

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.
- the legal rights of an individual with FASD in the CJS and how to enforce them.
- how to get support if you have FASD and are arrested, in court or in prison.
- what steps a carer/family can take to support 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 or 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 should have FASD taken into account when sentenced, which could reduce a sentence – this is called mitigation.

UNDERSTAND your rights

FASD and the Criminal Justice System (CJS)

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 the support they need.

The last page of this factsheet explains the many reasons an individual with FASD is more likely than others without FASD 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.

PACE 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 that you have FASD and why this means you are 'vulnerable' – you might like to 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 PACE 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 written 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 are 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 should be offered free and independent legal advice from a solicitor or accredited legal representative. Always take up this right (there will be a duty solicitor if you do not have your own), even if you think you have done nothing wrong.

The Liaison and Diversion Services (L & D Services)

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 the CJS, refer them for appropriate health or social care or enable them to be

diverted away from the CJS 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.

Interviews under caution

The police will give a caution on arrest and again when interviewed. An individual with FASD may make admissions, denials or omissions under caution which they do not mean to make, and which could incriminate them. Carers, representatives and appropriate adults should tell the police that the individual has FASD which means they may not have capacity to understand the significance of a caution and insist the police make a written record of these concerns, ideally in the police interview records.

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 or evidence against them, 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, consider the environment, allow processing time for questions, offer breaks and use clear, simple language.

Unfortunately, the reality is that adjustments in the CJS are 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.

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 a HMCTS approved 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 representation

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 were interviewed under a caution you did not understand, 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 needs. You may wish to contact an NSM for support.

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 often not made because information about impairments are not understood or passed on. You may 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 services 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 CJ system to be neurotypical and often do not get the support they need and are often 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 CJ system.

➤ Difficulties with executive functioning

- Individuals can find it difficult to understand the implications or future consequences of their words or actions, making them more vulnerable to committing 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 J 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 J Gilbert et al, 2023](#)).
- Difficulty delaying gratification. This tendency may make an individual with FASD vulnerable to committing theft.

➤ Regulation

- Fight/flight/freeze/fawn. An individual with FASD may express sudden and strong emotions and find it difficult to self-regulate. In the fight state an individual may become aggressive; 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 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 exercise caution in this situation.
- Lack of personal boundaries. This can make those with FASD more vulnerable to committing a crime and 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.
- Poor receptive language and processing skills, meaning individuals with FASD can struggle to take in and process what is being said to them, including the charges against them, especially if they are not given time to process that information.

➤ 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 poor memory recall ([David J 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, an individual with FASD may have the social skills of a 7-year-old. This 'mismatch' can leave them vulnerable.

➤ Spiky profile

- Individuals with FASD often have a 'spiky profile'. A spiky profile describes an uneven pattern of strengths and weaknesses whereby an individual can function well in some areas but not in others and this can vary from day to day. This means that they can present as more able than they actually are. For example, an individual with FASD may be very articulate but be unable to have any concept of time or tie their own shoelaces.

➤ Confabulation

- An individual may suffer from a type of memory disorder called confabulation, usually due to damage to the frontal lobe – this is where an individual produces 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 J Gilbert et al, 2023](#)).

➤ Vulnerability

- Often vulnerable to peer pressure, wanting to please or 'fit in'. 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.