



Neurodivergence, autism and the appropriate adult safeguard in police custody

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ABSTRACT

Neurodivergent suspects and defendants may be disadvantaged by the processes and procedures within the criminal justice system. Whilst these disadvantages may emerge at any point, they are particularly pertinent during detention in police custody. The various processes and procedures that suspects are subjected to, in combination with the critical nature of the investigative stage of the criminal process, may be destabilising or detrimental to the interests of the neurodivergent suspect. Focusing on autism, this article examines the difficulties that autistic individuals may face and the ways in which their ‘vulnerability’ may emerge when engaging with the criminal process. Examining the appropriate adult – a procedural safeguard in police custody – and its implementation, this article provides a robust analysis of the problems faced by autistic suspects, drawing upon, *inter alia*, empirical research. It also provides suggestions for law, policy and practice, serving as a catalyst to critically reflect upon the safeguarding of neurodivergent suspects.

Keywords: autism; neurodivergence; appropriate adults; vulnerability; police custody; fairness; safeguards; criminal process.

INTRODUCTION

There is increasing recognition that neurodivergent suspects and defendants may be disadvantaged by standard criminal justice processes. These disadvantages can exist or emerge at any point of the process, but may be particularly pronounced and impactful at the investigative stage of the criminal process (which, in many cases, is often the only stage that occurs). This is most acutely problematic when

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suspects are detained in police custody. Suspects, neurodivergent or not, are almost certain to encounter a range of intrusive and unfamiliar procedures and investigative powers, including but not limited to, the police interview; strip search; and confinement. Whilst general safeguards exist to promote suspects' rights and entitlements and to regulate police powers,¹ there are also specific safeguards – such as the appropriate adult (AA) – intended to promote and protect the rights and entitlements of 'vulnerable' suspects in this context. This is considered vital due to the enhanced risk of mistreatment and wrongful conviction of vulnerable individuals.² Whilst there are well-established concerns about the effectiveness of such safeguards generally, there is emerging evidence of specific barriers to fair and effective processes for neurodivergent suspects in custody. However, this remains an underexplored area and one only recently recognised at a policy-making level.³

This article extends scholarship in relation to vulnerability and neurodivergence in police custody via a specific focus on a key safeguard (AAs) and its role facilitating access to justice for autistic suspects. It begins by exploring the role of the AA, before proceeding to consider the advantages and limitations of the AA generally and in relation to autistic suspects. By drawing upon, *inter alia*, empirical data from a project on the implementation of the AA safeguard in police custody, it examines whether and to what extent the AA is a suitable form of safeguard for autistic suspects in police custody. Finally, we make recommendations for reform of law, policy and practice with the aim of improving the service provided to autistic suspects and promoting equitable access to justice at this crucial stage of criminal proceedings. Beyond this in-depth analysis, the article aims to act as a catalyst to stimulate (socio-)legal work in neurodivergence.

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- 1 Primarily, PACE 1984. Similar safeguards exist in Northern Ireland by virtue of the Police and Criminal Evidence NI Order 1989.
 - 2 The term 'vulnerability' can encompass many factors: see R Dehaghani, *Vulnerability in Police Custody: Police Decision-making and the Appropriate Adult Safeguard* (Routledge 2019), although for the purposes of the AA safeguard the definition emanates from PACE Code C: see Home Office, Code C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Home Office 2023) para 3.5.
 - 3 See, eg, CJNI, 'Neurodiversity in the criminal justice system: a review of evidence' (HM Inspectorate of Prisons and HM Inspectorate of Constabulary, Fire and Rescue Services July 2021).

AUTISM, THE CRIMINAL PROCESS, AND POLICE CUSTODY

Any individual drawn into criminal proceedings generally faces significant challenges due to the stressful, complex and specialised nature of such proceedings. These challenges are particularly acute for vulnerable persons;⁴ there is a vital and enduring need to ensure fair and effective processes which protect vulnerable individuals from injustice and trauma as a result of involvement in criminal justice processes. In recent years, a particular area of focus in this context has been neurodivergence. Whilst not a set term, neurodivergence commonly describes ‘perceived variations seen in cognitive, affectual, and sensory functioning differing from the majority of the general population or “predominant neurotype”, more usually known as the “neurotypical” population’.⁵ Neurodivergence is not a restrictive medical term but an organic concept subject to ongoing debate; however, it is commonly taken to include a range of neurodevelopmental and cognitive conditions (or differences),⁶ such as autism, attention deficit hyperactivity disorder (ADHD), Tourette’s, dyslexia, dyspraxia, dyscalculia, bipolar disorder, Down syndrome and dementia.⁷

Nesting within the concept of neurodivergence is autism.⁸ Autism is a neurodevelopmental condition typically characterised by impairments in social reciprocal interactions and communication,

4 This is a broad and widely debated term of art but is generally taken to include both vulnerability due to age and vulnerability due to a characteristic (eg physical and mental health needs).

5 H Rosqvist, A Stenning and N Chown, ‘Introduction’ in H Rosqvist, A Stenning and N Chown (eds), *Neurodiversity Studies: A New Critical Paradigm* (Routledge 2020) 1.

6 See the social model perspective, M Oliver, *Social Work with Disabled People* (Macmillan 1983); R Woods, ‘Exploring how the social model of disability can be re-invigorated for autism: in response to Jonathan Levitt’ (2017) 32(7) *Disability and Society* 1090–1095.

7 These conditions often overlap and/or co-occur with mental disorder (discussed later). Perhaps more accurately and problematically, a number of these ‘conditions’ or characteristics are treated as mental health problems, when they are in fact distinct and separate concepts.

8 ‘Autism’ can be understood interchangeably with autism spectrum disorder and ASC. This article recognises the open and emotive debate about appropriate terminology when discussing autism and acknowledges the importance of ensuring academic freedom of expression in writing about autism. It uses the ‘identity first’ (eg autistic person) construction. For more, see K Bottema-Beutel, S K Kapp, J N Lester, N J Sasson and B N Hand, ‘Avoiding ableist language: suggestions for autism researchers’ (2021) 3(1) *Autism in Adulthood* 18–29.

and restricted, repetitive patterns of interests and behaviour.⁹ It also commonly involves a variety of sensory processing differences, such as hyper-reactivity (increased sensitivity) and hypo-reactivity (reduced sensitivity) to particular sensory stimuli.¹⁰ Whilst this is not, statistically speaking, the most prevalent form of neurodivergence,¹¹ autism has arguably been the subject of more attention within existing literature on criminal justice procedure, policing and law;¹² and within policy and practice (eg autism awareness and autism leads in policing, focus on autism when discussing neurodivergence in the criminal justice system (CJS)), possibly because autistic individuals are more likely to come into contact with the police when compared with the general population, either as a suspect – often owing to police misinterpretation of behaviour – or, in most cases, as a victim of crime.¹³

Whilst autism has typically been described in terms of a spectrum, it is increasingly recognised that (notwithstanding the clinical markers required for diagnosis) autistic individuals have a differential experience related to variable or uneven cognitive development, sometimes described as a ‘spiky’ profile.¹⁴ Contrary to the stereotypical idea of autistic behaviour and presentation (eg gaze avoidance, being non-verbal), the manner in which an autistic individual experiences the world around them and the way in which this externally presents

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- 9 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 5th edn (APA 2013); see also C Allely and P Cooper, ‘Jurors’ and judges’ evaluation of defendants with autism and the impact on sentencing: a systematic preferred reporting items for systematic reviews and meta-analyses (PRISMA) review of autism spectrum disorder in the courtroom’ (2017) 25(1) *Journal of Law and Medicine* 105–123.
 - 10 L Crane, L Goddard and L Pring, ‘Sensory processing in adults with autism spectrum disorders’ (2009) 13(3) *Autism* 215–228.
 - 11 Current statistical data suggests that around one in 100 people are autistic and there are around 700,000 autistic adults and children in the UK, although there is also significant debate about levels of underdiagnosis: National Autistic Society, ‘What is autism?’.
 - 12 See, for example, I Dickie, S Reveley and A Dorrity, ‘Adults with a diagnosis of autism: personal experiences of engaging with regional criminal justice services’ (2019) 4(2) *Journal of Applied Psychology and Social Science* 52–70; C Holloway, N Munro, J Jackson, S Phillips and D Ropar, ‘Exploring the autistic and police perspectives of the custody process through a participative walkthrough’ (2020) 97 *Research in Developmental Disabilities* 103545; C Allely, *Autism Spectrum Disorder in the Criminal Justice System* (Routledge 2022); T Smith, *Autism and Criminal Justice: The Experience of Suspects, Defendants and Offenders in England and Wales* (Routledge 2023).
 - 13 Holloway et al (n 12 above).
 - 14 N Martin and D Milton, ‘Supporting the inclusion of autistic children’ in G Knowles (ed), *Supporting Inclusive Practice and Ensuring Opportunity is Equal for All* (Routledge 2017) 114.

can vary significantly. Alongside areas of strength, autistic individuals also experience areas of challenge which are likely to be different to neurotypical peers. Autistic people may experience challenges in communicating and interacting with other people due to differences in both communication style and cognitive processing. For example, some autistic people may be entirely non-verbal or have limited speech, whereas others may have excellent language skills, which disguise challenges in understanding non-literal language or non-verbal cues. Autistic people may, despite outward appearances, therefore fail to understand common markers of neurotypical verbal communication, such as the use of abstract concepts and idioms, or sarcasm and metaphorical turns of phrase, without further clarification or the use of more literal, explicit language.

An autistic individual may not display neurotypically expressive empathy due to an ‘impaired ... ability to appreciate the subjective experiences of others’, a concept referred to as ‘theory of mind’ (ToM).¹⁵ Autistic defendants *may* have problems with ToM, which can mean that they ‘act in a certain way because they fail to appreciate what others are likely to be thinking’,¹⁶ as opposed to understanding but not caring. The perception may, however, be of someone who is insensitive or aloof. Due to sensory differences commonly associated with autism, an individual may become overwhelmed, distressed or extremely uncomfortable with too little or too much sensory information (eg lights, noises, smells, textures). Autistic people may also engage in repetitive and restrictive behaviour, such as specific behaviours, phrases or thought patterns (which may intensify when placed in a stressful situation).¹⁷ They may closely follow a routine and ensure consistency in food, clothing, travel, and/or social activity, and/or engage in repetitive movements (often referred to as stimming).¹⁸ As such, they may experience significant and impairing anxiety when placed in unfamiliar situations and social events; and may display repetitive behaviour or thoughts (which may intensify when placed in a stressful situation).¹⁹ Autistic individuals may also, in situations causing extreme anxiety and overwhelm, ‘melt down’ (a state which involves a loss of verbal and physical control) and ‘shut down’ (which

15 Also referred to as ‘mindblindness’. For more, see A V Askham, “‘Theory of mind’ in autism: a research field reborn” (*Spectrum News* 8 April 2022).

16 P Cooper and C Allely, ‘You can’t judge a book by its cover: evolving professional responsibilities, liabilities and “judgecraft” when a party has Asperger’s syndrome’ (2017) 68(1) *Northern Ireland Law Quarterly* 38–58, 50.

17 National Health Service (NHS), ‘What is autism?’.

18 S Kapp, R Steward, L Crane, D Elliott, C Elphick, E Pellicano and G Russell, “People should be allowed to do what they like”: autistic adults’ views and experiences of stimming’ (2019) 23(7) *Autism* 1782–1792.

19 NHS (n 17 above).

involves silence or switching-off).²⁰ Additionally, autism (like other neurodivergent conditions) is associated with cognitive processing and executive function differences, meaning that autistic individuals may process, understand and interpret information in a non-linear manner or focus on different kinds of information to neurotypical peers; this may also mean they require extra time for processing certain kinds of information. Transposed into the context of the criminal justice process, these differences in autistic individuals' communication and behaviour can, without appropriate knowledge, support and adjustments, create various barriers to fair and effective engagement and outcomes.

Research has demonstrated that some behaviours and responses during engagement with police and other legal professionals may be misinterpreted. For example, Lim and others have noted 'the marked similarity between perceived indicators of deception and common Autistic behaviors' (such as gaze avoidance and fidgeting), which can therefore lead autistic individuals to being 'judged as more deceptive than their neurotypical peers when telling the truth'.²¹ Autistic individuals may provide too much or insufficient detail in answer to questions, leading to suspicions of evasion;²² or may interpret information literally, which may be read as disruptive or difficult. An autistic suspect might 'fail to understand questions as intended (despite having a wide, comprehensive and expressive vocabulary)',²³ leading to a misplaced belief that the question *should* be understood by them. Autistic individuals may also present themselves in a manner that deviates from expected behaviour in the context or which contravenes neurotypical norms (eg laughing when discussing the alleged offence, a coping mechanism which does not represent their actual thoughts and feelings).²⁴ Autistic individuals may not understand or recognise their own misinterpretation of questions,²⁵ and evidence suggests that police officers and legal professionals are not likely to either.

Considering that neurotypical norms dominate and shape understandings and expectations of behaviours in police custody and other criminal justice environments, autistic individuals may not

20 Ibid.

21 A Lim, R Young and N Brewer, 'Autistic adults may be erroneously perceived as deceptive and lacking credibility' (2021) 52(2) *Journal of Autism and Developmental Disorders* 490–507.

22 Autistic individuals can have difficulty identifying the relevance of providing (or not providing) information to another as part of dialogue in a particular situation – described by Vermeulen as 'context blindness': P Vermeulen, 'Context blindness in autism spectrum disorder: not using the forest to see the trees as trees' (2015) 30(3) *Focus on Autism and Other Developmental Disabilities* 182–192.

23 Cooper and Allely (n 16 above) 49.

24 Ibid 50.

25 Ibid 56.

therefore present themselves and their responses in a manner pursuant to their own interests primarily because it does not align with said norms. As such, autistic individuals may be interpreted by criminal justice professionals as untrustworthy, deliberately evading questions, ‘playing for time’ when being asked a difficult question,²⁶ or may be interpreted as insensitive to the feelings of others.²⁷ Indeed, the recent work of Lim et al – one of the first studies of its kind – appears to confirm that autistic individuals are perceived as more deceptive and less credible than neurotypical peers in direct, two-way interactions.²⁸ Alongside evidence that ‘pervasive stereotypes’ of deception are commonly held by officers (and other CJS professionals), this presents significant potential for misinterpretation.²⁹

However, the evidence suggests that CJS professionals do not have the requisite knowledge and understanding of autism.³⁰ In 2020, the United Kingdom (UK) Government launched a Criminal Justice Joint Inspection (CJJI) of neurodiversity in the CJS (including autism as one of the more well-recognised neurodivergent conditions), concluding that the system offered ‘patchy and inconsistent provision’ for neurodivergent individuals, with ‘serious gaps, failings, and missed opportunities at every stage of the system’.³¹ Whilst the review recognised signs of progress (particularly in relation to autism), it suggests that the CJS remains largely unaffected by many of the insights and recommendations emerging from the research community, and that there remains much to do for autistic individuals to have fair and effective access to justice.³² Research suggests that training on and knowledge of autism amongst officers in England and Wales has been historically inadequate (though appears to be better than for

26 Ibid 49.

27 Autistic individuals may also have difficulties with pragmatic communication, that is difficulty with understanding and/or responding in appropriate ways in social discourse (for example, use of gestures; personal space; timing; topic selection; non-literal language; and unusual prosody) *ibid* 50.

28 *Ibid*.

29 Lim et al (n 21 above) 491. We might also point to a ‘core characteristic’ of police culture – suspicion – as an important factor in this context: for more, see B Loftus, ‘Police occupational culture: classic themes, altered times’ (2009) 20(1) *Policing and Society* 1–20.

30 Holloway et al (n 12 above); Cooper and Allely (n 16 above).

31 CJJI (n 3 above) 4.

32 Department of Health and Social Care and Department of Education, *The National Strategy for Autistic Children Young People and Adults: 2021 to 2026* (HM Stationery Office 2021) s 8.

other neurodivergent conditions).³³ Indeed, Slavny-Cross et al have suggested that the failure to provide adequate access to AAs could be due to the inability of officers to identify autistic people as they enter custody.³⁴ The training officers do receive is often subsumed into training on mental health (a distinct concept), leading to dilution and confusion and therefore undermining effectiveness.³⁵

The challenges are particularly pronounced in police custody. Whilst police custody can be destabilising for any suspect, an autistic suspect may be further destabilised for a number of reasons.³⁶ Police custody involves significant periods of isolation – typically, suspects can be detained for up to 24 hours without charge,³⁷ although recent research has estimated that the detention period lasts on average between 11 hours for children and 14 hours for adults.³⁸ The suspect, whilst not being permitted to interact with friends and family, is often required to interact with various healthcare professionals, an AA, a legal representative, and/or police custody staff. During such interactions, the suspect may be required to speak with multiple people regarding multiple issues and may be asked a range of questions pertaining to health and wellbeing, in addition to being questioned by the police regarding the allegations against them. This therefore combines the denial of access to familiar persons with a significant amount of social communication in a short period, in an unfamiliar environment, with unfamiliar people, something which can be challenging for autistic individuals without appropriate adaptations and support. This could be considered mentally and emotionally exhausting for any suspect, but is likely to be particularly acute for autistic individuals.

33 Holloway et al (n 12 above); D Hepworth, ‘A critical review of current police training and policy for autism spectrum disorder’ (2017) 8(4) *Journal of Intellectual Disabilities and Offending Behaviour* 212–222; N Chown, D Debbaudt, L Beardon, J Scott and K Cossburn, ‘Autism and operational policing’ in F Volkmar, R Loftin, A Westphal and M Woodbury-Smith, *Handbook of Autism Spectrum Disorder and the Law* (Springer 2021); CJJI (n 3 above).

34 R Slavny-Cross, C Allison, S Griffiths and S Baron-Cohen, ‘Autism and the criminal justice system: an analysis of 93 cases’ (2022) 15(5) *Autism Research* 904–914.

35 Hepworth (n 33 above); I Dickie and S Reveley, ‘“Street” policing and autism: perceptions and preconceptions of police officers when interacting with autistic suspects in the community’ in Smith (n 12 above).

36 Generally, see R Dehaghani, ‘Interrogating vulnerability: reframing the vulnerable suspect in police custody’ (2021) 30(2) *Social and Legal Studies* 251–271. In relation to autism, see Holloway et al (n 12 above).

37 PACE 1984, s 41.

38 V Kemp, N Carr, H Kent and S Farrall, ‘Examining the impact of PACE on the detention and questioning of child suspects’ (University of Nottingham 2023) 39. Recent observations in police custody would suggest that this is longer still with many adult suspects detained for close to 24 hours.

Isolation may also have a bearing on the suspect's ability to understand their rights and entitlements, particularly because 'reading in detention ... [often] necessitates reading alone'.³⁹ Autistic individuals who rely on others for communication support may find reading and understanding information incredibly difficult and distressing, particularly if they are to do so without the support of someone they know and trust. Moreover, this particular challenge may be compounded by co-occurring neurodivergence (for example, dyslexia) or an intellectual disability. Police custody may also be destabilising owing to a lack of control. During detention, a suspect's movements and their routine – such as mealtimes, exercise, social interaction, and personal care – are largely controlled by the police. Again, this can be distressing and frustrating for any suspect but it can prove particularly distressing for autistic suspects who may engage in specific, repetitive behaviours and routines, designed to cope with stress and overwhelm, and provide stability, comfort and control. If an autistic suspect is unable to access such mechanisms, they may experience meltdowns or shutdowns which not only harms their wellbeing, but impedes meaningful participation in criminal justice terms. Alternatively, the high stress of detention (without support and control) may lead to an overwhelming desire to leave the custody environment as quickly as possible;⁴⁰ this can cause them to agree to anything that would facilitate that – such as declining a lawyer,⁴¹ accepting a caution, or admitting an offence.⁴² In short, autistic suspects become 'more vulnerable to adverse outcomes'.⁴³

There is also significant uncertainty associated with detention in police custody in relation to the exact nature of the allegations against them and how the investigation will proceed; and they may

39 F Rock, *Communicating Rights: The Language of Arrest and Detention* (Palgrave Macmillan 2007) 109.

40 See generally L Skinnis and A Wooff, 'Pain in police detention: a critical point in the "penal painscape"?' (2021) 31(3) *Policing and Society* 245–262.

41 L Skinnis, "'I'm a detainee; get me out of here": predictors of access to custodial legal advice in public and privatized police custody areas in England and Wales' (2009) 49(3) *British Journal of Criminology* 399–417; V Kemp, '[Digital legal rights for suspects: users' perspectives and PACE safeguards](#)' (University of Nottingham June 2018).

42 See Dehaghani (n 36 above) 254; R Woodbury-Smith and K Dein, 'Autism spectrum disorder (ASD) and unlawful behaviour: where do we go from here?' (2014) 44 *Journal of Autism and Developmental Disorders* 2738–2741; J Pearse, G Gudjonsson and C Rutter, 'Police interviewing and psychological vulnerabilities: predicting the likelihood of a confession' (1998) 8(1) *Journal of Community and Applied Social Science* 1–21, which highlights that confessions are the result of 'the interaction of a number of variables' including 'custodial pressure' (at 3).

43 Holloway et al (n 12 above) 2.

not understand legal language or the various processes of detention. The 'booking-in' procedure also includes a range of often intrusive questions and is typically accompanied by intrusive procedures such as the taking of fingerprints, photographs and DNA⁴⁴ and potentially strip and intimate searches.⁴⁵ Such procedures can be difficult for any suspect but again present particular challenges for autistic suspects who will often have significant sensory differences (for example, hypersensitivity to touch). There are also other specific sensory concerns that arise because of the geography of detention;⁴⁶ police custody is a wholly unpleasant environment⁴⁷ which often involves strong, unpleasant smells (urine, vomit, faeces, stale blood, (stale) alcohol, body odour and disinfectant), cells are dimly lit, clinical and cold, constructed to minimise the risk of self-harm and suicide, and strip or fluorescent lighting is used throughout the suite (outside of the cells). Custody suites are generally noisy and, depending on time of day, busy.⁴⁸ The risk of overload for autistic individuals with sensory sensitivities is acute; there is limited space, little privacy and limited ability to meet and control personal needs (such as food, toileting and feminine hygiene). Individuals may be highly sensitive to noise, light and temperature, all of which are more intense and outside of the control of the suspect. Such issues are compounded when officers lack the necessary knowledge, training, time, resources and (perhaps) empathy to recognise and manage these needs appropriately.⁴⁹

Holloway et al's research has identified the myriad problems that autistic individuals may face in police custody such as unfamiliarity with the environment, lack of space, inability to sleep due to the lighting in the cell and a lack of privacy.⁵⁰ Their research also indicated that autistic individuals may feel overwhelmed, may be more concerned than neurotypical peers about the long-term impact of arrest and detention, and may require emotional support throughout and beyond the process. Holloway et al's research also highlighted the anxiety that autistic individuals feel in relation to communication, and that being appropriately informed about the process could reduce anxiety, but that accessible information may be required to achieve this aim.⁵¹ One

44 PACE 1984, ss 61–63.

45 Ibid ss 54–55A.

46 See A Wooff and L Skinns, 'The role of emotion, space and place in police custody in England: towards a geography of police custody' (2017) 20(5) *Punishment and Society* 562–579.

47 See L Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2010).

48 CJJI (n 3 above) 44. See also Holloway et al (n 12 above) 7.

49 Holloway et al (n 12 above) 9.

50 Ibid 5.

51 Ibid 9.

way to alleviate some of the challenges faced by autistic suspects in police custody is the provision of the AA safeguard.

THE APPROPRIATE ADULT SAFEGUARD

As set out in Code C to the Police and Criminal Evidence Act (PACE) 1984,⁵² vulnerable suspects are entitled to an AA during police custody. Vulnerable suspects are defined within Code C as either those below the age of 18 or those who because of a mental health condition or mental disorder⁵³ (1) may struggle to understand or communicate effectively about the implications of various procedures and the process connected with their arrest and detention, voluntary attendance, or rights and entitlements (and the exercise thereof); (2) do not appear to understand the significance of what they are told, questions asked, or their replies; and/or (3) are prone to becoming confused or unclear about their position, agreeing to suggestions of others without protest or question, or, without knowing or wishing to do so, providing unreliable, misleading or incriminating information or accepting or acting on suggestions from others.⁵⁴ In short, a suspect is considered vulnerable if they are a minor or, if an adult, have a mental health condition or mental disorder that results in barriers to communication and information-processing and/or suggestibility or acquiescence. However, if a police officer has reasonable grounds to suspect that the suspect is vulnerable but does not have an identified or diagnosed mental health condition or mental disorder, they can nevertheless

52 PACE 1984 implemented a legislative framework through which to regulate police powers and procedures and safeguard suspects' rights and entitlements. The AA safeguard is not included within the primary legislation; it is outlined in the sub-statutory Code of Practice C (which relates to the detention, treatment and questioning of suspects).

53 Defined as 'any disorder or disability of the mind': see Home Office 2023 (n 2 above), note 1G in combination with the Mental Health Act 1983, s 1(2).

54 Home Office 2023 (n 2 above) para 1.13d. Prior to 2018, adult suspect vulnerability was premised on whether the suspect had a 'mental vulnerability' (difficulty with understanding 'the significance of what is said, of questions or of their replies' due to issues with mental state or capacity; or 'mental disorder' ('any disorder or disability of the mind'): for both, see Home Office, Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers (Home Office 2017), note 1G, in combination with the Mental Health Act 1983, s 1(2). For a discussion and critique of these new provisions, see R Dehaghani, 'Interpreting and reframing the appropriate adult safeguard' (2022) 42(1) *Oxford Journal of Legal Studies* 187–206; R Dehaghani and C Bath, 'Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C' (2019) 3 *Criminal Law Review* 213–232.

treat the individual as vulnerable provided that they meet one of the ‘functional test’ criteria.⁵⁵

It is important to note that, in determining the necessity of an AA, two categories emerge: the former (being a juvenile) which is very clear; and the latter which is open to interpretation by officers, and therefore less clear. Crucially, Code C does not provide officers with much guidance on how to identify vulnerability – rather, it discusses the identification of risk, which is typically focused on reducing the risk of physical harm to the suspect (eg physical illness, suicide, or self-harm) or to others (eg attacks on other detainees or staff),⁵⁶ the exclusion of justice risks (eg misleading or wrongful confession) and an inability to meaningfully and effectively participate – whether through active participation, resisting participation (eg answering ‘no comment’) or avoiding participation (eg remaining silent). As such, the focus of assessing vulnerability is not only dependent to a significant extent on the knowledge, awareness and understanding of individual custody officers (COs), but is skewed away from vulnerability affecting justice-related experiences and outcomes.

Should a suspect be identified as vulnerable and in need of an AA, an AA should be called to attend custody. An AA’s role is to provide support, advice and assistance relating to any procedure or practice of Code C or any other code or when the suspect is ‘given or asked to provide information or participate in any procedure’.⁵⁷ The AA must assist the suspect in communication (and the absence of communication, respecting the suspect’s right to silence) with the police and uphold fairness by ensuring that the suspect understands their rights and entitlements whilst also ensuring that rights are protected and respected by the police.⁵⁸ The AA must also be present for various procedures where rights and entitlements are engaged such as charge, cautions, warnings in relation to adverse inferences, the taking of samples (ie fingerprints, photographs and DNA), reviews of detention, and the conduct of intimate searches.⁵⁹

Code C permits a range of individuals to perform the AA role for adults – these include: relatives, guardians or other individuals responsible for the care or custody of the adult; or someone experienced in dealing with vulnerable people but who is not prohibited from acting as an AA; or someone responsible who is over the age of 18 who is

55 Home Office (n 2 above), note for guidance 1G.

56 Dehaghani (n 2 above).

57 Home Office (n 2 above) para 1.7A.

58 Ibid.

59 Ibid paras 16.1, 10.12, 10.11A, read alongside para 10.11, annex A, paras 2B, 11.17, 1.4.

not prohibited.⁶⁰ Those who are police officers or have contractual arrangements with the police or otherwise lack independence from the police, lawyers, and independent custody visitors are prohibited from performing the role of AA.⁶¹ Thus, the AA role can be performed by a number of different individuals, although as Dehaghani has argued, they can be categorised as (a) friends/relatives (to include family members), (b) volunteers or (c) professionals. Category (a) will include those who are known personally to the suspect; category (b) will include those who volunteer as AAs (either from a scheme or otherwise) and who, whilst unpaid, may have some level of training; and category (c) are those who may act as an AA in their professional capacity either as part of their job (such as social workers) or as their job (ie those employed as an AA).⁶²

VULNERABILITY AND THE APPROPRIATE ADULT SAFEGUARD – GENERAL CRITICISMS AND CHALLENGES

However, the AA safeguard faces considerable challenges in both law and practice. PACE 1984 fails to include any information on vulnerability and/or the AA safeguard – the requirement for an AA and the guidance around both vulnerability and the role is entirely contained within Codes of Practice, which, as sub-statutory soft law, lack the enforceability of statute.⁶³ This is because breaches of the Codes are not subject to civil or criminal sanction⁶⁴ and can merely result in exclusion of evidence at trial,⁶⁵ where the case reaches that stage.⁶⁶ The one exception here is that the AA safeguard for young suspects is on a statutory footing by virtue of the Crime and Disorder Act 1998 which requires that youth offending teams⁶⁷ attend as AAs for young suspects where an AA cannot otherwise be secured. Second, the focus of Code C largely frames vulnerability in respect of adults

60 Ibid para 1.7.

61 Ibid and note for guidance 1F.

62 R Dehaghani, ‘Defining the “appropriate” in “appropriate adult”: restrictions and opportunities for reform’ (2020) *Criminal Law Review* 1137–1155.

63 R Dehaghani, ‘He’s just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody’ (2016) 55(4) *Howard Journal of Criminal Justice* 396–413.

64 PACE 1984, s 67(10).

65 For example, in relation to confession evidence, under PACE 1984, ss 76 or 78; or in relation to any evidence, PACE 1984, s 78.

66 See Dehaghani (n 2 above).

67 These are multi-agency teams which are co-ordinated by a local authority to reduce reoffending amongst children and young people.

as an inability to or interference with the ability to provide reliable evidence.⁶⁸ Until 2018 (when Code C underwent significant revision), the AA's role did not involve appreciation of the suspect's rights⁶⁹ and the AA's role in facilitating communication did not acknowledge the need to respect the suspect's right to silence.⁷⁰ The AA safeguard is mainly concerned with the integrity of evidence rather than the needs of the suspect.⁷¹

There are also significant challenges with implementing the AA safeguard in practice. Whilst 39 per cent of suspects may qualify for the AA safeguard (based on a diagnosis of 'mental disorder'),⁷² only 6.2 per cent of suspects receive an AA.⁷³ All young suspects are provided with an AA based on age; as noted above, this is typically straightforward to determine and subject to no discretion or 'interpretative judgment'.⁷⁴ In contrast, the determination of whether an AA is required in respect of adult suspects is left to the CO. Research examining how COs make such decisions identified three overarching barriers – definition, identification and decision-making.⁷⁵ First, COs may fail to acknowledge that a suspect is vulnerable as they may adopt a narrow definition of vulnerability, which focuses on whether the

68 Home Office 2017 (n 54 above) note 1G; see also Home Office 2023 (n 2 above).

69 This was arguably as a result of the input of the National Appropriate Adult Network (NAAN), a charity that oversees AA provision across England, Wales, Northern Ireland and the Isle of Man: see [Guide for Appropriate Adults](#) (Home Office and NAAN 2011); [Guidance for Appropriate Adults](#) (Home Office 2003).

70 As per Dehaghani's recommendation to the Home Office. For a discussion of the challenges posed by adverse inferences from silence, see H Quirk, *The Rise and Fall of the Right of Silence* (Routledge 2017).

71 Dehaghani (n 2 above).

72 This highlights problems for supporting vulnerability when a suspect is undiagnosed. These figures are the closest estimate there is to ascertaining levels of required AA need: I McKinnon and D Grubin, 'Health screening of people in police custody – evaluation of current police screening procedures in London, UK' (2013) 23(3) *European Journal of Public Health* 399–405.

73 Rates also vary between police forces such that the rates of implementation may actually be much lower in individual forces: see C Bath and R Dehaghani, *There to Help 3: The Identification of Vulnerable Adult Suspects and Application of the Appropriate Adult Safeguard in Police Investigations in 2018/19* (National Appropriate Adult Network 2020).

74 S Bronitt and P Stenning, 'Understanding discretion in modern policing' (2011) 35(6) *Criminal Law Journal* 319–332.

75 Police culture and (the lack of) oversight can explain some of the reasons for definition, identification and decision-making being approached in this way: see Dehaghani (n 2 above).

suspect understands basic procedures and concepts.⁷⁶ Typically, an adult suspect must appear in some way ‘childlike’⁷⁷ (CO-2 Interview) or ‘abnormal’ and must ‘perform’ their vulnerability. This problem arguably emerges because of the term used for the safeguard and the fact that it is also applied to juveniles.⁷⁸

AAs have also acknowledged the shortcomings of their own skills in identifying whether a suspect has, for example, a mental health condition or mental disorder.⁷⁹ There is also a failure, or unwillingness, to recognise that a suspect may (at least appear to) understand what is being said to them but may, for example, be suggestible or acquiescent.⁸⁰ Second, there are challenges presented by how COs identify vulnerability. As noted above, Code C does not outline how a CO is to identify vulnerability, although it does comment on how COs should identify ‘risk’. COs predominantly rely upon the risk assessment, conducted upon ‘booking in’,⁸¹ the suspect’s behaviour upon booking-in, and to a certain extent during their time in custody, for making a determination as to whether the suspect requires an AA. The risk assessment does not, however, focus on the identification of vulnerability and does not include specific questions that may enable an officer to identify whether the suspect is to be considered vulnerable.⁸² Further, suspects may not evidently display any behavioural clues that would give rise to a suspicion that they are vulnerable as per the police conceptualisation noted above (such as failing to understand basic questions or behaving in a ‘childlike’ or ‘abnormal’ manner when answering risk assessment questions). Although officers can refer to information about the suspect contained in the Police National

76 An officer who subscribes to traditional expressions of police culture, such as cynicism and suspicion, may find it difficult to accept a suspect as vulnerable. For an example of how officer attitudes shape conceptualisation of victims as vulnerable, see N Caveney, P Scott, S Williams and L Howe-Walsh, ‘Police reform, austerity and “cop culture”: time to change the record?’ (2020) 30(10) *Policing and Society* 1210–1225.

77 Dehaghani (n 2 above).

78 Ibid.

79 Ibid.

80 There is a significant body of evidence regarding coerced-compliant confessions, which are often linked to vulnerable individuals: see G Gudjonsson, ‘[The science-based pathways to understanding false confessions and wrongful convictions](#)’ (2021) *Frontiers in Psychology* 12. More on this in relation to autism below: also see Dickie et al (n 12 above).

81 ‘Booking in’ is the collective term for various procedures which must occur when a suspect arrives at a custody suite. These include searches, risk assessment, identifying any welfare needs of the suspect, informing the suspect about rights and entitlements, and evaluating the necessity of detention. These tasks are normally conducted by the CO.

82 See Dehaghani (n 2 above).

Computer or the Police National Database, they may not always do so and, even if they do, the information there may be limited (as it is based on what others have recorded/thought important to record). Moreover, COs could over-rely on the computer and may therefore fail to engage their autonomous skills of assessing vulnerability.

Officers can also rely on, for example, information provided by others such as healthcare professionals (HCPs), family members and friends of the suspect, the lawyer (if one is requested) or other police officers (such as information gathered at the time of arrest or information relating to the offence).⁸³ These sources can be limited, as HCPs, lawyers and police officers may lack the specific knowledge of vulnerability generally or of specific vulnerabilities and/or may lack legal knowledge (ie knowledge of the requirements of the Code);⁸⁴ and family members and friends may not come forward with information (particularly so if they are not aware that the suspect is being detained).

The effective and consistent identification of vulnerability in respect of autistic suspects appears to be an area of weakness in this regard. Identification of autism amongst healthcare professionals in police custody reflects similar trends in respect of identifying vulnerability more generally. Of 55,301 adult liaison and diversion (L&D) cases that did not involve an AA, at least 550 people were identified as having autism spectrum condition (ASC) by L&D and were not provided with an AA.⁸⁵ However, given the under-identification of autism generally and autism in police custody, this figure is highly likely to underestimate the scale of the problem.

COs may feel that the AA is unnecessary even if they determine that the suspect is vulnerable. This may be because a solicitor has been requested and is seen to obviate the need for an AA;⁸⁶ or because the

83 In terms of the arresting officer, since they will have chosen to exercise the power of arrest, they are likely to believe a suspect is either not vulnerable at all; not so vulnerable that they cannot be detained; or have simply not considered this (for example, in a perceived situation of urgency). As such, it is questionable whether they will be a useful or reliable source of information for COs considering vulnerability at the police station.

84 For example, the role of L&D in custody is vital to vulnerable suspects accessing appropriate support, but may be hindered by a lack of knowledge/understanding of autism amongst L&D practitioners. See E Burch and J Rose, 'The subjective experiences of liaison and diversion staff who encounter individuals with autism' (2020) 6(2) *Journal of Criminological Research, Policy and Practice* 137–150. HCPs and police officers may lack knowledge of the Code but lawyers may also lack in-depth knowledge thereof.

85 Bath and Dehaghani (n 73 above).

86 For discussion see R Dehaghani, and D Newman, 'Can – and should – lawyers be considered "appropriate" appropriate adults?' (2019) 58(1) *Howard Journal of Crime and Justice* 3–24.

offence is unlikely to reach the courts and will therefore not be subject to scrutiny. Alternatively, there may be a determination that the suspect is insufficiently vulnerable to warrant an AA or that, notwithstanding any vulnerability, calling an AA will lead to ‘unnecessary’ delay in the interview, leading to a release from custody and an adverse effect on the workload of other officers or the CO.⁸⁷ Whilst practices may have slightly improved since the revised Code was implemented, evidence suggests that a large number of suspects are still not being provided with an AA even when they are likely entitled to one.⁸⁸ Yet, it is arguable that the ‘loose’ definition of when an AA should be called grants COs significant interpretive scope under the regulatory framework, one which is in theory designed to aid in protecting vulnerability via the AA safeguard. In the context of autistic suspects, this means that the aforementioned deficit in provision is likely entirely lawful even if the evidence suggests such decisions create a significant unmet need in custody for vulnerable autistic suspects.

The AA’s role has also been subject to critique in law and in practice. First, although the AA is required to facilitate communication, they are not subject to legal privilege,⁸⁹ thus interfering with open communication between the suspect and (if present) the lawyer. An AA may therefore lack sufficient knowledge and awareness of, for example, the interview strategy or the suspects’ involvement or otherwise in the offence. The AA may also be placed in a difficult position if compelled to give evidence at trial and may therefore avoid the lawyer consultation altogether to circumvent this possibility. Second, AAs for adults are not always present for the procedures required (as discussed above) and are typically only called to be present at the interview stage.⁹⁰ Third, the AA is discouraged from taking an active role as they can be asked to leave if considered unreasonably obstructive,⁹¹ which is compounded further by the fact that Code C fails to elaborate on what

87 See Dehaghani (n 2 above).

88 See Bath and Dehaghani (n 73 above).

89 *A Local Authority v B* [2008] EWHC 1017 (Fam). See also C Bath, ‘Legal privilege and appropriate adults’ (2014) 178(27) *Criminal Law and Justice Weekly*.

90 Dehaghani (n 2 above). This mirrors the established problem of defence lawyers who are ‘interview focused’ – that is, who only attend custody for their client’s interview, leaving suspects unsupported for most of their time in custody. By placing exclusive emphasis on support during the specifically investigative/evidential aspects of custody, rather than the custody experience as a whole, lawyers/AAs ignore the impact of the wider context of custody on the suspect’s welfare and ignore the potential impact of a difficult custody experience on the interview.

91 Dehaghani (n 62 above). See Home Office 2023 (n 2 above) para 11.17A.

is considered an unreasonable obstruction.⁹² In practice, critique has been levelled at the AA safeguard over concerns regarding the quality of AAs generally or of specific types of AAs,⁹³ inconsistencies in service delivery,⁹⁴ the remit of the AA role,⁹⁵ and the interpretation of the AA's role and position.⁹⁶ Further, as Dehaghani has previously argued, the AA may be limited by power dynamics as they are dependent on the police for their safety whilst in custody.⁹⁷ Finally, the AA seeks to address multiple vulnerabilities and needs across an array of different frameworks and, in doing so, they may fail to address some or all of the suspect's needs⁹⁸ and may also provide a false sense of safety. The following section will discuss several of the above concerns in more detail in relation to autistic suspects, demonstrating that AAs – as currently conceived in law and practice – may not be an adequate safeguard in custody.

92 This can prove advantageous for the police who will have discharged their duty by calling an AA but can eject an AA if they determine that the AA is being unreasonably obstructive.

93 J Hodgson, 'Vulnerable suspects and the appropriate adult' (1997) *Criminal Law Review* 785; T Jessiman and A Cameron, 'The role of the appropriate adult in supporting vulnerable adults in custody: comparing the perspectives of service users and service providers' (2017) 45(4) *British Journal of Learning Disabilities* 246; H Pierpoint, 'How appropriate are volunteers as "appropriate adults" for young suspects? The "appropriate adult" system and human rights' (2000) 22(4) *Journal of Social Welfare and Family Law* 383–400; K Quinn and J Jackson, 'Of rights and roles: police interviews with young suspects in Northern Ireland' (2007) 47(2) *British Journal of Criminology* 234–255.

94 M Perks, 'Appropriate adult provision in England and Wales: report prepared for the Department of Health and the Home Office by Mark Perks Development Officer, National Appropriate Adult Network' (NAAN 2010). In 2017/18, 18 per cent of local authority areas had no scheme for adults, with the result that 16 per cent of the population lived in an area without identifiable AA provision. Of the areas with a scheme, only 45 per cent had a scheme that operated 24/7: C Bath, *There to Help 2: Ensuring Provision of Appropriate Adults for Vulnerable Adults Detained or Interviewed by Police: An Update on Progress 2013/14 to 2017/18* (NAAN 2019).

95 Hodgson (n 93 above); Pierpoint (n 93 above); Quinn and Jackson (n 93 above).

96 Her Majesty's Inspectorate of Constabulary (HMIC), 'The welfare of vulnerable people in police custody' (HMIC 2015); H Pierpoint, 'A survey of volunteer appropriate adult services in England and Wales' (2004) 4(1) *Youth Justice* 32–45; P Fennell, 'Mentally disordered suspects in the criminal justice system' (1994) 21 *Journal of Law and Society* 57; Dehaghani (n 36 above).

97 Similar to lawyers: see Quirk (n 70 above).

98 See Dehaghani (n 54 above).

AUTISM AND APPROPRIATE ADULTS: ENTITLEMENT AND IDENTIFICATION

In addition to the general challenges and criticisms outlined above in respect of definition, identification and decision-making on vulnerability, and on the AA safeguard and on the scope of the AA safeguard itself, there are specific considerations in respect of autistic individuals which raise questions about the functionality of the AA as a safeguard for this vulnerable category of suspect.

As discussed above, COs define vulnerability in respect of the AA safeguard in a manner that constructs vulnerability as something ‘abnormal’ or ‘childlike’. With this in mind, if an autistic suspect does not ‘perform’ vulnerability in a manner which aligns with this interpretation, they may be denied access to an AA and therefore placed at a disadvantage in the custodial context. This may be compounded if the individual does not present in a stereotypically autistic manner (eg gaze avoidance or being non-verbal), which is a particular concern as many autistic individuals have learnt to ‘mask’ or camouflage their autism.⁹⁹ For example, autistic individuals may engage in ‘social echolalia’, which involves responding to questions ‘in a way that could appear as if they have accurately understood ... when in fact this might not be the case’.¹⁰⁰ This form of camouflaging operates by either ‘hiding behaviour that might be viewed as socially unacceptable or artificially “performing” social behaviour deemed to be more neurotypical’ and can present significant problems in identifying and protecting vulnerable autistic suspects,¹⁰¹ because ‘they [may] appear to be in possession of a greater level of awareness about their current situation context than is the case’.¹⁰² When the current situation context is police custody or interview, officers or others may overlook the suspect’s true vulnerability, leading to inappropriate outcomes such as unfairly assigning culpability or failing to provide support to cope with such encounters because the individual’s ‘needs might go unrecognised or be ignored’.¹⁰³ Combined with the barrier of

99 M C Lai, M V Lombardo, A N V Ruigrok, B Chakrabarti, B Auyeng, P Szartmari, F Happe and S Baron-Cohen, ‘Quantifying and exploring camouflaging with men and women with autism’ (2017) 21(6) *Autism* 690–702.

100 Ibid 9; see T Attwood, *The Complete Guide to Aspergers Syndrome* (Jessica Kingsley 2007). For further discussion of the function of echolalia in communication of autistic individuals, see L Sterponi and J Shankey, ‘Rethinking echolalia: repetition as interactional resource in the communication of a child with autism’ (2014) 41(2) *Journal of Child Language* 275–304.

101 Lai et al (n 99 above) 690.

102 Dickie et al (n 12 above) 56.

103 Ibid 65.

not ‘performing’ vulnerability in a compliant manner, it becomes clear that autistic suspects are likely to be denied the support of an AA.

In the study mentioned at the start of this article, COs discussed who would and would not have access to the AA safeguard and stated that they would query why autistic individuals should access the safeguard when the autistic suspect was, for example, highly intelligent:

I have a friend who’s a consultant anaesthetist who’s on the Autistic [spectrum], his son’s at Oxford University doing languages. You would say that their behaviour sometimes is a bit ... how they talk, that’s a bit different. But does that make them different? No ... There are degrees and I think they show themselves when you talk to people, I think. It’s a judgment call. The Autistic Society – is it the Autistic Society? – recommend that everybody has an [AA]. Do they? Does my friend who’s a consultant anaesthetist need one for interview? I’d say not. So, you know, everyone has to be dealt with individually. You can’t just sort of say, blanket, across the board, that everybody needs an [AA]. (CO4-W Interview)¹⁰⁴

This quote shows a significant and problematic misunderstanding of autism, particularly autistic presentation and hidden vulnerability, which has implications for the ability to identify when a suspect may be vulnerable and therefore in need of an AA. First, the CO conflates high intelligence with competence in other areas of cognitive function. This fails to recognise that an autistic person’s apparently high intelligence may be accompanied by other developmental differences which can create challenges, such as emotional regulation, sensory processing, executive function and social communication skills.¹⁰⁵ This therefore relies on a stereotypical and restrictive interpretation of ‘vulnerability’ (and, indeed, autism) – that intelligent individuals cannot be vulnerable. Second, although the individual’s autism is known in the above quote, it more broadly illustrates a failure to identify the potential for autistic masking (eg social echolalia, mentioned above). Autistic individuals may be adept (intentionally or not) at masking any vulnerability. As such, the CO’s reliance on their ability to identify vulnerable autistic individuals (‘I think they show themselves when

104 When asked why, CO4-W stated: ‘because they know the difference between right and wrong, they know why they’re here’.

105 In the context of healthcare, see P Bradshaw, E Pellicano, M van Driel et al, ‘How can we support the healthcare needs of autistic adults without intellectual disability?’ (2019) 6 *Current Developmental Disorder Reports* 45–56. See also G A Alvares, K Bebbington, D Cleary, K Evans, E J Glasson, M T Maybery, S Pillar, M Uljarević, K Varcin, J Wray, and A J Whitehouse, ‘The misnomer of “high functioning autism”: intelligence is an imprecise predictor of functional abilities at diagnosis’ (2020) 24(1) *Autism* 221–232.

you talk to people’) is misplaced.¹⁰⁶ Third, the quote suggests a static understanding of vulnerability; that is, that an individual who is not vulnerable in one context (eg practising as an anaesthetist) will not be vulnerable in others (eg in police custody). Again, this makes assumptions which may lead to the denial of support on the basis that all contexts pose effectively the same challenges to individuals – which is undoubtedly not true.¹⁰⁷ Fourth, the quote highlights the disadvantage of thinking in ‘spectrum’ terms, where there is a fairly crude dichotomy between ‘low functioning’ (associated with low intelligence) and ‘high functioning’ (associated with high intelligence).¹⁰⁸ The former implies that someone is more vulnerable, the latter less so; in fact, there are very likely to be a variety of strengths and weaknesses for different autistic individuals in different contexts (the aforementioned ‘spiky profile’). Further, it ignores the cumulative effects of detention (see the section above on ‘Autism, the criminal process, and police custody’). After several hours in police custody, an autistic suspect who may have been invisibly ‘coping’ with various challenges at the early stages of detention – sensory overload, adapting to neurotypical communication, processing new information and circumstances – could, later in the process (such as at the point of interview), find that their cognitive and emotional resources are depleted, leading to them to simply agree to whatever is presented to them or to disengage completely.¹⁰⁹

The process by which the need for an AA is identified may also be problematic in respect of autism. First, the risk assessment questions asked upon booking-in do not contain any autism-specific questions or any questions that may prompt an autistic suspect to disclose information that may lead to the identification of vulnerability and thus the need for an AA. Holloway et al have suggested that some autistic individuals see their autism as part of their identity and may therefore not disclose this information as part of the risk assessment, as they do not perceive it in such terms.¹¹⁰ Second, autistic suspects may be reluctant to disclose personal information pertaining to their autism or otherwise, for example, for fear of stigma, which may be compounded by a lack of trust in or fear of the police. Autistic individuals in Crane et al’s research were reluctant to disclose their autism diagnosis due

106 See J Cook, L Crane, L Hull, L Bourne and W Mandy, ‘Self-reported camouflaging behaviours used by autistic adults during everyday social interactions’ (2022) 26(2) *Autism* 406–421.

107 For more, see the work of Martha Fineman on universal vulnerability.

108 Alvares et al (n 105 above).

109 The exclusionary rules of evidence under PACE 1984, ss 76 and 78, may account for the consequences of interviewing an autistic suspect under such circumstances, although given the notable challenges with the admissibility rules (see Dehaghani n 2 above) it would be problematic to rely on these as a remedy.

110 Holloway et al (n 12 above) 5.

to ‘fear of discrimination or victimisation by police officers’.¹¹¹ Of a total of 28 adults with autism who were questioned about whether they would disclose their diagnosis, 39 per cent said that they would always do so, 36 per cent said that they would never do so, and 25 per cent said that they would ‘on some occasions, but not others’.¹¹² This may be further compounded by the absence of autism-specific questions, but also compounded further still by a lack of explanation as to why this information is being asked for and recorded. An autistic suspect – or any suspect – may not disclose information if they do not know why that information is requested.

Additional questions found on the risk assessment – namely, those that police forces have included that go beyond the scope of the authorised professional practice – first require a police officer to consider asking them and, second, may not apply to the situation, (eg where the autistic suspect is asked whether they went to a ‘special school’, may not understand what ‘special school’ means or may not have, in fact, attended a ‘special school’).¹¹³ COs and other custody staff may rely on behavioural cues to identify whether a suspect is vulnerable, but the absence of behavioural cues in those who have successfully learnt to mask¹¹⁴ their autism may interfere with the ability to accurately determine whether an AA is required. This challenge was acknowledged by CO13-W:

Autism at different ends of the spectrum is quite apparent to see or not. People present really, really well and they say ‘I’m Autistic’ and if you hadn’t have told me that you were Autistic, I would never have known and I would’ve gone ahead and said ‘Right, go to interview straight away’. And if people present well to me and they seem to know what is happening then I put them through I say ‘Right, go to interview’.¹¹⁵

That the CO would not have detected autism is problematic for the reasons outlined above, yet a disclosure from the suspect should be enough to trigger the AA safeguard. Unfortunately, for the autistic suspect, in line with the approach taken by CO13-W (and of many COs),¹¹⁶ a self-disclosure would not be enough to trigger the safeguard as the suspect did not ‘perform’ their vulnerability in line with

111 L Crane, K Maras, T Hawken, S Mulcahy and A Memon, ‘Experiences of autism spectrum disorder and policing in England and Wales: surveying police and the autism community’ (2016) 46 *Journal of Autism and Developmental Disorders* 2028, 2036.

112 *Ibid* 2036.

113 See generally K Bradley, *The Bradley Report: Lord Bradley’s Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Crown 2009).

114 Lai et al (n 99 above).

115 Dehaghani (n 2 above).

116 *Ibid*.

expectations. There were, however, officers who, upon identifying that the suspect was autistic, would provide an AA as a general rule – CO9-W and CO10-W commented that ‘anything on the Autistic spectrum’ (CO9-W Interview) would warrant the AA safeguard because ‘our rule book says “They will have an [AA]”’ (CO9-W Interview).¹¹⁷

In Crane et al’s research, of the 192 police officers (out of a total of 400 respondents) responding to the question of whether an autistic suspect would have an AA, 67 per cent stated that autistic suspects always had an AA and 31 per cent stated that an AA would sometimes be involved.¹¹⁸ This research, however, relies on police officers accurately reporting their practices, does not unpick how police officers understand autism and whether they understand the condition and its effects sufficiently, and undoubtedly does not take into account instances where officers fail to detect that the suspect was autistic. With regard to training, Richards and Milne found that 37 per cent of officers had received training on autism, although there was a recognised need for training tailored to the specific role that the police officer was performing.¹¹⁹ Moreover, having training on autism does not necessarily ensure that one has an understanding of autism or, at least, enough of an understanding to be able to identify whether someone is autistic.¹²⁰ Richards and Milne did, however, note that, whilst 48 per cent of police officers rated themselves as knowledgeable about autism, those with autism (total 80) who completed the survey felt that other officers lacked general knowledge and awareness of autism such that their needs ‘were not being met’. They also felt ‘there was a lack of information, and explanation, given by police officers’, that ‘delays at various stages were unacceptable’ and ‘some individuals felt victimised or discriminated against by police officers’.¹²¹

AUTISM AND APPROPRIATE ADULTS: SUITABILITY

Questions also arise as to the AA’s suitability in assisting autistic suspects, supposing access is granted. The first point to note is that the AA safeguard is not, at a regulatory level, designed around the needs of autistic suspects or any specific type of vulnerable suspect;

117 The ‘rule book’ is Code C in Home Office 2023 (n 2 above). See Dehaghani (n 2 above).

118 Crane et al (n 111).

119 Ibid 2036.

120 Indeed, this will depend on the nature and quality of training and how officers engage with it. See I Dickie, S Reveley and A Dorrity, ‘The criminal justice system and people on the autism spectrum: perspectives on awareness and identification’ (2018) 4(1) *Journal of Applied Psychology and Social Science* 1–21; and Hepworth (n 33 above).

121 Ibid 2036.

rather, it is a safeguard aimed at vulnerability generally.¹²² The role, in terms of who can deliver it, can be flexibly interpreted based on the particular suspect; whilst this clearly has advantages it also means that there are few fixed demands in terms of skillset and qualification. For example, the AA may be a communication specialist in a general sense but be unfamiliar with differences in communication style of autistic individuals or recognise particular challenges for autistic suspects (such as common linguistic devices like multi-part, open or ‘tagged’ questioning).¹²³ Even where the AA is a specialist in communication (eg a speech and language therapist), they may not necessarily possess the skills and awareness needed to support the autistic suspect they have been assigned to. In addition, they may not know the specific suspect on a personal level, and therefore they may not know how (best) to respond to their specific needs. If the AA is someone known to the suspect (eg a family member, friend, or care worker), they may possess the specific awareness of need and understanding of how (best) to provide support, but they may lack the legal and procedural knowledge required of their role. This may therefore mean that the AA is not able to adequately support an autistic suspect either through lack of knowledge of autism and its relevance in the context, or of law and process in custody.

Previous research has indicated a general awareness of autism amongst AAs, however, this research also indicated challenges in how this knowledge would be put into practice in an interview setting. In Richards and Milne’s research examining AAs’ understanding of autism, of the 49 who responded, 28.6 per cent (14) reported that they had undertaken training on autism. This training included ‘awareness of the characteristics of [autism], developing an understanding of the spectrum, discussion of behavioural issues, communication issues, and methods of diagnosis’.¹²⁴ The majority of respondents (43 out of 48) indicated that further training would be useful.¹²⁵ AAs were generally able to recognise characteristics that are associated with autism, most typically ‘understanding the minds of others ... and difficulties understanding gestures and tone of voice ... However, less association was given to understanding social rules ... and the ability to give eye contact.’¹²⁶ Whilst AAs could correctly distinguish between psychopathy and autism, they tended to agree with stereotypical

122 See Dehaghani (n 2 above).

123 See Judicial College, *Equal Treatment Bench Book* (April 2023) para 164.

124 J Richards and R Milne, ‘Appropriate adults, their experiences and understanding of autism spectrum disorder’ (2020) 103 *Research in Developmental Disabilities* 12: appropriate adults rated their training as good or very good (at 12).

125 *Ibid.*

126 *Ibid* 12–13.

and disadvantageous conceptualisations, such as the suggestion that autistic people can be ‘very aggressive’ or that autistic people had good memory recall (an assumption which would undermine a suspect who failed to meet this expectation).¹²⁷ They also found that AAs had an awareness of autism, despite only 14 having undergone training, yet only 16 had prior experience of autistic people.¹²⁸ Convergence was also found in responses regarding the three characteristics that AAs believed would most impact upon interview – whilst ‘the majority identified ... characteristics indicative’ of autism, there were ‘more obscure comments’ such as ‘people with [autism] resisting authority, not understanding right from wrong, refusing to admit guilt, and being unwilling to conform’.¹²⁹ Underlying such comments is a negative judgement of the autistic suspect and, arguably, a suggestion that the suspect should adapt their behaviour to be compliant with police (and AA) expectations. However, this not only dismisses their vulnerability but ignores the reasons behind such behaviour (for example, resistance or meltdown as a response to stress, not as an attempt to be ‘difficult’). Moreover, such comments see AAs positioning themselves as police allies, suggesting a serious misunderstanding of their role in custody or interview. Richards and Milne therefore rightly note the need for further research to ascertain whether such ‘stereotypical information is detrimental to the quality of support an [AA] provides’.¹³⁰

Although these results are promising in that at least some AAs have knowledge of autism, there are particular concerns regarding the limitations of the sample, given its relatively diminutive size and scope (16 out of 58 organisations took part in the research). The findings may be limited further still by the fact that there are significant disparities in AA provision and organisation nationwide.¹³¹ A lack of understanding of how autism affected the suspect was found in Maras et al’s research to be the reason that a number of police officers (50 % of 189 respondents) found the AA safeguard unhelpful (30%) or neutral (20%).¹³² Ultimately, the current inference one can draw from available research is that, in practice, AAs may be unable to offer the support envisaged by the regulatory framework.

It is also worth considering how helpful the addition of an AA to the circumstances of custody and interview truly is. Whilst designed as a form of support for an autistic suspect, it should be remembered that custody already involves a whole host of new information,

127 Ibid.

128 Ibid 21.

129 Ibid.

130 Ibid.

131 See Perks (n 94 above).

132 51 per cent found the AA helpful: Crane et al (n 111 above) 2034.

routines and – crucially – people. In the course of the process, an autistic suspect is likely to encounter COs and custody detention officers (CDOs), interviewing officers, a lawyer (if they request one) on the phone and/or in person, L&D staff and (in a less direct way) other officers and detainees in a custody suite. To add an AA to the already extensive number of new people arguably only increases the strain on a suspect caused by excessive social communication. As such, we might ask whether the AA, regardless of who they are, is the right *kind* of safeguard in custody, particularly without other adjustments (for example, to environments or interview questioning style). It may well be that the provision of a lawyer and/or an AA may be deemed adequate to safeguard the suspect's rights and entitlements, and that nothing else need be done. In reality, this may not be helpful at all.

IMPROVING THE SAFEGUARDING OF AUTISTIC SUSPECTS

At this juncture, it is necessary to summarise the key problems and pitfalls of custody for autistic suspects. First, there are particular characteristics of police custody that may be problematic for autistic suspects: the absence of familiar support and significant compelled social communication with unfamiliar people in positions of authority (ie the police); disruption to routines with control vested in others; intrusive processes and procedures; significant and sustained uncertainty; and an unfamiliar, destabilising and sensorily overwhelming environment. Second, there are general and specific problems with the AA safeguard: it is not always implemented owing to (mis)interpretation of need, barriers to identification, and various factors influencing decision-making; it is limited in scope and in terms of the (type of) support it can provide to vulnerable suspects generally and autistic individuals in particular; and it may be detrimental, rather than beneficial, for some autistic suspects.

Following on from the analysis of the problems and pitfalls in relation to police custody and the AA safeguard for autistic suspects, here we consider what changes to law, policy and practice are necessary to improve the AA safeguard. It is, however, important to first acknowledge that the AA safeguard, and other rights and entitlements under PACE 1984, do not exist in isolation and necessarily require consideration in their wider context. Broader reforms addressing COs and lawyers, their powers and duties, and their knowledge and understanding, are also necessary.

In terms of legal and regulatory reform, one must consider whether PACE Code C requires amendment to include autism- and neurodivergent-specific provisions, particularly in relation to the

definition and identification of vulnerability. Providing an indicative and non-exhaustive list of conditions and clarifying how COs could identify vulnerability could reduce, albeit not eradicate, the scope for interpretation and the challenges posed by and to definition and identification. The ability to identify autism and the possible need for an AA also requires significant improvement, particularly deeper knowledge and a more sophisticated understanding of autism. This is necessary across all professional actors in police custody such as lawyers, police officers, COs, CDOs, HCPs, L&D staff and AAs. A more pervasive form of cultural change is required – away from suspects as a dangerous ‘other’ or a risk to be managed towards a recognition of their vulnerability, particularly within the context of custodial detention. It may be necessary to remove key decision-making away from COs and towards (more impartial) health and social care professionals, given the concerns regarding CO ‘independence’ from the broader functions of policing.¹³³

This form of structural change must be coupled with improved knowledge and understanding of autism – and of vulnerability more broadly – amongst criminal justice professionals. First, knowledge and understanding must improve amongst those working on the frontline who are making a determination during the early – and often only – stages of the criminal process, as noted above. Yet, this knowledge and understanding shift must also occur amongst the judiciary,¹³⁴ particularly those who are tasked with determining the admissibility of evidence where, for example, an autistic or otherwise ‘vulnerable’ suspect has confessed without an AA present. This knowledge and understanding should arguably also extend to understanding how autistic suspects ‘present’ and what other challenges a neurotypical-centred CJS may create. It is perhaps necessary to reimagine the criminal justice process, although doing so is outside of the scope of this article.

133 See I McKenzie, ‘Helping the police with their inquiries: the necessity principle and voluntary attendance at the police station’ (1990) *Criminal Law Review* 22; and R Dehaghani, ‘Automatic authorisation: an exploration of the decision to detain in police custody’ (2017) 3 *Criminal Law Review* 187–202; M McConville, A Sanders and R Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).

134 This need exists not only in domestic courts, but also at the European Court of Human Rights. The recent *Hasáliková* case demonstrated the need for judges to understand what makes a suspect vulnerable and what is sufficient – and what is not sufficient – to address this vulnerability. The dissenting judgment of Turković and Schembri Orland demonstrated a more sophisticated knowledge and understanding of vulnerability: see *Hasáliková v Slovakia* App no 39654/15 (24 June 2021).

Autistic suspects should be considered vulnerable under Code C if they meet the ‘functional test’ (see the section above on ‘The appropriate adult safeguard’), and it is likely that (many) autistic suspects would meet at least some of these requirements. Whilst there is certainly scope for ‘interpretative judgment’¹³⁵ in determining whether a suspect is vulnerable and therefore requires an AA, it is necessary that the CO dispel the notion that the suspect is vulnerable.¹³⁶ Relying on stereotypical – and misplaced – understandings of autism is likely not enough to do so. When an AA is granted, we should not – as discussed above – simply accept that as adequate. Arguably, the AA safeguard (now largely unchanged in basic terms for four decades) is overdue a redesign, and provision for autistic suspects makes a good case for doing so. The reconceptualisation of the AA based on particular needs (rather than its current form which is relatively general) might suggest the necessity of different ‘types’ or ‘categories’ of AA. Indeed, the name itself is problematic – ‘appropriate adults’ were designed with children in mind, and this ethos of vulnerability lingers in the background of modern assessment of need and provision of support.¹³⁷ Alternative categories might include familiar supporter (a non-professional known to the suspect); specialist supporter (a professional expert in particular conditions/differences); and a communication supporter (to focus on this aspect of need). These are merely examples, but imply a more bespoke role with an emphasis on support for all vulnerability (not just because of age). In short, the goal would be to ensure the appropriateness of safeguard(s).¹³⁸

Whilst a significant and well-considered redesign of the AA role is important, this will, undoubtedly, take time to achieve; until that happens, it is imperative that officers and others adopt a more tailored approach when an autistic individual enters police custody. There are a range of adjustments which can and should be considered in such cases, on the basis of a person’s particular profile. For example, sensory adaptations – such as adjusted lighting, quiet areas, use of ear defenders, or provision of fidget toys – could be deployed quickly and at low cost. The aforementioned issue of isolation could be ameliorated with some informal access to an (appropriate) family member or other close figure. Indeed, that person may – in fact – eventually act as an AA; but even short of this, some form of access would likely be achievable in most cases with no meaningful impact on the integrity and effectiveness

135 Bronitt and Stenning (n 74 above).

136 Home Office 2023 (n 2 above) para 1.4.

137 See Dehaghani (n 54 above).

138 See Dehaghani (n 62).

of a police investigation.¹³⁹ Other adjustments might, potentially, be more complex to implement but could be highly impactful: for example, consideration of what food an autistic individual is given; or whether they can be granted access, in some form, to a special interest to enable emotional regulation whilst detained. The argument might be advanced that such adjustments amount to special treatment not extended to other detainees, but this is misplaced. Such adjustments are more akin to a levelling of the playing field for autistic detainees and could be the difference between making custody a stressful but manageable process and one which is overwhelming, traumatic and obstructive to effective investigation.¹⁴⁰

CONCLUSION

It is evident that autistic suspects require support whilst in police custody and throughout the investigative stage(s) of the criminal process, and it is evident that there are obstacles to this, namely in the correct identification of their vulnerability but also in the type of support offered and whether such support is appropriate. Despite its importance to vulnerable suspects, the efficacy of the AA safeguard is undermined by numerous barriers both in its implementation and its operationalisation, both generally and in relation to autistic suspects. By building on existing work on vulnerable suspects and the AA, this article has outlined and analysed the challenges faced by autistic suspects in a neurotypical and largely coercive environment and serves as a catalyst to reflect upon how safeguards may be improved to ensure proper access to justice for autistic people. It is necessary to analyse the challenges and critique shortcomings in law and practice, yet this article has gone further by making recommendations for reform which aim to improve the service provided to autistic suspects who are detained, with the objective of promoting equitable access to justice at this crucial stage of criminal proceedings.

Undoubtedly, many of the challenges faced by autistic suspects may also arise in the same or similar way for other neurodivergent suspects, although the reason for these challenges may be different. For example, individuals with ADHD can be inattentive and/or hyperactive and impulsive which may impact their ability to effectively participate in the criminal process; dyslexic individuals may have issues with reading comprehension and this may hamper their ability to understand and enforce their rights and entitlements; individuals with Tourette's may

139 However, a potential danger here might be the conclusion that an AA is no longer needed as the suspect has had 'familiar' support.

140 For more on the potential range of adjustments that could be made, see Holloway et al (n 12 above); and CJJI (n 3 above).

experience uncontrollable tics, which can increase in severity and/or frequency in stressful situations, with the risk that officers may incorrectly interpret this as threatening. Further research is required to address the limitations of pre-trial safeguards for individuals with other neurodivergent conditions, building upon the vital research in forensic and developmental psychology¹⁴¹ and the nascent research in law and socio-legal studies.¹⁴²

141 See, eg, Dickie et al (n 12 above); Dickie and Reveley (n 35 above); and Dickie et al (n 120 above); Crane et al (n 111); K Maras, C Dando, H Stephenson, A Lambrechts, S Anns and S Gaigg, 'The witness-aimed first account (WAFA): a new technique for interviewing autistic witnesses and victims' (2020) 24 (6) *Autism* 1449; Richards and Milne (n 124).

142 See, eg, Holloway et al (n 12 above).