

FASD AND THE CRIMINAL JUSTICE SYSTEM



WHAT is this Factsheet about?

Individuals with FASD are estimated to be over 19 times more likely to encounter the criminal justice system (CJS) than individuals who do not have FASD.

Police, lawyers and courts generally have very little understanding of FASD.

This factsheet explains:

- why an individual with FASD is more at risk of entering the CJS and what makes them vulnerable.
- how to get support if you or someone you know has FASD and is arrested, in court or in prison.
- the legal rights of an individual with FASD in the CJS and how to enforce them.
- what steps a carer can take to help an individual with FASD who is in the CJS.

There are helpful links throughout this factsheet

KEY POINTS:

- The UK criminal justice system offers limited, but important protections for those with FASD in police custody and in court, but those rights are not automatic and usually need to be asserted.
- Awareness of FASD is low amongst police, lawyers and courts. Always tell the police, your legal representative and the court that you have FASD, and you need help with understanding.
- An individual with FASD is likely to be a 'vulnerable person' under the Police and Criminal Evidence Act 1984. Carry around an FASD vulnerable person card.
- Always ask for an 'appropriate adult' if you are arrested and exercise your right to free legal advice at the police station.
- Individuals with FASD can have FASD taken into account when sentenced which could reduce a sentence – this is called mitigation.

UNDERSTAND your rights

FASD and the justice system

Increasingly there is more awareness of neurodiversity within the CJS but, police officers, lawyers and courts generally have little understanding of FASD.

The starting point of the CJS is an assumption that all people, including those with FASD, can be full participants without any exemptions or special treatment (unless shown not to be the case).

This means individuals with FASD are particularly vulnerable because FASD is largely hidden, meaning many individuals with FASD are assumed to be neurotypical and so often do not receive support.

The last page of this factsheet explains the many reasons an individual with FASD is more likely than others to be arrested, sentenced or imprisoned and why they are particularly vulnerable. You could share this with representatives or use it to help you explain the needs of those individuals with FASD in the CJS.

AT THE POLICE STATION

An individual with FASD is very likely to be 'vulnerable' under the Police and Criminal Evidence Act 1984 ('PACE') and its Codes of Practice ([PACE Code C, paragraph 1.13\(d\)](#)):

A person is vulnerable, if because of a mental health condition or mental disorder they:

- appear to be highly suggestible or eager to please.
- appear confused or prone to providing unreliable, misleading or incriminating information without knowing or wishing to do so.
- may have difficulty understanding the implications of police procedures and processes.
- may have difficulty understanding what they are told, the questions they are asked or their replies.
- may not understand or be able to exercise their rights and entitlements.

[Code C, paragraph 1.4](#) states that if at **any** time a police officer has **any** reason to suspect a person **may** be vulnerable, **in the absence of clear evidence to dispel that suspicion, the person must be treated as vulnerable.**

Individuals with FASD will usually meet the above definition, **but** will often present as lucid and articulate, and so the police may gain a misleading impression and conclude the individual with FASD is not vulnerable. **You or a carer should explain why the individual is vulnerable – use the last page of this factsheet to help you.**

UNDERSTAND your rights

If you are arrested carry out these **4 STEPS**

- ✓ **1: INFORM** the police that you have FASD
- ✓ **2: ASK** for an [appropriate adult](#)
- ✓ **3: SHOW** the police the [FASD vulnerable person card](#)
- ✓ **4: DO SAY 'YES'** to your right to free legal advice

1. **INFORM** the police you have FASD

Notifying the police that a person has FASD will trigger the [Code C, paragraph 1.4](#) suspicion that the police have a vulnerable person in front of them and (i) must treat you as such, (ii) make reasonable enquiries, and (iii) make a record.

2. **ASK** for an appropriate adult

An [appropriate adult](#) will help you to understand what is happening and what the police are saying. This can be a relative, guardian or an independent person with experience of dealing with vulnerable people, it's free of charge ([PACE Code C, 1.7\(b\)](#)).

The police may not know you need an 'appropriate adult' so you should actively ask for one. An [appropriate adult](#) can not give you legal advice but has the right to seek legal advice on your behalf.

3. **SHOW** your vulnerability Identification Card

Always show your [FASD vulnerable person card](#) and say "***I have FASD, I do not understand, please get me an appropriate adult***". You should then [remain silent](#) until the appropriate adult arrives to help you.

Across the country, police forces are increasingly developing and supporting free [card-based identification schemes](#). These cards are often 'autism' focussed but can be adapted for those with FASD and they can be helpful in assisting police to identify mental vulnerabilities, putting the police on notice that an individual is vulnerable.

4. **DO** say 'YES' to legal advice

All detained persons receive free and independent legal advice from a solicitor or accredited legal representative. Always take up this right even if you think you have done nothing wrong. A legal adviser will help you understand and give you advice.

The Liaison and Diversion Services (L & D Services)

NHS England Health and Justice is responsible for commissioning a range of healthcare services that support children and adults throughout the youth justice and criminal justice systems in England.

The role of [L & D services](#) is to identify people with poor mental health, learning disabilities, substance misuse issues or other vulnerabilities when they are first in contact with the criminal or youth justice systems as suspects, defendants or offenders and to support them through the early stages of criminal system, refer them for appropriate health or social care or enable them to be diverted away from the criminal justice system into a more appropriate setting, if required.

Ask to talk to the liaison and diversion manager if you need help with adjustments or you feel you are not being heard.

Fitness for detention and interview

Before interviewing a person, the police must consider whether a medical assessment should be carried out if interviewing could significantly harm a person's physical or mental state or might lead to unreliable evidence. In reality, most people who are not suffering from an acute mental or physical illness or episode are assessed fit to be detained and interviewed.

AT COURT

If an individual is charged, they will appear in court and legal proceedings will begin.

There is no special procedure that applies to people with FASD or other neurological conditions.

The only exception to this is where a person is assessed by two medical practitioners as being 'unfit to plead' which means they are unable to understand the charges against them, the evidence and can not participate in their defence.

Fitness to plead

If a defendant is found unfit to plead, a normal trial cannot take place, and the court is limited to a small number of sentencing options intended for those with significant mental impairments.

Individuals with FASD may not understand fully court proceedings or the evidence, but the rules relating to mental capacity in UK criminal courts date from Victorian times and arguably do not reflect modern understanding of disabilities. The threshold for being unfit to plead is very high and most doctors have little knowledge of FASD. In practice, most people with FASD will be considered fit to plead.

An ongoing PhD [research project](#) looking at FASD and fitness to plead may highlight the vulnerabilities of those with FASD in the CJS.

UNDERSTAND your rights

Reasonable adjustments

The police and courts have a duty under the Equality Act 2010 to make [reasonable adjustments](#) for people with disabilities.

[Reasonable adjustments](#) are changes the court should make to prevent an individual's disability putting them at a disadvantage compared with others who are not disabled.

Ensure your legal representative knows you have FASD and that you need adjustments. Reasonable adjustments should include, at the very least, taking measures to ensure a person with FASD can follow, understand and participate in court proceedings. For example, lawyers and judges speaking clearly, using simple language, and allowing regular breaks.

Unfortunately, the reality of courts' adjustments in the CJ system is often inadequate – be proactive and always ask for the adjustments you need.

Legal aid

If you've been charged with a crime, ask your lawyer if you are eligible for [criminal legal aid](#). Once you've left the police station, legal aid is means tested. You can find a legal aid solicitor [here](#) or [contact your nearest Citizens Advice](#) for a list of legal aid solicitors.

Use of an intermediary at court

The court can appoint an independent [intermediary](#) to help in court. An intermediary is a professional (often speech & language, teaching, social work) who is specially trained in communication to assist defendants to understand and communicate in court. Intermediaries will conduct an assessment and set out the communication needs and adjustments necessary to meet those needs. Tell an intermediary you have FASD.

If you are not legally represented, you can ask for intermediary support from the court or tribunal where the hearing will take place either by email, post or in person at a hearing. Find contact details [here](#). If approved, the court will arrange an assessment.

If legally represented your representative should request an assessment using this form [here](#).

If you are a witness or complainant (and not a defendant) and you are to give evidence in criminal trials, you must use the [Ministry of Justice Witness Intermediary Scheme](#).

McKenzie Friend

Individuals are usually legally represented in criminal courts but if you are unable to secure legal

in court you may [apply for a McKenzie friend](#), also known as a defendant's assistant. A McKenzie friend can be a family member, friend, voluntary helper or someone who offers this support for a fee.

A McKenzie friend can provide moral support, take notes, help with case papers and quietly give advice but can not speak in court or manage a case outside of court.

Anyone can call themselves a McKenzie friend so you should be cautious. An individual with FASD is particularly vulnerable and is likely to need someone legally qualified who understands FASD.

Remote hearings

A remote hearing is a hearing where one or all parties attend via video or telephone rather than physically attending court. A judge will decide if it's appropriate and in the interests of justice to hold a remote hearing. An individual with FASD or their carer should always tell the court that they have FASD and will need adjustments.

It is unlikely to be appropriate for an individual with FASD to attend a remote hearing. It is harder for those with communication difficulties to fully understand, give evidence and properly participate in a remote hearing. An Equality and Human Rights Commission report '*Inclusive justice: a system designed for all*' explains [why](#).

Sentencing

When sentenced for any offence, a person has the right to put forward reasons why their sentence should be reduced, usually through their legal representatives (this is called 'mitigation').

Being aware that an individual has FASD, and its effects may help a court understand why a person has behaved in a way that amounted to a criminal act and can be a mitigating factor which may reduce a sentence.

Tell your lawyer if you were refused an appropriate adult or an intermediary, if you believe you were not fit to plead, or you had to attend a remote hearing and felt you could not properly participate or you believe you were otherwise disadvantaged because reasonable adjustments were not made. In certain circumstances, a legal representative may be able to argue that a conviction is unsafe, or a sentence should be reduced.

IN PRISON

Neurodiversity Support Manager (NSM)

The role of the [NSM](#) is to raise awareness of neurodiversity in prison and help strengthen approaches for identifying and supporting those with neurodivergent

MYTHBUSTERS

The police say there is nothing ‘wrong’ with me and so I’m not entitled to help or support

If you inform the police you have FASD they must treat you as ‘vulnerable’ under PACE and allow you an appropriate adult unless they find clear evidence that this is not the case. The police should provide reasonable adjustments under the Equality Act 2010 so you can participate. If adjustments are not made or the police do not comply with PACE it may make the evidence unreliable and, in some cases, a confession inadmissible at court. Tell your legal representative what happened.

I asked for reasonable adjustments, but I was ignored

Adjustments are not always made because information about impairments are not understood or passed on. You often need to ask for adjustments at each stage of the court process. If no one is listening to you speak to your legal representative, Liaison and Diversion manager or complain in writing to the court (see links below).

I have no diagnosis, so I am not entitled to any help

There are many people in the CJS who have FASD but

who do not have a formal FASD diagnosis. You do not need a diagnosis to have a disability under the Equality Act 2010 and be entitled to reasonable adjustments. You do not need a diagnosis to be ‘vulnerable’ under PACE and be entitled to an appropriate adult.

My son was arrested but he doesn’t understand the charges against him

A key role of a lawyer is to ensure the client understands the charges. Try to contact his legal representative to explain he has FASD, what help is needed and why.

My son is in prison waiting for sentence/has been sentenced but I don’t know what is happening so I can’t support him

You can sign up to [CourtServe](#) free of charge to find out when a hearing is to take place. Sentences are public records and should be accessible to all. [Law pages](#) can often provide information about sentences. You can also order [transcripts](#) of a public hearing for a fee. It can be difficult trying to find the status of a case but if you can find your son’s legal representative, lawyers are often willing to keep family updated. You can also contact the liaison and diversion service or complain on your son’s behalf using the links below.

HOW can I enforce my rights?

- Complain about a court – [here](#).
- If you are unhappy with the outcome of a complaint to the court, you can refer your case to the [Parliamentary and Health Service Ombudsman](#).
- If you’re unhappy with the way a judge or member has behaved, you can complain to the [Judicial Conduct Investigations Office](#). This office only investigates complaints of [misconduct](#) and does not accept complaints about a judge’s decision or the way a judge has managed a case.
- If you want to appeal a decision of a judge, seek legal advice as there may be an appeal process in certain circumstances.
- [Complaints about magistrates](#) must be sent to the relevant advisory committee in writing within 3 months of the matter complained of.
- Complaints about Liaison and Diversion services - [Parliamentary and Health Service Ombudsman](#)

The University of Salford is conducting an international study on FASD and the Criminal Justice System. Participate [here](#).

KEY RESOURCES:

- [FASD medical information card](#) for police
- [Vulnerability Identification Card Schemes](#)
- [Liaison and Diversion services](#)
- [Nacro](#) provides practical and personalised support at different stages of the criminal justice system
- Find a solicitor using [the Law Society’s official database](#). Find a legal aid adviser [here](#)
- Citizens Advice advice on [remote hearings](#) including what to do if you do not want one.
- Law society information about [getting free legal advice](#)
- [Liberty](#) – what vulnerable means in PACE Code C
- [Young people and the law](#) – Gov UK
- [Is it a crime?](#) - an easy read guide
- Pre-register your disability using the police Pegasus scheme so the police understand your communication needs. [Nottinghamshire](#), [Hertfordshire](#), [Cambridgeshire](#), [Surrey](#) and [Suffolk](#), [Lancashire](#)

Why individuals with FASD are more likely to become involved with the criminal justice system.



There is, at present, little understanding of FASD in the criminal justice system and because FASD is a hidden disability and individuals with FASD tend to be articulate, those with FASD are usually assumed by those in the CJS to be neurotypical and often do not get the support they are entitled to.

Each individual with FASD is unique but there are some common key 'symptoms' of FASD that are due to brain difference compared to those of typical individuals which may contribute to an individual being more likely than a neurotypical person to enter the CJS.

> Difficulties with executive functioning

- Individuals can find it difficult to understand the implications or consequences of their words or actions. This can make those individuals more vulnerable to committing a criminal act as they may not understand the future consequences of their current behaviour. Even if they have not committed a criminal act, they are more at risk of incriminating themselves (saying they did when they did not) especially under pressure in a police interview or in cross-examination at court. A recent study found that individuals with FASD had "lower executive functioning" and were more vulnerable to interrogative pressure ([David Junior Gilbert et al, 2023](#)).
- Poor impulse control and lack of inhibition. Acting or saying something on impulse, without considered thought or understanding first may make an individual with FASD more vulnerable to crime or incriminating themselves for a crime they have not actually committed. A recent study found that during interrogative questioning those with FASD were "significantly more impulsive" ([David Junior Gilbert et al, 2023](#)).
- Difficulty delaying gratification. This tendency may put an individual with FASD at risk of committing theft.

> Regulation

- Fight/flight/freeze/fawn. An individual with FASD may express sudden or/and strong emotions and find it difficult to self-regulate. They may have a tendency to explosive behaviour.
If in the fight state an individual may become aggressive, if in flight, they may run, in freeze they may not defend themselves or in fawn they may agree with what someone is saying to them, to please. These states also leave an individual vulnerable if arrested, questioned, interviewed or cross-examined.

> Adaptive behaviour

- Not understanding social cues and rules of different situations. Individuals with FASD may not understand that what they say in a police station could lead to a criminal charge and that they need to think carefully in this particular situation about what they say.
- Lack of personal boundaries. This can make those with FASD more vulnerable to committing a crime, not understanding where boundaries lie, but can also mean they are vulnerable to 'over-trusting' people who may exploit them. They may touch people inappropriately and think they are just being friendly.

> Language

- Good expressive language can hide their lack of understanding. Police, lawyers, social workers, litigation friends and courts may not see the challenges because those with FASD are often articulate and come across as being capable. This makes them particularly vulnerable.
- Receptive language and processing. Individuals with FASD often have low receptive processing skills, meaning they struggle to

take in and process what is being said to them and need time to understand it. This may mean they struggle to understand what is happening in the CJS including the charges against them.

> Memory

- Memory may be affected and it may be difficult to recall events and dates which can lead to difficulties when giving evidence or questioned by the police or interviewed at the police station. A recent study found that during interrogative questioning those with FASD had poorer memory recall ([David Junior Gilbert et al, 2023](#)).

> Dysmaturity

- Individuals with FASD will have a different developmental age in some areas compared to their actual chronological age. At age 18, for example, they may have the social skills of a 7-year-old. This 'mismatch' can leave them vulnerable.

> Spikey profile

- Ability may be delayed in some areas but 'normal' or even 'advanced' in others. For example, an individual may be very articulate but be unable to navigate a bus route to town. This can be difficult for the police or court to understand and may look like the individual is lying.

> Confabulation

- An individual may suffer from a type of memory disorder called confabulation – this is where they produce false memories – these may be exaggerations of actual events, inserting memories of one event into another time or place, recalling an older event but believing it took place more recently, filling in gaps in memory or creating a new memory that never occurred. This is not the same as lying as there is no 'willful action' i.e. they do not intend to deceive. This puts an individual with FASD at risk of giving false information.

> Suggestibility

- A study comparing suggestibility rates between adolescents with FASD and neurotypical adolescents during interrogative questioning found those with FASD were "more vulnerable to leading questions" with "significantly higher suggestibility" ([David Junior Gilbert et al, 2023](#)).

> Vulnerability

- Vulnerable to peer pressure. This means they are more vulnerable to committing a crime to please their friends or via exploitation or coercion.
- Females may be vulnerable to male exploitation for food, shelter, attention or drugs.

> Not understanding ownership

- Individuals with FASD can struggle to understand ownership and may take things that are not theirs or damage things that do not belong to them.