or pedantic manner of speaking (Klin et al 2005; Foster 2015);
- have difficulty seeing things from other people’s perspectives and therefore seem to lack empathy (e.g. Baron-Cohen 2003; Gillberg 1992);
- become verbally abusive or physically lash out because of difficulties keeping calm in highly stressful situations. This may be indicative of a ‘meltdown’, which is a temporary loss of behavioural control in response to an overwhelming situation (see National Autistic Society (NAS) ‘Meltdowns’). Meltdowns can take different forms, including screaming, crying, biting, or complete withdrawal.



Communication needs (ASD) (cont'd)

Most people with ASD will experience heightened anxiety when

- In unfamiliar settings
- Communicating with unfamiliar people
- Changes to routine or plan of what is expected

- Difficulties with attention and listening
- Limited attention span

- Difficulties with spoken language
- a person with ASD may seem articulate but this can mask difficulties understanding spoken language
- And have difficulties using language
- May appear to read well but not fully understand (hyperlexia)



ADHD, ADD and other hidden disabilities

- A considerable percentage of the population may have difficulty in reading, spelling and numeracy, or have weaknesses in information processing, communication skills and memory; A significant number of teenage boys or young men (particularly offenders) commonly display features of attention deficit (hyperactivity) disorder (ADHD).
- Specific language difficulties include specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)D. Together, specific language difficulties are believed to affect at least 15% of the population and constitute the most common disability to be encountered in the criminal justice system.



ADHD, ADD and other hidden disabilities (cont'd)

- **Specific learning difficulties** consist of a family of related neurological conditions which occur independently of intelligence and involve weaknesses in information processing communication skills and memory. It is common for someone with a specific learning difficulty to have more than one, and/ or other conditions.
- **Specific language impairment** refers to difficulties with comprehension and/or expression (use) of spoken language.
- **Dyslexia** affects the way information is processed, stored and retrieved, with problems of memory, processing, organisation and sequencing, and getting dates, numbers and events in the right order.
- **Dyspraxia** impairs movement and co-ordination but can also involve problems with language, perception, thought and personal organisation.
- **Dyscalculia** causes difficulties concerning telling the time, time-keeping and understanding quantity, prices and money.
- **Attention deficit (hyperactivity) disorder** is a neuro-developmental disorder affecting the cognitive management system of the brain. It is typified by poor listening skills, distractibility and disorganisation.



Communication needs

The person may need additional support with:

- expressive communication – verbal fluency and precision in speech and word-finding;
- receptive communication – simplifying complex vocabulary, abstract concepts and legal terminology and long or complex questions;
- receptive language delay – the person may have difficulty with taking in information: delay between hearing something and understanding it and in working out how to respond;
- misunderstandings due to over-literal interpretation, use of pronouns and/or use of negatives.

The person may have dyssemic difficulties:

- expressive and receptive problems with body language – may not use body language conventionally or appropriately and may have difficulties understanding and interpreting the body language of others.
- modulating speech volume – can be over-loud (which may seem aggressive) or too quiet.

- modulating tone of voice – may be monotone, sound excessively enthusiastic or sarcastic.

6.3.6 The person may have sequencing, organisation and time management difficulties:

- problems with presenting a sequence of events in a logical, structured way;
- problems sequencing numbers and letters;
- problems with time management;
- difficulties estimating the passage of time.

7.3.7 The person may need support with reading.

- Some people with dyslexia experience visual stress when reading; text can appear distorted or blurred. Tinted paper is preferable with well-spaced plain print in font size 12 or above, non-justified (see British Dyslexia Association).



Communication needs with ADHD

- Inattention & Poor Focus
- Difficulty Concentrating
- Distracted Easily
- Struggling to Maintain Focus on a Specific Task
- Problems with Planning, Executing, and Completing Certain Tasks
- The Appearance of Not Listening when Being Spoken To
- Manages Some Tasks Better Than Others
- Difficulty Learning and Developing New Skills or Concepts
- Hyperactivity & Significant Difficulties Staying Still, Not Fidgeting
- Often Rotates Between Tasks and Activities
- Often Doing Multiple Things At Once
- Impulsive Behaviour
- Impatient and Has a Hard Time Taking Turns
- May appear loud / aggressive
- May respond inappropriately / blurt out what seems to be an inappropriate response

**Likely to also suffer with depression
anxiety and panic attacks**



Depression / Anxiety /PTSD

- Research suggests that those suffering from anxiety and depression are viewed as not requiring the same level of support or empathy
- Snap out of it approach or
- Take medication and it will all be better
- Prone to stress reactions when their coping strategies break down
- Overwhelming feelings of guilt / shame
- Emotional distress can fluctuate
- Be aware of the impact of trauma on communication
- PTSD avoid triggers
- Symptoms of hyper arousal hyper vigilance, startle response, sleep disturbance outburst of fear panic or aggression
- High anxiety may trigger episodes of dissociation



What to look for

- Does your client need assistance reading / filling in official forms
- Do they have dyslexia (more likely to admit to this than have a LD)
- How are they in terms of keeping appointments do they need reminders
- On meeting clients do they appear to understand what is going on understand the seriousness of allegations ?
- Do they seem hostile to you
- CAF assessment or SWET referencing any of the following might be indicators
 - distractibility / not listening
 - Scrolling on phone
 - Appearing to fall asleep in meetings / disinterest in meetings
 - Walking away from S/w meetings / not attending meetings
 - Repeatedly failing to follow practical advice
 - Loud aggressive communication
 - Is there a history of CSC involvement



So far...

**it seems almost every client may be vulnerable
and or suffering from a disability**



‘[Disability] places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities’,

Lady Hale in P V Cheshire West and Others [2014] UKSC 19, paragraph 45



Neuro physiological responses to stress

- Shark music



Why do I need to know this?

- Because it impacts on how we communicate with with our clients
- And how we ask other professionals to engage with them
- Clients are may become overwhelmed and their ability for critical thinking shuts down
- They are in survival mode
- The part of the brain that is activated to ensure survival, is different from the part of the brain that is activated when calm.
- In survival mode the vulnerable person will not be able to engage or communicate effectively
- It may be difficult to spot when a client is in survival mode
- They may present externally very differently to how they feel on the inside

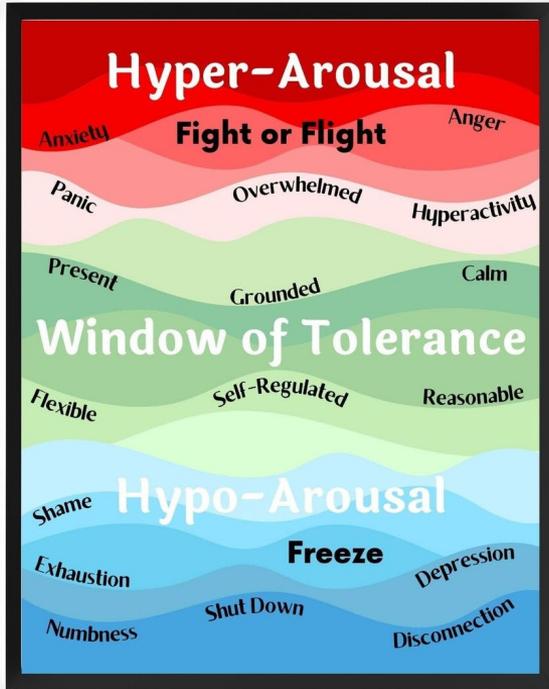


The impact of stress on communication

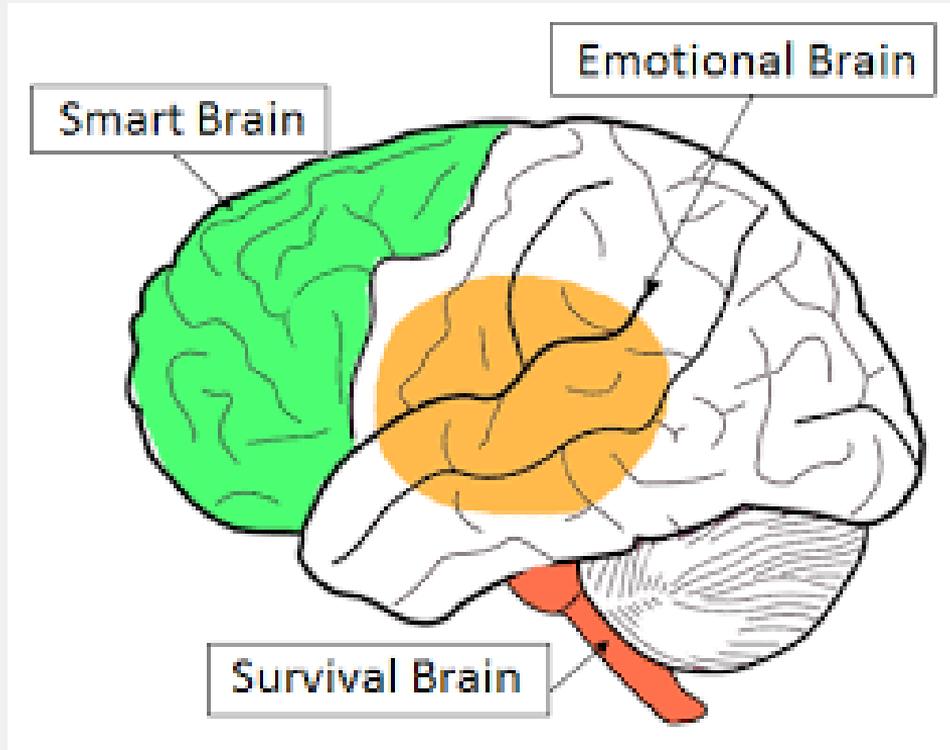
- **Be aware of the impact of stress on communication because many people with a specific learning difficulty**
- Mental health difficulties neurodevelopmental difficulties are likely to have low confidence and self-esteem, rendering them prone to stress reactions where their coping strategies break down and their impairments become even more pronounced. Frustration and stress are heightened by poor communication, not knowing what is going to happen, and delays. Responses may include feelings of panic and mental overload, leading to total shutdown or the urge to provide any answer at all in order to bring questioning to an end.
- (Toolkit 5 4.25)



The Window of Tolerance



The brain and coping strategies



Dan Siegel's hand model of the brain

- Warning slightly irritating American psychiatrist
- But
- explains why it's so hard for any of us to think/react rationally when we're triggered. It's not specifically about neuro-diverse people or those with mental health difficulties, but they will tend to be more triggered by stressful situations. It helpful in conjunction with thinking about the Window Of Tolerance.



What happens in Survival Mode

- Freeze mode
- Flight mode
- Fight mode
- Collapse or submit mode



FREEZE MODE

What I look like in Freeze mode

- Bored
- Distracted
- Not listening
- Appearing zoned out
- Looking around scanning the room



What I am aware of in Freeze mode

- My heart is beating faster
- My breathing is faster
- My brain is slowing down
- Background noises (I can hear what is around me without focusing)
- The tone of voices rather than words, listening for threats of danger
- I'm under attack
- Terrified
- I need to get ready to protect myself
- Body language cues looking for where the attack may come from
- My immediate surroundings and where the danger or escape route is



How my body feels in Freeze mode

- Under attack
- Ready to fight to defend myself
- Very scared
- My pulse rate is going up
- My muscles are tensing my hands might clench into fists
- Some sounds are louder some more distant, I can't focus on what is being said but I can hear information and where the threats could be from the tone of your voice



What is happening in my inner world

- I'm a failure
- I'm not as good as everyone else
- I'm not worth bothering with
- I hate myself
- I need to get somewhere safe
- I can't do this
- I'm humiliated and embarrassed
- I'm scared
- I'm out of my depth I'm drowning



You can help me feel safe by

- Don't stand over me when I am struggling with a task
- Try not to get annoyed with me if I have forgotten what I was supposed to be doing
- Don't ask me question after question
- Give me time to regulate



FLIGHT MODE

What I look like in Flight

- Hyperactive, manic
- Aggressive: stiffening up or clenching fists
- Walking away, escaping, disappearing
- Threatening
- loud and noisy
- Disrespectful
- Anti-social, lonely, a loner
- Immature



What I am aware of in Flight

- Vigilant to what is around me as a threat to my survival
- Sudden (noises others might not hear)
- Overwhelmed, too much stimulation to cope
- Noise levels
- Tone of voice from anyone speaking
- Who might be a danger to me
- How far away I am from feeling safe
- I need to get out of here



What my body feels in Flight

- Terrified
- My heart is beating faster my pulse is going up my heart is racing
- My breathing is getting quicker, I am ready to run / walk out
- My muscles are tensing so I can fight my way past
- Nauseous
- Increased sweating



What is happening in my inner world

- I need to get out of here I'm in danger
- There are more of them than me I need to find somewhere safe
- I'm not important
- Alone
- I must not show how I feel
- I must not tell anyone how I feel



How you can help

- Allow me time out
- Recognise that you might not feel the meeting place is threatening but I might see things you do not
- Understand large meetings full of professionals some of whom I do not know can be terrifying
- Accept I feel threatened
- Appreciate if I have forgotten something I have not done this on purpose
- Give me time to regulate



FIGHT MODE

What I look like in Fight

- Argumentative and aggressive
- Unable to concentrate
- Unable to finish a task
- Unable to follow the rules
- Unable to get on with staff / professionals
- Confrontational
- Disrespectful
- Non attender
- Immature



What I am aware of in fight mode

- Multiple threats of danger from all around me, I need to escape
- If I hit out first I might survive
- I need to escape
- I don't trust anyone
- You don't listen so I will say what you want me to just to make you go away
- You don't really want to help me
- You don't really care



What my body feels in Fight

- Tense ready for action
- Over alert my hearting is beating so loud I can hear it
- Nauseous
- Terrified
- Faint / dizzy
- Overwhelmed
- I'm alone no-one understands
- I need to cry / scream / laugh hysterically



What is happening in my inner world

- I wish I could make this work
- I want to go somewhere it is safe
- I wish you would notice how scary this all is
- I wish I had someone to talk to / who understood



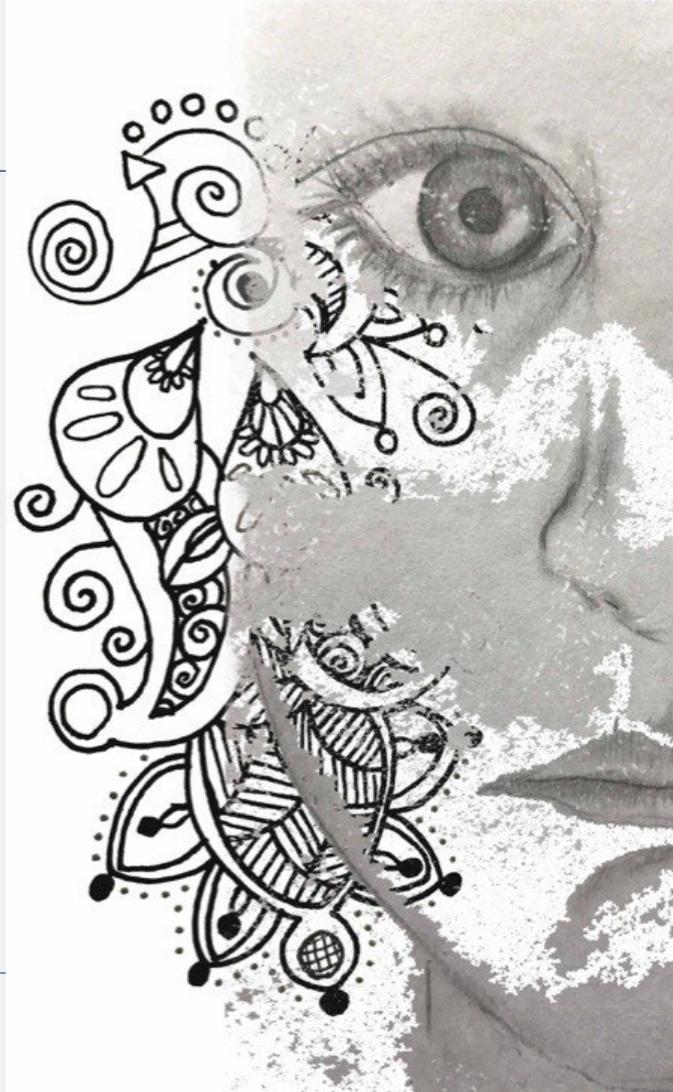
You can make feel safe by

- Understanding I may not feel safe speaking to some professionals
- Understand that sometimes I need extra time
- Understand that I can't focus in this state
- Let me have somewhere safe to go to calm down
- Give me time to regulate
- Listen and accept that I feel and see things differently, do not trivialize
- Understand this is scary
- Tell me about changes before they happen
- Accept I might not know why I behaved in a certain way or I might not remember



Collapse / submit mode

- Unhappy
- Withdrawn
- Anxious
- Head down
- Fidgety but not disruptive
- Not asking questions
- Yes no answers
- Quiet / passive



What I am aware of in Submit

- I am exhausted
- I need to put on a brave face
- If I do what you want / agree with you I will be left alone
- I feel dead inside



What is happening in my inner world

- Self harm helps me to feel something
- Drinking alcohol / using drugs helps me feel happy
- I am worthless
- It is not going to get better so I might as well give up
- I am dead inside



What my body feels in submit

- Exhausted
- Depressed
- Anxious
- Worthless
- Guilty
- Like crying or screaming
- Unable to sleep
- Unable to relax or enjoy anything
- Unable to care / feel



You can help me by

- Listen to me
- See me
- Recognise I am hurting inside
- Recognise that I will say whatever I think you want me to say
- Give me time to regulate



Why have we included all of this?

To help establish a roadmap to help all understand how our vulnerable client may feel in the following situations

- CP LAC /CIN meetings
- Social work visits / professional visits when asked many questions
- Parenting assessments
- FSW interventions
- Court hearings
- Meeting solicitor / barrister



What can we do as professionals to help

- Take time to listen to learn about your client and what they want
- Do not immediately focus on the criticisms
- Think about the positives and how you can help
- Ask how they experience certain situations / professionals
- Try to adapt to fit the client's needs
- Think about preparing a one page profile



Benefits of a One page profile

- This is not a statement of evidence
- A short hopefully one page document setting out key information to be given to all professionals involved
- Avoids the repetition of information to each professional as this can be re-traumatising and triggering
- Sets out what is important to your client and what they want to achieve
- Summarises the vulnerability and how this may look
- Explains behaviour that may be misunderstood
- Sets out how professionals can help a person self regulate



How to get the best out of your intermediary

- And why we need them
- We know in theory how to poach an egg but how many of us actually do it?
- The barrister / solicitor cannot be fully alert to communication difficulties at the same time as undertaking advocacy



Helpful documents to accompany clients at all times

- Tourettes passport
- NAS passport
- Mencap passport
- Available to all professionals, lawyers, SWs, court staff
- Confidentiality issues, best interests of client and consents



The PLO

- Important to identify vulnerability at this stage to ensure in so far as is possible that appropriate assessments are undertaken
- Remind the LA of its obligations under the Care Act s64
- Importance of having independent advocacy
- Use health passports /one page profiles



Useful resources



Finally

- “If we value our children, we should cherish the parents”

John Bowlby



Thank you

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GARDEN COURT CHAMBERS
