

ORIGINAL ARTICLE

Effective participation of mentally vulnerable defendants in the English magistrates' courts: The crucial role of liaison and diversion

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Abstract

Mentally vulnerable defendants who are unable to effectively participate in their trial in the magistrates' courts are unprotected by the law relating to unfitness to plead. The conveyor-belt justice offered in the magistrates' courts means that these defendants are at risk of being overlooked. This article aims to demonstrate that, in addition to police custody suites, a permanent presence of Liaison and Diversion (L&D) teams within all English magistrates' courts is crucial to the protection of vulnerable defendants who are unable to effectively participate in their trial. Moreover, the presence of L&D teams within all magistrates' courts might provide a more pragmatic and compassionate solution than legal reforms to those vulnerable individuals who are unable to understand the trial process. This improvement is achievable given the cost efficiencies highlighted by the RAND Europe Outcome Evaluation, published in April 2021.

KEYWORDS

effective participation, liaison and diversion, magistrates' courts, mentally vulnerable defendants, unfitness to plead

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1 | INTRODUCTION

Mentally vulnerable defendants who are unable to effectively participate in their trial in the magistrates' courts are unprotected by the law relating to unfitness to plead (*M (John)* [2003] EWCA Crim 3452), which applies only in the Crown Court (Law Commission, 2016, ch. 7). The protection of vulnerability should lie at the heart of our societal values. Regrettably, this protection is often lacking towards suspects or defendants who are mentally vulnerable and are appearing only before the magistrates' court. To some degree, this is understandable, given the volume of work in the magistrates' courts, and particularly where harm has been caused to a victim (Peay & Player, 2018, p.939). This should not mean, however, that these defendants are not deserving of protection and support, especially given that vulnerability permeates throughout the criminal justice process (Asquith, Bartkowiak-Théron & Roberts, 2016, p.162). The criminal justice system is known to deplete the resilience of suspects and defendants in 'myriad ways' (Dehaghani, 2021, p.265), with mental vulnerability being only one such form of susceptibility. In the absence of a 'comprehensive definition of vulnerabilities' (Revolving Doors Agency & Centre for Mental Health, 2019, p.25), for the purpose of this article 'mentally vulnerable defendants' will be defined in the broadest sense to include suspects or defendants suffering from any mental disorder, personality disorder, autism spectrum disorder or learning difficulty which might compromise their ability to stand trial. This definition reflects the inclusive approach of the JUSTICE (2017) report towards defining mental vulnerability (pp.15–16). The need for a definition is a significant issue, but requires a more detailed exposition outside of the scope of this article. Other issues requiring deeper examination elsewhere include the Criminal Justice Liaison Service in Wales, and the youth courts in England and Wales; while many of the issues discussed below will be relevant to the former, the latter raises countless additional issues relating to vulnerability, which cannot be addressed by way of a brief overview.

The Law Commission for England and Wales has proposed that any legal reform relating to unfitness to plead should be equally applicable in the magistrates' courts (Law Commission, 2016, ch. 7). On closer examination of the Law Commission's proposals, it has been argued that extending any reform of the law on unfitness to plead into the magistrates' courts might be unworkable due to time pressures and the paucity of legal aid funding, and that policy changes might be more effective (Howard, 2021). Given the scarcity of options available to a defendant who is unable to understand the trial process, and given also the increased move towards virtual hearings, now 'is a particularly important time to consider the defendant's participatory role' (Owusu-Bempah, 2020, p.610). This article will suggest that the work of the Liaison and Diversion (L&D) service is crucial in this regard. While the remit of the national L&D model does not include advising on issues of effective participation, it will be submitted that, in preference to enacting potentially unworkable legal reforms, the L&D service uniquely offers the support needed by mentally vulnerable defendants who are unable to withstand the trial process in the magistrates' courts. Whether by recommending diversion or providing essential information to the defendants, their legal representatives or the court, this supplementary support should be commended and entrenched by the provision of a permanent L&D presence in all English magistrates' courts.

The current scope and implementation of the national model for L&D will be examined, addressing the largely successful deployment of L&D teams within police custody suites, as well as focusing on the need for L&D provision in the magistrates' courts in order to close some of the unavoidable gaps. Subsequent to this, a sample of views taken from L&D teams working within the Tees, Esk and Wear Valleys NHS Trust (TEWV) will be analysed. While these views draw on a

small sample and cannot be representative of all L&D services, when taken alongside evaluations of the national model (RAND Europe, 2016, 2021; Revolving Doors Agency & Centre for Mental Health, 2019), two key emerging themes relating to resourcing and information sharing are clearly apposite at a national level. Within these two themes, there will be a discussion of some of the gaps and obstacles to mentally vulnerable defendants receiving a fair trial and fair treatment within the magistrates' courts. The article will conclude by advocating some achievable solutions based, unsurprisingly, on better resourcing of the L&D service nationally. The most significant recommendation is that there should be a permanent L&D presence in all magistrates' courts, an improvement that is achievable given the cost efficiencies highlighted by the most recent RAND Europe (2021) outcome evaluation.

2 | METHODOLOGY

This article will provide a brief overview of the law relating to effective participation in the magistrates' courts, highlighting the issues that a mentally vulnerable defendant might face here, followed by a doctrinal examination of the development and remit of the L&D service in England. The small empirical aspect of this research involved semi-structured interviews of participants, all of whom were past or current members of L&D teams working within TEWV. The flexibility of these interviews allowed participants to depart from the questions and provide a richer quality of answer (Bryman, 2016, p.467). Following ethical approval, all interviews were face-to-face online or in person (pre-Covid) and were recorded to allow for transcription. Personal details were kept confidential and subsequent analysis of the interviews was anonymised. Given the small number of employees within TEWV L&D teams, participants were selected from past and current team members, pseudonyms were used (Ash, Val, Finn, Sam, Cath, Gene, Ben and Charlie) and genders were randomly changed in order, as much as possible, to preserve anonymity. The location and job title of each participant was withheld. Purposive sampling was adopted in the form of snowball sampling, directed specifically towards L&D teams in TEWV. The semi-structured interviews generated conversations based around how mentally vulnerable defendants are generally identified, where there are gaps in service provision and what, in the participants' opinions, would be an ideal outcome for such individuals.

Eight participants were interviewed, all of whom worked in varying roles within L&D teams in TEWV. While in some respects data saturation was reached in respect of TEWV L&D service, it is recognised that such a small sample cannot be representative of the national L&D service. A more complete picture has been achieved by combining a doctrinal analysis of the L&D service, examining relevant evaluations (RAND Europe, 2016, 2021; Revolving Doors Agency & Centre for Mental Health, 2019) and analysing views of participants. The relative weaknesses of qualitative data were kept in mind, namely, the barriers to achieving objective data and, whether it is possible to carry out 'true analysis' (Bryman, 2016, p.570). Particular thought was given to not taking statements made by participants out of context and to not generalising inappropriately (Onwuegbuzie & Leech, 2010). Recognition was also given to the fact that participants might have been unwilling to disclose bad practice. After initial coding, analysis of the interviews was thematic, using the inductive approach (Thomas, 2006). Prior to this thematic analysis, there will be a brief consideration of the law with regard to effective participation in the magistrates' courts, followed by an examination of the remit of L&D services, focusing particularly on their role within magistrates' courts.

3 | THE LEGAL POSITION

Article 6 of the European Convention on Human Rights (ECHR) sets out the requirements for a fair trial. This includes the stipulation that the defendant has ‘adequate time and facilities for the preparation of his defence’ and being able to ‘examine or have examined witnesses against him’ (Articles 6(3)(b) and (d)). The term ‘effective participation’, reflects the approach of the European Court of Human Rights as presupposing ‘that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence’ (*SC v. United Kingdom* (2005) 40 EHRR 10 (App No 60958/00), para. 29). It follows that a trial will not be fair if a defendant has been unable to effectively participate in it, although, as Owusu-Bempah (2018) comments: ‘the potential for meaningful engagement of all defendants continues to be limited by an uncertain scope and restrictive application of the right to effective participation’ (p.322). Unlike the Crown Court, which has a test for unfitness to plead, the magistrates’ courts have no equivalent legal test (Law Commission, 2016). When a mentally vulnerable defendant appears unable to understand what is happening in his trial, the only options available are for the court to stay proceedings due to an abuse of process on the grounds that any trial would be unfair (*R (Ebrahim) v. Feltham Magistrates’ Court* [2001] 2 *Criminal Appeal Reports* 23, para. 17) or, if the offence is punishable by imprisonment, to make a hospital or guardianship order under Section 37(3) of the Mental Health Act 1983 that the defendant did the act or omission but only if all of the following criteria are met:

- evidence must be given by two registered medical practitioners;
- the offender must be suffering from a mental disorder;
- the mental disorder must be of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him, or the mental disorder must be of a nature or degree which warrants his reception into guardianship under the Act; and
- the court is of the opinion that this is the most suitable method of disposing of the case.

The above options are far from adequate. The Divisional Court in *R (Ebrahim) v. Feltham Magistrates’ Court*, has restated the view set out by the House of Lords in *Horseferry Road Magistrates’ Court ex parte Bennett* ([1994] 1 AC 42) that using the court’s inherent jurisdiction to stay proceedings ‘ought only to be employed in exceptional circumstances’ (*R (Ebrahim) v. Feltham Magistrates’ Court* [2001], para. 17). There is no process in the magistrates’ courts to deal with the defendant who lacks capacity to effectively participate in his trial due to learning difficulties, rather than a mental illness, nor is there a power to impose a restriction order under Section 41 of the Mental Health Act 2007 (Law Commission, 2016, para. 7.4(1)). A Section 41 restriction order can be useful in requiring a defendant to take medication in order to protect the public (*R v. Lall (Gurjeet)* [2021] EWCA Crim 404). Its absence in the magistrates’ courts further ties the hands of the magistrates, making the role of L&D practitioners more crucial to achieving a good outcome for both the defendant and the protection of the public. The restrictions on legal aid

funding further limit the support that a mentally vulnerable defendant might be able to receive in the magistrates' court, since legal representatives might be reluctant to request medical reports for minor offences if the fees must come out of their limited payments (Howard, 2021; Legal Aid Agency, 2021).

All of the above factors mean that mentally vulnerable defendants who face a trial in the magistrates' courts are disadvantaged and might have to stand trial when they lack sufficient capacity to engage in any meaningful dialogue (Howard, 2016, p.431). A defendant who is unable to engage in any meaningful moral conversation ought to be diverted and dealt with outside of the criminal justice system (Duff, 1994, p.420). While there is an increasing awareness of the need to address the support given to mentally vulnerable defendants (Ministry of Justice, HM Inspectorate of Prisons & the Rt Hon Robert Buckland QC MP, 2020), there is still a long way to go. The recent government announcement on creating a fairer system for neurodivergent people in the criminal justice system has been criticised for its aim 'simply to assist criminal justice professionals in dealing with such individuals once in the system' (Ormerod, 2021, p.248). The most significant improvement for diverting mentally vulnerable defendants away from the criminal justice system is the nationwide introduction of L&D teams. The L&D service, which will be considered below, is all the more essential in the magistrates' courts, given the extremely limited options available for mentally vulnerable defendants who are unable to effectively participate in their trial.

4 | THE LIAISON AND DIVERSION SERVICE

In 2009, the Bradley Report provided a comprehensive insight into the needs of mentally vulnerable defendants in the criminal justice system, recommending that 'police custody suites should have access to liaison and diversion services ... to facilitate the earliest possible diversion of offenders with mental disorders from the criminal justice system' (Bradley, 2009, p.53). Diversion was not intended to be an easy option for defendants, rather

a process whereby people are assessed and their needs identified as early as possible in the offender pathway ..., thus informing subsequent decisions about where an individual is best placed to receive treatment, taking into account public safety, safety of the individual and punishment of an offence. (Bradley, 2009, p.16)

Protection of the public remained at the centre of the Report's priorities. Prior to 2009, L&D services had no agreed definition, no national list and no official figures. The majority were based in the magistrates' courts, 16% operated three days or less per week and 19% had only one staff member (Bradley, 2009, p.81). The recommendations of the Bradley Report were groundbreaking and compelling. Pursuant to these recommendations, the Ministry of Justice, in partnership with the Department of Health and the Home Office, committed to rolling out pilot L&D services (Ministry of Justice, 2010, p.36) and, in 2014, a national model for L&D was implemented in ten trial sites (RAND Europe, 2016, p.xiii). Since then, the Revolving Doors, *In ten years time* report has praised 'the progress towards universal coverage of Liaison and Diversion services working to a nationally mandated operating model in all police stations and courts' (Revolving Doors Agency & Centre for Mental Health, 2019, p.9).

Funded by the NHS, L&D teams aim to 'provide early intervention for vulnerable people as they come to the attention of the criminal justice system' (NHS England and NHS Improvement, 2019a). Their roles range from having a presence at police stations, keeping communications open

with court staff and probation officers, through to providing advice or guidance at the sentencing stage in courts. Screening, assessment, information sharing and safeguarding are among the key services undertaken by L&D. The *Liaison and diversion standard service specification* (NHS England and NHS Improvement, 2019a) stretches to 36 pages and specifies that:

[s]ervices shall be provided at, but not limited to, the locations listed below:

- Voluntary attendance settings
- Police Custody Suites
- Magistrates' Courts
- Youth Courts
- Crown Courts. (pp.8–9)

The Bradley Report identified the 'police stage' as being 'least developed in the offender pathway in terms of engagement with health and social services' which therefore allowed 'the greatest opportunity to effect change' (Bradley, 2009, p.34). However, the Report also recognised that '[i]nformation on the needs of people arriving at court is essential to determine their immediate requirements' (p.60). Their needs might relate to their fitness to plead, whether they require hospital treatment and what sentencing options are available to them. This view was echoed by Lord Bradley in 2019:

we need to ensure all the relevant information is available to the courts to support appropriate sentencing. If we can improve assessment and information sharing, fewer people with mental ill-health or learning disabilities will end up in prison in the first place. (Revolving Doors Agency & Centre for Mental Health, 2019, p.5)

This statement demonstrates that the valuable service now provided by L&D teams in custody suites should not be overlooked in the magistrates' courts. As discussed above, the mentally vulnerable defendant who is unable to participate in his trial in the magistrates' court is unprotected by a legal test for unfitness to plead; even if he has been identified as vulnerable and has access to a legal representative, there are limits to what can be achieved on his behalf. In the police custody suites, L&D teams share relevant information with custody officers and legal representatives, potentially allowing for early diversion outside of the criminal justice system, thus avoiding the need for a charge or trial. In the magistrates' courts, L&D teams might be in a position to provide information to the legal representative and the court as to the defendant's vulnerability. Despite the fact that L&D teams do not assess a defendant's fitness to stand trial, this information sharing might allow for the defendant's vulnerability to be addressed and for proper support to be given. In the absence of adequate legal protection in the magistrates' courts, the potential value of L&D services should not be underestimated. The L&D service provides crucial support to mentally vulnerable defendants who find themselves floundering within the criminal justice system. Properly funded and functioning effectively, it is difficult to imagine a role more vital to the safe and effective administration of justice. In reality, as will be expounded below, very small teams operate efficiently and successfully but are able only to cover some of the locations listed above and are unable to maintain a presence at all of these venues at all times. Evaluations conducted since the introduction of the national model for L&D services point to their many successes, but there are still many challenges faced (RAND Europe, 2016, 2021; Revolving Doors Agency & Centre for Mental Health, 2019).

In its first evaluation of L&D services, RAND Europe (2016) commented that 'stakeholders from partner agencies and those delivering L&D services were overwhelmingly positive about

the National Model' (p.107). In relation to the presence of L&D teams in the police stations, the evaluation found that mental health issues formed the greatest need in terms of vulnerability (p.46) and accounted for the greatest number of 'interventions' (p.48), reporting that the police tended to be the agency that received the most information from L&D services (p.50). Unfortunately, no evidence was offered as to whether this was due to the greatest demand being created at the police station, or whether the lack of availability of L&D elsewhere, such as in the magistrates' courts, accounted for this fact. Certainly, the evaluation found that the relationship between L&D services and the police was 'pivotal' and that '[c]o-location in the police station was central to the operation of the National Model' (p.63). The success of L&D services in police stations is discussed by interviewees below. Where the interviewees and the RAND evaluation differ is in identifying the gaps in service, particularly in relation to the magistrates' courts.

The 2016 commentary by RAND on the impact of L&D services in the courts provides an optimistic view of how effective a properly resourced and deployed L&D team might successfully contribute to the needs of vulnerable defendants in the magistrates' courts, highlighting that the L&D services under consideration 'provided relevant and timely information to the court' (RAND Europe, 2016, p.78). Feedback from the courts was complimentary in relation to 'the *quality and accuracy* of L&D reports' (p.80, italics in original) which allowed for 'more informed decision-making by magistrates' (p.79) and resulted in more efficient court processes as a consequence (p.81). The evaluation did not address the position of L&D teams who had to choose between deploying staff in either the police stations or the magistrates' courts, but were unable to provide cover at both venues. The evaluation was further limited by the availability of certain data: it was not possible to compare the national model with a 'control' area that had no L&D provision, nor was it possible to make comparisons with areas which had previously had no locally developed services (p.xv). It was also unable to ascertain whether the demand for more funding and staffing was attributable to underfunding or the need for redistribution of staff (p.38). From analysis of the interviews below, it can be inferred that underfunding is the most likely cause.

In ten years time provided a more pragmatic picture of the position of the L&D service in 2019, commenting that 'despite significant progress, far too many people in the criminal justice system with mental ill-health or a learning disability are left without their needs properly identified' (Revolving Doors Agency & Centre for Mental Health, 2019, p.9). This is borne out in the interviews discussed below. *In ten years time* further identifies the need for a 'comprehensive protocol to screening, assessment, information sharing and care access across the whole system' (p.25). The L&D national model contains a standard Court Report Template (NHS England and NHS Improvement, 2019a, p.34), but the information sharing agreements/protocols are local to various NHS Trusts. This is likely to lead to an inconsistent quality of information shared across Trusts and police custody suites, with some being more effective than others.

More recently, RAND Europe published a more comprehensive evaluation of the L&D service using data from

four separate healthcare sources (Hospital Episode Statistics Accident & Emergency, Mental Health Services Datasets, Improving Access to Psychological Therapies database, National Drug Treatment Monitoring System) and two separate criminal justice sources (Police National Computer (PNC), Her Majesty's Courts and Tribunals Service). (RAND Europe, 2021, p.12)

The limitations to this study related to: L&D services not having been selected randomly; an imperfect match with a comparison group; variable quality of administrative data; and utilisation

of services as opposed to improvements in health (RAND Europe, 2021, p.14). While the outcome evaluation did not find there was 'evidence of an impact on offending' or on court processes, it was able to establish that the L&D service contributes to savings to the criminal justice system of between '£13.1 million and £41.5 million' over a twelve-month period (RAND Europe, 2021, p.x). The outcome evaluation did not comment, and was not required to comment, on the fact that many vulnerable defendants were dealt with in a more compassionate way because of their contact with L&D services, nor was it able to comment on whether L&D teams provided appropriate support to defendants who were unable to effectively participate in their trial, but it did acknowledge that L&D services were available to people 'often at a time of acute crisis when they are most in need' (RAND Europe, 2021, p.xi). This suggests that improved resourcing of L&D services might not only be self-financing, but might also allow for improved efficiency and savings within the criminal justice system. The interviews analysed from TEWV L&D service indicate how this improved resourcing might be utilised.

5 | PARTICIPANT INTERVIEWS

5.1 | L&D in TEWV

The model for L&D teams in TEWV NHS is provided by three organisations. There are 'navigators' from the third sector agency, Spectrum (spectrumhealth.org.uk), who virtually screen all custody suites for vulnerable suspects from early morning by accessing NICHE, the police computer system (nicherms.com), and cross-referencing against PARIS, the NHS database in TEWV (tewv.nhs.uk). L&D practitioners carry out more specialist mental health work and court reporting, while Humankind (humankindcharity.org.uk), another third sector agency, provides various types of follow-up support. Suspects with no mental health needs might bypass the practitioners and be referred by Spectrum directly to Humankind. Despite the three different organisations, all participants identified themselves as forming part of their L&D team. As stated above, in order to protect the anonymity of participants, their position, location, gender and name will not be disclosed.

To provide some geographical context, North Yorkshire has three custody suites (York, Harrogate and Scarborough). Cleveland has a single custody suite (Middlesbrough), while County Durham has Darlington, Durham, Bishop Auckland and Peterlee. The biggest 'gaps' (according to Ash, Ben, Sam, Charlie and Gene) in L&D service provision appear to be in covering the magistrates' courts which are based in Middlesbrough, Newton Aycliffe, Peterlee, York, Scarborough and Harrogate. In terms of attendance at court, the L&D practitioner will complete a standard form (NHS England and NHS Improvement, 2019a, p.34), to be submitted to the court. This might occur during a prearranged meeting with the defendant, or could occur following a brief meeting at the magistrates' court on the day of trial. This will usually be given to the defendant's legal representative, to be put in front of the magistrates during the trial.

While participants were asked to consider what ideally should happen when a defendant is unable to effectively participate in the magistrates' courts, two key themes emerged from the interviews with L&D teams, namely, resourcing and information sharing. These themes generated a broader discussion around the successes and challenges faced by L&D teams, but addressing these issues would undoubtedly ameliorate problems of effective participation in the magistrates' courts. Within the theme of resourcing, the most notable issue concerned the need for an L&D presence in the magistrates' court, with time frames being another significant factor. Within the

theme of information sharing, the most salient issue was the need for profile raising/networking, given that, to some degree, L&D teams were out of sight and out of mind in the magistrates' courts, as Ash pointed out. Also falling within this theme are the geographical features of TEVV, which might be similarly problematic in other areas. Each of these will be considered in turn.

5.2 | Resourcing

At the time of interview (October 2019–March 2020), some L&D participants were still hoping to have 'sufficient resource to be present in each of the police custody suites' (Val), while others felt that this provision was adequately resourced (Ash). No one thought that a 24-hour presence was needed in the custody suites, given that during the night most suspects would need to sleep or recover from a state of intoxication (Val), however, this does risk some defendants being missed. Ash admitted that 'the ones we can miss, [are] the ones that come in during the night'. A 24-hour presence in the custody suites seems unlikely to be cost-effective, especially given the more pressing gaps that were identified; however, a more consistent presence in the magistrates' courts might enable identification of those vulnerable defendants who were missed during the night.

Val commented on 'the very resource tight budget', meaning that on the day of interview there were only two practitioners on duty in the relevant area, both of whom had to visit the same individual for safety reasons. At the time of interview, there was no person permanently based in any of the courts in the relevant area. While it was agreed that L&D workers would go over to the courts (Finn) or liaise with the court personnel (Sam and Ben), it was felt that 'once we do have someone based in court it will be a much smoother process' (Charlie).

Clearly, an L&D presence in the courts would assist in filling the gap for those mentally vulnerable defendants who are missed in the custody suites. Ash summarised the problem as follows:

We start at 8, at about half 6 if we're screening, but by that point they might have already been interviewed, decision's been made, they're going to court and they've been remanded. And off they go to court so we might not have any involvement with them.

She pointed out that while demand could be met in the courts – 'if they ring we go' – the people who are missed are the ones that no one has told them about, adding: 'I think if we [have a] presence in court, we could be doing the assessment in the cells, that may have slipped through the net potentially'.

The first time a defendant appears at a magistrates' court has been highlighted as 'crucial to the identification of vulnerabilities that were not picked up at the police station stage' (Revolving Doors Agency & Centre for Mental Health, 2019, p.15). This first appearance has also been identified as being 'of critical significance in the vast number of offences which are prosecuted without the defendant having been arrested' (JUSTICE, 2017, para. 4.3). Finn pointed out that: 'if it's the first time [a person has an MH need], I think that would be harder to pick up on'. Such individuals might be missed in the custody suite, but voluntary attenders at police stations and first appearances at magistrates' court for non-arrestable offences also miss out on L&D support if it is only available in custody suites. Voluntary attendance is the process by which the police invite a suspect for an interview where they are not technically arrested but they are interviewed under caution. *In ten years time* acknowledges the issue of voluntary attendance as an 'emerging challenge', recognising that the L&D service should be 'available to all suspects regardless of

whether they are detained or attending voluntarily' (Revolving Doors Agency & Centre for Mental Health, 2019, p.13). Val highlighted: 'there's an increasing drive for all police forces everywhere to deal with people through voluntary attendance', adding this 'means that it's less likely that people with a mental health need who are interviewed as a voluntary attender ... [will] have access to the safeguards of an appropriate adult' or 'come under the radar of L&D'. While the focus of this article is the need for a permanent L&D presence in the magistrates' courts, there is an argument that an outreach service, provided by L&D support workers, to which voluntary attenders can be referred in the community before charge, would further support diversion from the criminal justice system and avoid questions of effective participation. Gene also identified this as a gap that needs to be filled, adding: 'how do we do that? It's, you know, there's a big court landing with lots of strange faces there. We don't know whether they're defendants, whether they're supporting people ...'.

In addition to this, Gene highlighted that sometimes it is necessary to prioritise:

The other thing with magistrates as well is we just get to see the ones that come through custody on that day. So obviously we've had the weekend, so there was a lot marked up for court this morning [Monday]. We only have two staff on on a weekend, so basically we're prioritising the people who get assessments on a weekend so there will be a lot of people attending court who may or probably haven't been seen by us ... The [other] ones that might slip through in that area are the ones released on investigation ... and then we don't get to know the outcome of the investigation cos investigations could be a week, could be six months, or whatever. So unless we were to keep a ... trail of everybody which would be a massive piece of work, we can't do at the minute.

While the above factors demonstrate a clear need for a presence in the courts, the resourcing of L&D teams in the magistrates' courts was of more universal concern, with Cath stating that: 'we're so only hitting the tip of the iceberg, we don't even get a feel for who's leaving without any input', and that 'prevalence rates ... in the criminal justice system' suggest the number of encounters with people with mental health issues should be much higher. Having had some experience of the Crown Court, Sam said it was easier to 'see what is missing in the magistrates'. Ash also commented on the fluctuating provision in the courts depending on staffing levels:

As soon as you jot your numbers, it's the first thing that seems to go because you want to focus on the custody side of it. So I think the courts have just got used to running how they always have done and managing things in-house.

It would be remiss within this theme to ignore government plans for the digitisation of hearings (House of Commons Justice Committee, 2019) which 'will undoubtedly have an impact on defendant participation' (Owusu-Bempah, 2018, p.322). Even before Covid, concerns existed about digitalisation of plea and mode of trial hearings (Magrath, 2020, p.131). As Val pointed out: 'there are a lot of concerns about the concept of video conferencing'. When assessing a suspect, much of the assessment involves 'observing the appearance, demeanour [and] attitudes' of the individual. This type of observation is clearly much more difficult over a video link. This concern is echoed by *In ten years time*, which anticipates that dealing with offences online will deny the magistrates' courts 'an important early opportunity to identify vulnerabilities' (Revolving Doors Agency & Centre for Mental Health, 2019, p.15). JUSTICE and Transform Justice also point out that this reform does

not 'accommodate vulnerability' (JUSTICE, 2017, para. 4.4) or provide 'adjustment for those with mental disabilities' (Gibbs, 2017, p.33). Clearly, the more processes which are moved online, the more that access to L&D teams will be restricted, and the more likely that vulnerabilities will be missed. It should not need stating that the *Transforming Justice* digitalisation programme needs to 'be reviewed to ensure robust evidence is available on the impact on people with mental ill-health, learning disabilities, or other vulnerabilities' (Revolving Doors Agency & Centre for Mental Health, 2019, p.25).

Also raised within the theme of resourcing, was the time pressure put on magistrates' courts. The magistrates' courts by their nature are designed to distribute fast and efficient justice. This 'assembly line' justice (Brown, 1991, p.81) runs counter to the needs of some mentally vulnerable defendants who might need more time to be seen and dealt with than other defendants. The absence of L&D teams in the magistrates' courts is compounded by the time frames within which practitioners who are present in the courts are compelled to work. The benefits of having time to spend with a vulnerable defendant were highlighted by Cath: 'when we've really had time I think we've had much better outcomes. We don't really get time'. By way of example, she described a case where a vulnerable defendant had not yet been diagnosed with autism. An L&D practitioner was given time to work with the defendant 'that had a real good impact within the court, [and] that person did get diverted'. This is a striking example of how an L&D practitioner diverted a defendant, who might have been unable to effectively participate in a summary trial, away from the criminal justice system, but this luxury of time is not always present. As Cath pointed out:

more than one [practitioner] covers custody but ... the pressure's on because of time-frames. Maybe the police shout louder, we're based in there and it just seems to fall in naturally that that's immediate but I do wonder sometimes if we've got it backwards.

Sam's comments support this statement: 'we don't have sufficient time to look into the case, to deliver the care ... You want to deliver the care that has a quality but the system is not allowing [us] to do it'. He described needing to meet a vulnerable defendant in the magistrates' court, then running upstairs to draft a court report, commenting: 'if you have the time to proof read it, you are very blessed' and then needing to 'physically go to the court', in order to ensure the legal representative has the report in front of him. Ash also commented on the 'time pressures on the court. They just want to get things done, get things moving'. Charlie described time spent 'going about the county meeting other services ... and kind of spreading the name of L&D and making connections initially so that it was easier when we first started', commenting: 'it was lucky that we had that time and I think that really helped as well'. Ash also commented on the value of having conversations with solicitors at court:

when we send reports to the court, it goes directly to the legal adviser, who then prints out and gives to the magistrates and both sides of the bench ... but they only get that copy when that hearing's about to take place which is less helpful than actually having a conversation about it.

When asked what would help, Ash simply stated: 'we'd like enough staff to face to face, to see everybody'. Cath felt that, in relation to the above example of undiagnosed autism:

I actually think you would need, I don't know, four or five more people to actually deliver that quality of service each time because it just isn't there, the resource isn't there, because that was actually quite time consuming.

Gene was of the view that 'we could never have enough practitioners' and that more support workers would also be useful:

[t]hey're the ones that are doing the groundwork actually physically going out and taking people to where they need to be. They're like an ... outreach model I always think. So if we had more of those we could obviously help more people.

A 'single point of contact in all the areas we work from' (Ben) would be desirable and this should include a 'member of staff based in each custody suite as well as the courts' (Charlie). More ambitiously, and less likely to be achievable, Val advocated: 'some sort of assessment facility that we could refer people to and into as an adjunct to or in replace of those initial remands' ... 'for up to a week for an initial assessment', acknowledging: 'it's a big gap in kind of what we can do and then the gaps are kind of the bits that irritate those that need confidence in our service'.

5.3 | Information sharing

The Bradley Report pointed to a 'single consistent theme' present throughout the review, namely 'the importance of managing information effectively' (Bradley, 2009, p.135). This view is echoed in the RAND Europe (2016) evaluation which commended the 'access to the case management and service user information databases of a range of agencies – which allowed information about service users to be accessed quickly' (p.105). Participants interviewed for this article were also of the view that information sharing is crucial to success. The point at which information sharing was identified as being most successful was in relation to vulnerable individuals in custody suites who were already known to relevant services.

In all areas of TEWV, L&D teams have permission from the police to access the custody record database, NICHE. This information is cross-referenced against PARIS, the NHS patient care record, in order to identify people with vulnerabilities. This co-operation between TEWV and local police is reached through agreement between the organisations and is not taken for granted. Val described the police as having 'kindly given us permission to access NICHE', while Ash commented that this type of access to information 'is very helpful for us doing our assessment, but also very helpful for the police making decisions about [the suspect's] safety whilst they're in police custody'. Gene pointed out that previously vulnerable suspects might have been overlooked when they said they had not been previously involved with mental health services:

now at least the navigators are screening everybody so if we get somebody in and they say no, no I've not been involved with mental health services ... then we can look on PARIS and go, actually they have. Quite often that happens.

JUSTICE (2017) has identified this type of information sharing as being particularly important, given that legal professionals do not have the benefit of access to the same quality of information (para. 2.51). This underlines the need for L&D practitioners to 'ensure that they update legal representatives about suspects' medical conditions and vulnerability' (para. 2.51). The same should

be the case in relation to legal professionals in the courts. Charlie described the situation in the courts as relying on co-operation and goodwill:

I've not found much difficulty with information sharing. The courts are very good whenever you ring them about finding out the outcome of a trial, say we're going to work with someone but we don't know if they're been recalled or something like that. They're always good at letting us know.

He added that when people know the L&D team is part of 'an NHS service, people ease up quite a bit' and

[i]f you say liaison and diversion, people might not know who you are, then you go we're an NHS service in the police station, they're tick, tick, right, OK fine, there you go. So ... I think that helps break down barriers as well.

Finn found that working under the umbrella term of L&D with partner agencies meant that, for example, 'Humankind ... [has] ... information sharing agreements in place with drug and alcohol services, housing services, probation, because Humankind is already very established'. This is a clear example of a successful working model in TEWV, given that networking with other organisations/service providers has been identified as needing greater attention (Bradley, 2009, p.86).

Charlie was of the view that there is a 'lack of consistency' as to what L&D teams offer and that this could make people 'confused about what we do and where we are', adding: 'I don't even know how much the courts know of us ... because I know for a fact that we're barely ever there'. Again, this points to the need to raise awareness of the L&D service among other organisations linked to the criminal justice process. This view is supported by JUSTICE (2017) which recommended that all professionals within the criminal justice process should learn about other roles (para. 2.67). Val pointed to 'a different culture and a clash of cultures sometimes that exists within adult mental health, the criminal justice system and L&D that's trying to breach both of these'. Networking and knowledge exchange between different organisations within the criminal justice system would raise the profile of the L&D service, as well as raising awareness of the need for all stakeholders to be prepared to look out for vulnerability. Ash commented that L&D teams 'do rely on [the courts] ringing us and that all depends on what's your rapport like, with the staff', adding:

[w]hen we're working there regularly, ... a regular presence, you have that rapport. [They'll say], number three's, something's not quite right or number three's saying he's going to harm himself and you've got that, oh yeah, I'll pop in and see him and oh he's fine, he's alright, or you're right, thank you for bringing that to my attention cos there's something going on here.

Adding further weight to the need for a permanent presence in the courts, Ash stated:

what we find is it's almost like out of sight out of mind. If we go there, there's work there. We'll find the work or somebody finds the work for us. If we're not physically there, less work comes through to our service.

Also within the theme of information sharing, a recurring topic raised by participants was the geographical location and size of the TEWV. The issue of geographical boundaries was touched on in the Bradley Report, given that in some areas ‘geographical boundaries’ were not ‘co-terminous with those of NHS organisations ... who will have different sets of priorities and budgets’ (Bradley, 2009, p.54). This has not been an issue in TEWV, according to Cath, because ‘our system covers the North East’ whereas this is ‘not the case for the rest of the country’. In terms of positive information sharing, Sam pointed out that in Teesside ‘everything is so close by’; by contrast, Bradford, which had only recently introduced an L&D service, did not have the same level of ‘accessibility’. Unlike Teesside, North Yorkshire is a very large area, bordering on some areas that do not share information as co-operatively. Where a vulnerable suspect has moved into an area from one of these bordering counties, there might not be ‘access to the same richness of information’ (Val), although there are links to other L&D teams. As Gene commented: ‘if anybody comes from Manchester, Liverpool, anywhere else in the country they can be not known to our service but it might be the fact that they’ve had diagnoses from elsewhere in the country’. TEWV L&D teams will not find this out unless the vulnerable suspect volunteers this information. Given a defendant’s reluctance to volunteer information can happen ‘[q]uite often’ (Gene), this creates another challenge for L&D teams. Charlie summarised that, outside of TEWV, if someone moves into the area ‘and they’ve got a previous history, we wouldn’t know’. Ash commented that if a person has never been involved with any mental health service, then they are lucky if ‘somebody, another professional within the criminal justice system identif[ies] there’s a need there’ and that ‘we’re kind of relying on people that don’t work in the mental health field having that gut feeling’ and identifying the need for L&D services.

In terms of improvements that would assist in the quality of information sharing, Val thought that ‘an annual networking event but with a different focus each time’ might be useful, while Sam agreed that ‘sit[ting] everybody around a table understanding each other’s role, and being able to discuss a pathway/brainstorm ... on how to make the system more efficient even with the resources that we have for the moment ...’ would be helpful. In a post-Covid world, the table might need to be virtual.

6 | DISCUSSION AND RECOMMENDATIONS

6.1 | Resourcing

Unsurprisingly, better resourcing of TEWV L&D service is needed and would lead to better outcomes. Given the good practices and successes of TEWV L&D service, it is likely that the same will apply to L&D services outside of TEWV. The Department of Health and Social Care has acknowledged the importance of ‘rapid diversion to health care and treatment’ (Department of Health and Social Care, 2021). The NHS, in its *Five year forward view*, also documented the need to invest an additional £1 billion into mental health services (NHS England Mental Health Taskforce, 2016, p.19). Now replaced by the NHS *Mental Health Dashboard* (www.england.nhs.uk/mental-health/taskforce/imp/mh-dashboard), this aspiration for additional investment also takes into account the Covid pandemic which has clearly caused an additional strain on mental health services in a manner both unforeseen and unforeseeable.

While the need for L&D teams in custody suites should, rightly, take priority over attendance at court, as it is preferable that a mentally vulnerable defendant is supported and potentially diverted away from the criminal justice system at the earliest point possible, the need for a permanent

presence of L&D teams in the magistrates' courts seems crucial. In respect of the magistrates' courts, L&D teams will 'typically' look at court lists to identify anyone already known to them, as well as taking referrals from solicitors, court staff, probation officers and magistrates (Revolving Doors Agency & Centre for Mental Health, 2019, p.15). Without a court presence, mentally vulnerable defendants will be missed, and there will be a disproportionate reliance on the defendant's legal representation identifying vulnerability without necessarily having had any training. The process of identifying vulnerability then becomes dependant on the legal representative having a 'gut instinct' about a defendant (Howard, 2021, p.8), which will not always be sufficient, given that Fairclough (2017) highlights: 'the poor identification of defendant vulnerability within the criminal justice system ... particularly by defence lawyers' (p.215). The benefit of having an L&D presence in the courts has been described as having a 'significant impact to the information known about defendants in magistrates' courts', especially where practitioners are experienced (JUSTICE, 2017, para. 4.15).

Redeploying practitioners from custody suites into magistrates' courts would clearly be a mistake. The Bradley Report found that court-only L&D teams performed worst (Bradley, 2009, p.86). The successes gained in custody suites ought not to be compromised, however, funding for a permanent L&D presence in every magistrates' court would allow L&D teams to provide support to those vulnerable individuals who were missed in the custody suites. The gaps which need to be filled include voluntary attenders, suspects arrested and released overnight, those appearing for a non-arrestable offence, and those who are new to the area or not known to either the police or NHS mental health services. The digitalisation of hearings is only likely to exacerbate this problem.

The Bradley Report highlighted that '[i]nformation on the needs of people arriving at court is essential to determine their immediate requirements' (Bradley, 2009, p.60) and recommended that '[a]ll courts ... should have access to liaison and diversion services' (p.80). *In ten years time* recommended that: 'Liaison and Diversion services should be resourced to enable effective screening of 100% of those who come into custody or attend voluntarily' (Revolving Doors Agency & Centre for Mental Health, 2019, p.25). An L&D presence in every court would ensure access to L&D services for a wider range of vulnerable defendants. The presence of an L&D practitioner in all courts would also partially address the poverty of time, discussed above. In light of the RAND Europe (2021) outcome evaluation and the estimated savings made by L&D teams to the criminal justice process (p.x), increasing the size of L&D teams would not only ensure that mentally vulnerable defendants are better supported, but could also be cost-effective in the longer term and might achieve the goal of 'giving a voice to those most affected by the criminal process', enhancing 'the legitimacy of the process and the outcome of trials' (Owusu-Bempah, 2020, p.629). It should be borne in mind that the perception of offences in the magistrates' courts as 'trivial' is far from correct for the defendant (McBarnet, 1981, p.191) and should not result in them being overlooked.

6.2 | Information sharing

The Bradley Report suggests that information sharing works best where informal links have been formed in well-established teams (Bradley, 2009, p.86). Stronger networking links and a permanent presence in all magistrates' courts could facilitate this. The lack of consistency in the quality of information sharing both within and between different L&D areas, despite there being a national model for the L&D service, is a serious shortfall which means that almost certainly some

mentally vulnerable defendants will be overlooked. The Bradley Report recognised the need for L&D services to 'form close links with the judiciary' to provide information about mental health of defendants and on 'local health and learning disability services' (Bradley, 2009, p.74). Multi-agency work was identified as being 'problematic', with few schemes described as having positive relationships with other agencies (p.86). The need to raise awareness of the L&D service was also addressed by RAND Europe (2016) which commented that L&D interviewees 'felt it was necessary to undertake further communication to increase awareness of the scheme in partner agencies' (p.105). Similar comments were made in 2019 that while L&D teams took referrals from solicitors, court staff, probation officers and magistrates: '[i]n places where the service has been operating for some time, practitioners are well known' and it is therefore easier to seek them out for advice (Revolving Doors Agency & Centre for Mental Health, 2019, p.15). The inference here is that where practitioners are less well known, it will be harder to contact them. All of this points to the benefits of there being sufficient L&D practitioners to have the time to be able to undertake this extremely valuable work. Strong networking links would inevitably be further enhanced by the presence of L&D practitioners in all magistrates' courts. It is the author's contention that these improvements might contribute to creating 'a more inclusive and hospitable environment in which all defendants can play a meaningful role in their trial' (Owusu-Bempah, 2018, p.338).

Consideration should be given to the geographical size of each L&D area, especially those that border on to several other counties. In this respect, there should be sufficient practitioners to cover, or to be based in, different parts of geographically large areas, such as North Yorkshire. There are some geographical factors that might be impossible to overcome. For example, in terms of local NHS information sharing agreements, as Gene pointed out: '[t]he only way you're going to get over that is if you had a national system [but] technically they're all independent businesses from each other, aren't they?' Perhaps the most achievable improvement to this issue will be the creation of a directory of services for L&D teams which has been recommended by NHS England and would no doubt be beneficial (NHS England and NHS Improvements, 2019b, p.6). At a more strategic level, there needs to be an acceptance that the criminal justice system and health care agencies must work together more co-operatively, moving 'beyond siloed strategies that merely react to recognised and recognisable vulnerability' (Asquith, Bartkowiak-Théron & Roberts, 2016, p.162).

In March 2021, as a response to the interest in improving networking connections, the author, alongside two colleagues, launched an online networking community, *North East Connecting Vulnerability*. The community aims to bring together like-minded professionals who work with mentally vulnerable people in the criminal justice system, creating a repository for best practice, and providing access to a list of contacts, useful online resources and news updates. At the time of writing, TEWV L&D practitioners, magistrates, legal professionals, members of the police, charity workers and appropriate adults have become members of this community. Lord Bradley has kindly provided his support for this initiative. It is hoped that closer collaboration between academics and practitioners will forge successful connections, resulting in more vulnerable individuals who find themselves struggling within the criminal justice system receiving the necessary support.

7 | CONCLUSION

L&D teams provide a crucial service: they provide a bridge between all agencies involved in the criminal justice process by identifying vulnerability and advising on disposal outcomes for

vulnerable defendants. They support, and often help to divert, mentally vulnerable defendants from the criminal justice system so that these individuals can receive treatment rather than punishment. They are the most pragmatic and compassionate option available in the magistrates' court for defendants who struggle to effectively participate in their trial. In the absence of a legal procedure for effective participation in the magistrates' courts, which might in any event be unworkable, L&D input is essential. Furthermore, the L&D service represents an economical, cost-effective option for the criminal justice process. Based on the interviews of participants above and the outcome evaluation report (RAND Europe, 2021), this service needs to be better resourced and is worth the additional investment. Digitalisation of hearings in the magistrates' courts risks jeopardising the many successes of the L&D service. Whether it is possible to build in the necessary online support and safeguards for mentally vulnerable defendants is unclear but there are strong opinions weighing against this possibility.

Information sharing agreements should be encouraged and developed, wherever possible. Best practice needs to be shared between L&D areas, and stronger networking links should be developed to raise the profile of the L&D service beyond the positive relationships already forged in custody suites. Better resourcing of L&D teams would provide more time for team members to raise the profile of the L&D service as a whole, and particularly in relation to their value in the magistrates' courts. Without this crucial networking, there is a danger that L&D teams, while visible in custody suites, will remain out of sight and out of mind elsewhere. Where this remains the case, there is a danger that, in breach of Article 6 of the ECHR, some mentally vulnerable defendants who are unable to effectively participate in their trial will be unsupported and overlooked.

ACKNOWLEDGEMENTS

The author wishes to acknowledge the valuable comments of Professor Georgios Antonopoulos and Dr Cath Crosby.

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How to cite this article: Howard, H. (2022) Effective participation of mentally vulnerable defendants in the English magistrates' courts: The crucial role of liaison and diversion. *The Howard Journal of Crime and Justice*, 61:203–220.
<https://doi.org/10.1111/hojo.12470>