

Caught in the net: police powers of investigation and the risks for autistic individuals

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Introduction

Recent years have seen a growth in interest in the extent and impact of neurodivergent conditions – such as Autism, Attention Deficit Hyperactivity Disorder (ADHD) and Dyslexia – on the criminal justice system (hereafter, CJS). Whilst practitioners and scholars have been emphasising the importance of managing the needs of neurodivergent individuals¹ in the CJS for decades, it is only recently that policymakers have begun to consider this area in a focused manner. In late 2020, the Government announced two significant developments in relation to neurodivergence within the CJS. First, the inclusion in its white paper, ‘*A Smarter Approach to Sentencing*’,² of a number of policy objectives focused on neurodivergence in the context of sentencing. Second, acting on one of the objectives of the white paper, the three CJS inspectorates announced a call for evidence regarding neurodivergence at all stages of the CJS – with a report reviewing this published in summer 2021.³ This form of evidence gathering exercise, and the increased attention now being paid to this area, is to be welcomed but is long overdue. Until now, policymakers have undertaken limited exploration of neurodivergence and the CJS – including how police, courts and prisons manage the needs of neurodivergent individuals.

This might be partly explained by the size of the topic. Neurodivergence embraces a range of broadly related (and often co-morbid) but distinct conditions of varying complexity; and the CJS is an extensive, overlapping and unwieldy set of institutions and processes. Criminal justice processes can and often do start with the first contact of an individual with a police officer, through to their release into the care of probation post-sentence. This involves various stages of complex and challenging processes, multiple agencies, thousands of professionals, and millions of members of the public. In this context, an evidence gathering process is challenging, but also vital. This chapter seeks to provide a focused approach to reviewing current knowledge in this area. It will examine one facet of neurodivergence (autism); in relation to one group of individuals (those suspected, as opposed to formally accused or convicted, of criminal behaviour).⁴ There has been a considerable amount written about autism, generally, in the criminal justice process, primarily in the disciplines of developmental and forensic psychology. Much of this is empirically based, but there still remains significant scope for further research in this area in the context of England and Wales (hereafter, E&W), specifically with direct consideration of the various powers and procedures that comprise the CJS from a socio-legal perspective.

Notwithstanding that a number of academics and practitioners have examined this issue, there has been piecemeal and limited integration of evidence-based change in criminal justice, leading to “patchy and inconsistent provision” for neurodivergent individuals.⁵ Generally, the CJS remains largely unaffected by many of the academic insights and recommendations that can be identified in the literature; it appears that there continues to be insufficient recognition of the significance of the challenges faced by autistic suspects, defendants and offenders, with “serious gaps, failings, and missed opportunities at every stage of the system” for neurodivergent individuals generally.⁶ Indeed, whilst it recognises signs of progress, the Government’s 2021 national strategy for autistic individuals implies that much remains to be done to provide autistic individuals with fair and effective access to the CJS.⁷ This chapter will summarise some of the main themes emerging from the literature in the context of autistic suspects subject to police investigation, and try to

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¹ Broadly, individuals whose neurological development is divergent from the typical – though it should be noted there is no universally accepted definition of the term.

² Ministry of Justice, ‘A Smarter Approach to Sentencing’ (CP 292, 2020): <https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing> [last accessed: 16 July 2021]

³ Criminal Justice Joint Inspection, ‘Neurodiversity in the Criminal Justice System: a review of the evidence’ (July 2021): <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/neurodiversity-in-the-criminal-justice-system/> [last accessed: 21 July 2021].

⁴ In short, individuals at the pre-charge stage.

⁵ Criminal Justice Joint Inspection (n 3), 10.

⁶ *Ibid.*

⁷ HM Government, ‘The national strategy for autistic children, young people and adults: 2021 to 2026’ (July 2021), Chapter 8: <https://www.gov.uk/publications/national-strategy-for-autistic-children-young-people-and-adults-2021-to-2026> [last accessed: 21 July 2021].

connect them directly to some key procedures and powers of the CJS. In doing so, it will consider the significant negative impact on autistic persons drawn into the CJS.

This chapter uses the term ‘autism’, which can be understood interchangeably with Autism Spectrum Disorder (ASD) and Autism Spectrum Condition (ASC).⁸ Autism is a neurodevelopmental disorder (or, from a social model perspective, difference),⁹ which is typically characterised by impairments in social reciprocal interactions and communication, and restricted, repetitive patterns of interests and behaviour.¹⁰ 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.¹¹ Autistic individuals are no more likely to offend than non-autistic individuals, and are in fact more likely to become victims of crime.¹² However, the nature of the CJS in E&W creates significant challenges – and possible disadvantages – for autistic individuals suspected, accused or convicted of crime. Various features of the different stages of the CJS present problems – for example, the general emphasis on orality and personal interaction; the use of physical restraint; the importance of judgement of individuals based on behaviour and communication (often understood from a neurotypical perspective); and restrictive, alien environments and routines which can place significant sensory demands on individuals.

This chapter explores the challenges autistic individuals face at the investigation stage – that is, when the police can and do exercise their power to gather and examine evidence of alleged criminal behaviour. There are a number of aspects of police investigation of crime which can cause difficulties for autistic suspects. This chapter will broadly focus on two areas – specifically, the use of ‘street’ police powers and the use of police custody. What emerges are two main issues: first, the increased potential for investigatory powers being used against autistic individuals, both due to the flawed framework governing police powers and a general failure to appreciate that behaviour and communication of autistic individuals may not be suspicious or criminal at all; and second, the increased likelihood that when interactions are initiated between an officer and an autistic individual, such interactions may cause the latter to experience distress and confusion, and that further use of investigatory power (and even criminalisation) may become more likely. This can ultimately lead to autistic individuals becoming “entrenched as a suspect.”¹³

1 ‘Street’ Policing and Autistic Individuals

Whilst there are a variety of powers the police can exercise in ‘street’ policing – that is, policing in public spaces – two important ones in the current context are Stop and Search (hereafter, S&S) and arrest. The primary versions of these powers are discretionary and are granted to officers under the Police and Criminal Evidence Act (PACE) 1984.¹⁴ Whilst they differ in scope and purpose, S&S and arrest are, in essence, a restraint on an individual’s liberty for the purposes of investigating possible criminal activity, restricting (to some extent) the freedom of a suspect to proceed unhindered. S&S must take place in a publicly accessible space,¹⁵ and both powers will inevitably involve some level of personal, direct oral dialogue between officer and suspect. Equally, depending on the circumstances, the exercise of either power (particularly arrest) may involve the use of reasonable force by an officer in order to restrain a suspect whilst a search or arrest is conducted.¹⁶ The primary legislation includes various safeguards, designed to protect against misuse of these powers. In determining whether to exercise these discretionary powers, officers must generally establish that reasonable grounds for suspicion exist (for arrest, in relation to a criminal offence;¹⁷ and for S&S, in relation

⁸ It is also noted that different terminology is used by different people, including ‘person with autism (the ‘person-first’ construction).

⁹ For more on the social model of disability, see its originator: Oliver, M, *Social Work with Disabled People* (1983, Basingstoke: Macmillan). See also Woods R, ‘Exploring how the social model of disability can be re-invigorated for autism: In response to Jonathan Levitt’ (2017) *Disability & Society* 32(7).

¹⁰ [C Allely, 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’ \(2017\) *Journal of Law and Medicine* 25 \(1\), 105.](#)

¹¹ Crane L, Goddard L, Pring, L, ‘Sensory processing in adults with autism spectrum disorders’ (2009) *Autism* 13(3).

¹² National Autistic Society, (2020). ‘Criminal Justice’: <https://www.autism.org.uk/advice-and-guidance/topics/criminal-justice/criminal-justice> [last accessed: 16 July 2021].

¹³ Young R, Brewer N, ‘Brief Report: Perspective Taking Deficits, Autism Spectrum Disorder, and Allaying Police Officers’ Suspicions About Criminal Involvement’ (2020) *Journal of Autism and Developmental Disorders* 50 (6), 2234.

¹⁴ Sections 1 and 24 respectively.

¹⁵ PACE 1984, s.1(1); also see s.1(4).

¹⁶ *Ibid.* s.117.

¹⁷ *Ibid.* s.24(1) – (3).

to possession of a stolen or prohibited item).¹⁸ Additionally, for arrest, an officer will need to determine whether it is ‘necessary’ to arrest a suspect.

1.1 Reasonable Suspicion

S&S allows an officer to prevent a person or vehicle from proceeding, and to require that they surrender to a search (of said vehicle or, generally, an individual’s outer clothing).¹⁹ Section 1(3) stipulates that, to exercise this power, an officer must have reasonable grounds for suspecting that they will find one of several items/articles in a vehicle or in the suspect’s possession, connected to criminal behaviour.²⁰ Whilst the power under PACE 1984 is used to execute the vast majority of stops,²¹ other significant powers exist. Individual police officers do not need to have reasonable suspicion in order to stop a vehicle or person under either Section 60 of the Criminal Justice and Public Order (CJPOA) Act 1994, or Section 47A of the Terrorism Act 2000.²² The power of arrest (under Section 24 of PACE 1984) is wide; generally, an officer may arrest anyone; without a warrant; for any offence.²³ Section 24 covers situations where an offence has been committed in the past, is being committed in the present, or will be committed in the future; or there is reasonable suspicion of the above.²⁴ Normally, an arrest requires reasonable suspicion of an offence to be lawful, but also covers situations where an officer *knows* that an offence has been, is being or will be committed and the suspect is guilty, as well as situations where they are *not certain* but have reasonable grounds for suspicion.

Where it is required,²⁵ reasonable suspicion is designed to act as a restraint on police discretion, aiming to prevent arbitrary and unjustified use of their powers, and thereby reduce the risk of misuse. The police cannot (in theory) simply search or arrest someone because they ‘do not like the look of them’ (although evidence suggests that this does happen in practice).²⁶ Reasonable suspicion is a term that is open to interpretation. Officers must have grounds (that is, reasons or justifications) for their suspicion; and those grounds must be reasonable. PACE 1984 itself does not expand on this, but further information is provided by Codes of Practice A and G (hereafter, Codes A and G) in respect of both powers; and, to a lesser extent, case law. For example, paragraph 2.2 of Code A (applicable to S&S) provides a two-part test for reasonable suspicion, requiring that officers form “a genuine suspicion in their own mind that they will find the object for which the search power being exercised allows them to search”; and that the suspicion must be reasonable. In short, the subjective suspicion must be have some objective basis, which can be explained “by reference to intelligence or information.”²⁷ Importantly, Code A states that “personal factors” can never justify S&S (such as dislike for a particular person or group of people) and Code G states that arrest must be exercised in a “non-discriminatory and proportionate manner”, including on the grounds of protected characteristics.²⁸ This is an important

¹⁸ *Ibid.* s.1(3).

¹⁹ Home Office, ‘Code A (Revised): Code of Practice for the exercise by: Police Officers of Statutory Powers of stop and search; Police Officers and Police Staff of requirements to record public encounters’ (2015, TSO), [3.5] – [3.7].

²⁰ These include stolen property, ‘prohibited articles’ (offensive weapons; articles ‘made or adapted’ and intended for specified criminal behaviour), and blades.

²¹ In fact, more than half are conducted under the Misuse of Drugs Act 1971, s.23; for counting purposes these are classified as PACE 1984 stops and ‘associated legislation (Ministry of Justice, ‘Stop and search statistics data tables: police powers and procedures year ending 31 March 2020 second edition’ (November 2020), SS.01: <https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2020> [last accessed: 16 July 2021]).

²² This effectively allows individual officers to exercise their discretion without objectively justifiable reasons, though both powers must first be generally authorised for use – in a particular geographical area for a defined period – by a senior officer.
²³ S.24(1)

²⁴ The police can arrest an individual in four circumstances: when someone is *about to commit* an offence, or when the police have reasonable grounds for suspecting that someone is about to commit an offence; when someone *is committing* an offence or when the police have reasonable grounds for suspecting that someone is committing an offence; when the police have reasonable grounds for suspecting that an offence *has been committed*, the police can arrest someone who is guilty or whom they have reasonable grounds for suspecting is guilty; and when someone *has committed* an offence, the police can arrest someone who is guilty or whom they have reasonable grounds for suspecting is guilty (s.24(1) – (3))

²⁵ Clearly, the lack of a reasonable suspicion requirement for use of the powers under Sections 60 and 47A creates scope for searches to be based on subjective and/or poorly justified grounds.

²⁶ For example, looking ‘shifty’ (See Open Society Justice Initiative and StopWatch, ‘Viewed with Suspicion: The Human Cost of Stop and Search in England and Wales’ (2013): www.opensocietyfoundations.org/sites/default/files/viewed-with-suspicion-human-cost-stop-and-search-in-england-and-wales-20130419.pdf [last accessed: 16 July 2021].

²⁷ Code A, [2.2].

²⁸ Code A, [2.2B] and Code G, [1.3]. Factors include physical appearance (including the protected characteristics under Equality Act 2010, s 149 – including, crucially, disability); as well as generalisations or stereotypical images that certain groups are criminals.

restriction which is designed to limit (as far as is possible) the ability for personal prejudice, bias, generalisation, and stereotyping to inform an officer's decision to exercise their power.

The courts have provided additional, though limited, guidance on reasonable suspicion. What is clear is that “the threshold for the existence of reasonable grounds for suspicion is low”,²⁹ and certainly of “a lower standard than that which would be required to establish a *prima facie* case.”³⁰ This therefore suggests that any number of less than robust factors could satisfy reasonable suspicion, as it “allows police officers to take into account matters that would not be admissible as evidence.”³¹ In relation to arrest specifically, the case of *Castorina v Chief Constable of Surrey* provides a test to determine whether reasonable suspicion exists, with subjective and objective limbs.³² The subjective limb asks whether the officer did “suspect that the person who was arrested was guilty of the offence”, which will depend “entirely on the findings of fact as to the officer's state of mind”; whilst the purely objective” limb asks whether there was “reasonable cause for that suspicion.”³³ The flexibility and breadth of this concept allows officers significant discretion in satisfying themselves that reasons to search or arrest exist, which can lead to unfair and inconsistent approaches to the exercise of these powers.³⁴ This renders reasonable suspicion a somewhat ineffective safeguard against abuse of the power, a conclusion supported by research. For example, in 2013, it was found that 27% of stops lacked sufficient grounds to justify the use of the power, with the conclusion that this was due to poor understanding of what reasonable suspicion means.³⁵ More recently, in 2021, nearly 20% of searches were found to lack reasonable suspicion, with a quarter of grounds assessed as “weak.”³⁶ This suggests reasonable suspicion is limited in its ability to restrain unreasonable use of police power and thereby protect individuals from searches based on stereotyping and prejudice.³⁷

1.2 Necessity

An officer can only exercise the power of arrest when they have “reasonable grounds for believing that for any of the reasons mentioned in [Section 24(5)] it is necessary to arrest the person in question.”³⁸ The necessity of an arrest must flow from one of these reasons specified in the legislation, outlined in an exhaustive list. An officer can therefore only arrest in order to establish a suspect's identity or address; to prevent harm, loss, indecency or obstruction of a highway; to protect a child or vulnerable person from a suspect; to further an investigation; and to prevent flight.³⁹ All of the statutory reasons represent a type of risk; as such, the decision to arrest involves a form of risk assessment. If an officer believes one of these risks exists, they must assess whether arrest is the necessary response to manage that risk. If an officer has objectively based grounds for both believing there is a risk and that arrest is necessary, then this condition will be satisfied. The general implication of this provision is that use of the power of arrest should be thoughtfully considered, and reserved for when an officer *needs* to use it, with the word “needs” being used specifically in Code G.⁴⁰

Whilst this suggests that arrest is a last resort, the courts have refrained from defining necessity too restrictively, generally concluding that necessity is “an ordinary English word which can be applied without paraphrase.”⁴¹ An officer must “make some evaluation of the feasibility of achieving the object of the arrest

²⁹ *Howarth v Commissioner of Police of the Metropolis* [2011] EWHC 2818 (QB), [31].

³⁰ D Ormerod, D Perry, *Blackstone's Criminal Practice 2021 (31st Edition)* (2020, OUP: Oxford), Section D1.4. Also see, *Shaaban Bin Hussein v Chong Fook Kam* [1970] AC 942. It should be noted that this case pre-dates PACE 1984, but the principle has continued to be valid for post-PAE stops.

³¹ *Ibid.*

³² [1988] NLJR 180.

³³ *Ibid.* It must also be determined whether the decision to arrest was *Wednesbury* reasonable – that is, a decision that is not “so unreasonable that no reasonable authority could ever have come to it” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223).

³⁴ For an example of this, see the cases of *Francis and Slade*, detailed in Welsh L, Skynns L, Sanders A, *Sanders & Young's Criminal Justice* (2021), 64.

³⁵ HMICFRS, ‘Stop and Search Powers: Are the police using them effectively and fairly?’ (2013), 8.

³⁶ HMICFRS, ‘Disproportionate use of police powers A spotlight on stop and search and the use of force’ (February 2021), 7: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf> [last accessed 16 July 2021].

³⁷ For more, see P Quinton, ‘The formation of suspicions: police stop and search practices in England and Wales’ (2011) *Policing and Society* 21 (4).

³⁸ PACE 1984, Section 24(4). An officer must have reasonable grounds for “believing” (a higher level of certainty than “suspecting”) that it is necessary to arrest; in short, they must have some objective basis for belief as opposed to mere suspicion.

³⁹ *Ibid.*, s.24(5).

⁴⁰ At [2.6].

⁴¹ *Richardson v Chief Constable of West Midlands Police* [2011] 2 Cr App R 1, 62.

by some alternative means”,⁴² a requirement reflected in Paragraph 1.3 of Code G, which suggests examining “other, less intrusive means.” However, officers do not need to be satisfied that there is no viable alternative to arrest, only that it is the “practical and sensible option.”⁴³ This suggests that arrest is not reserved as a last resort, allowing a fairly flexible interpretation of when it will be deemed reasonably necessary. Code G emphasises that an officer must “examine and justify the reason or reasons why a person needs to be arrested.”⁴⁴ This underlines the importance of carefully assessing risk and whether an arrest is the necessary response, as opposed to merely convenient or desirable.⁴⁵ The belief that a risk exists and that arrest is necessary must be objective and based on solid rather than theoretical grounds.⁴⁶ Notwithstanding this, interpretation of reasons remains “a matter of operational discretion of individual officers”,⁴⁷ providing significant latitude.

Among the possible factors which might lead an officer to perceive a risk and consider an arrest necessary are “the circumstances of the suspect.”⁴⁸ This is pertinent to this chapter since it could of course include the behaviour and communication of an individual. If an officer considers the behaviour of a suspect to be threatening, evasive, or indicating a likelihood of flight, they may conclude that a risk exists and that arrest is necessary. This will depend on both how the officer interprets any behaviour or communication, whether they understand the reasons for it, and whether this is deemed reasonable in the circumstances. Even if there is, in fact, no risk and arrest is not actually necessary, this might be deemed reasonable as officers are not expected to be in possession of all facts, consider all possible interpretations of a situation, or explore all alternative responses. Whilst this makes sense from a practical perspective, it has scope for error when the behaviour or communication of a suspect deviates from the norm or resembles stereotypically ‘suspicious’ behaviour (such as gaze aversion and fidgeting).⁴⁹

This is particularly problematic because of “the marked similarity between perceived indicators of deception and common autistic behaviors”, which can therefore lead autistic individuals being “judged as more deceptive than their neurotypical peers when telling the truth.”⁵⁰ 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.⁵¹ Alongside evidence that “pervasive stereotypes” of deception are commonly held by officers (and other CJS professionals), this presents significant potential for misinterpretation.⁵² In relation to both reasonable suspicion and necessity, knowledge and understanding of autism is vital in ensuring that officers accurately interpret communication and behaviour, and do not incorrectly attribute it to suspicious, threatening or obstructive intentions on the part of an individual. Otherwise, officers may not recognise such behaviour as “a manifestation of their condition... which could make them more likely to be arrested, and diversion away from custody and the CJS may not be considered.”⁵³ It is particularly important that the onus is on officers to be able to distinguish between presentational behaviour and genuinely suspicious behaviour; evidence suggests that autistic individuals “sometimes have trouble allaying police suspicions and extricating themselves from the focus of investigations” due to issues in understanding how their behaviour might be interpreted by officers and others.⁵⁴

1.3 Assessing suspects

⁴² *Graham v Chief Constable of West Mercia Constabulary and Others* [2011] EWHC 4 (QB), [16].

⁴³ *Hayes v Merseyside Police* [2012] 1 WLR 517.

⁴⁴ [2.4] – [2.9].

⁴⁵ *R (on the application of L) v Chief Constable of Surrey Police* [2017] 1 WLR 2047, [40].

⁴⁶ *Lord Hanningfield of Chelmsford v Chief Constable of Essex* [2013] EWHC 243 (QB).

⁴⁷ Code G, [2.4].

⁴⁸ *Ibid.*, [2.8]

⁴⁹ A Lim, Young R, Brewer N, ‘Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility’ (2021) *Journal of Autism and Developmental Disorders*: <https://link.springer.com/article/10.1007/s10803-021-04963-4> [last accessed: 21 July 2021].

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Criminal Justice Joint Inspection (n 3), 13.

⁵⁴ Young and Brewer (n 11), 2238. This relates particularly to issues with ‘theory of mind’ – see more below.

The use of S&S or arrest should be intelligence-led;⁵⁵ however, it is evident that other, sometimes illegitimate, reasons can drive the use of these powers. For example, there is a long-standing problem of inadequately justified and disproportionate use of S&S against BAME communities, with specific explanations for this including the reliance of officers on stereotypes, and working practices based on instincts and assumptions about the look and behaviour of BAME individuals.⁵⁶ Powers of S&S and arrest can seemingly be used in a “wide spectrum of circumstances” due to “imprecision” in the legal framework.⁵⁷ As such, the powers described in PACE 1984 operate as a set of “enabling rules”, allowing officers to act in a broad range of circumstances and exercise discretion relatively freely.⁵⁸ In this context, extra-legal factors can and do creep into decision making. For example, research has suggested that a factor influencing the exercise of power is the need to enforce respect for the police. This causes officer to focus on the attitude and demeanour of individual suspects, with arguments that arrests for “contempt of cop” (such as swearing, perceived lack of cooperation or respect, or apparent hostility) are common.⁵⁹ The result is targeting of and disproportionately negative outcomes for individuals who are perceived to dislike, disrespect or distrust the police (for example, young, socially marginalised males); or who do not actively express normative indicators of ‘respect’ through compliant or deferential behaviour.⁶⁰

The exercise of police power that does result from intelligence can *potentially* be more fair and effective, but this of course depends on its quality. A great deal of police intelligence is derived from public reports or information;⁶¹ if a member of the public considers a person’s behaviour to be strange, odd or suspicious, they might report this to the police for further investigation. However, if the public also subscribe to inaccurate and unfair stereotypes and prejudices, this raises questions about the credibility of such intelligence in some circumstances. Whilst intelligence is not necessarily determinative as to the use of police power, its existence will certainly strengthen the rationale for S&S or arrest, as it allows an officer to point to a seemingly objective basis. In the context of this chapter, if the public judges behaviour and communication through a predominantly neurotypical lens, this seriously undermines claims that such intelligence is reliable, as it will inherently disadvantage neurodivergent individuals. Such intelligence can therefore lend false legitimacy to the potentially inappropriate use of power.

1.4 Assessing autistic suspects

With or without intelligence, officers will nearly always undertake some interpretation of the immediate demeanour, behaviour and communication of possible suspects in assessing whether or not they are ‘suspicious’ or whether arrest is necessary. Visible differences in the way a suspect moves or speaks which are not immediately explicable by reference to social norms or common knowledge may generate suspicion and concern, and lead to the inappropriate exercise of power.⁶² In such circumstances, both suspicion and the belief in necessity must be reasonable; but this merely raises questions about how ostensibly unusual, evasive or erratic behaviour might be judged against the standards of ‘a reasonable person’. Traditional conceptualisations, amongst both the public and legal professionals, of criminality (and what it ‘looks’ like) are often grounded in othering, distinguishing the law abiding from the law breaking based on difference.⁶³ There is also a long-standing linkage between conceptions of criminality and those with cognitive differences and/or mental health issues.⁶⁴ Foucault characterised archetypes of the ‘mad’ criminal – a sort of

⁵⁵ Inferred by much of the Codes of Practice, and used in general discourse about police powers in recent years – see National Police Chief’s Council, ‘Police service committed to intelligence-led approach in stop and search’ (2015):

<https://news.npcc.police.uk/releases/police-service-committed-to-intelligence-led-approach-in-stop-and-search> [last accessed: 16 July 2021].

⁵⁶ See Lammy, D, ‘The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority individuals in the Criminal Justice System’ (2017); MacPherson W, ‘The Stephen Lawrence Inquiry’ (Cm 4262-I, 1999); Bowling B, Phillips C, ‘Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search’ (2007) *Modern Law Review* 70 (6).

⁵⁷ *Criminal Justice* (n 33), 133 and 76.

⁵⁸ *Ibid.*, 133.

⁵⁹ *Ibid.*, 136.

⁶⁰ See Pearson G, Rowe M, Turner L, ‘Policy, Practicalities, and PACE s. 24: The Subsuming of the Necessity Criteria in Arrest Decision Making by Frontline Police Officers’ (2018) *Journal of Law & Society* 45 (2).

⁶¹ *Criminal Justice* (n 33), Chapter 2.

⁶² See Lim, Brewer and Young (n 45) for more on this; and Quinton (n 37) on formation of suspicion more generally.

⁶³ For more generally, see Eriksson A, *Punishing the Other: The social production of immorality revisited* (2016, Routledge: Abingdon); Whitehead P, *Demonising the Other: The criminalisation of morality* (2018, Policy Press: Bristol); and Stabile S, ‘Othering and the Law’ (2016) *University of St Thomas Law Journal* 12 (2).

⁶⁴ See Long, C, Midgely, M, ‘On the closeness of the concepts of the criminal and the mentally ill in the nineteenth century: yesterday’s opinion reflected today’ (1992) *Journal of Forensic Psychiatry* 3(1).

folk devil – as the modern equivalent of medieval “monsters”,⁶⁵ distinguished by “an internal rather than external monstrosity, a monstrosity which is invisible to the naked eye unless and until it manifests in that person’s words or behaviour.”⁶⁶ If such misconceptions permeate society and, by extension, policing, we must wonder how heavily they influence the assessment of behavioural and communication differences. Education and awareness can do much to dispel fears about ‘others’; but without this, such misconceptions will inevitably shape judgements. This has the potential to (unconsciously or not) influence assessments of suspicion and risk, particularly in the absence of clear, legal definitions. In short, if someone looks like a “monster”, they might be one – and that will generally be enough to satisfy the low thresholds described above. The amorphous space left by the law is readily filled by assumptions, stereotypes and prejudices, which in turn generate unjustified unease about individuals who appear to be different.

An example of the role of misinterpretation and the potential for inappropriate use of power is treatment of ‘stimming’. Stimming (or self-stimulatory behaviour) is “stereotyped or repetitive motor movements”, common amongst autistic individuals, which are generally used as a coping mechanism when faced with overwhelming emotions or experiences.⁶⁷ Whilst most people – neurodivergent or not – engage in some form of bodily stimulation (for example, nail biting, tapping), stimming is distinguished by the type, quantity, and visibility of stimulatory behaviours, such as hand flapping, spinning, rocking or repetition of words or phrases. Such behaviour – without knowledge and context – can be judged as odd or even threatening, particularly in a public context as it does not comply with social or cultural norms. The following example illustrates the significant issues that can arise:

“AB has profound anxiety about traveling on public transport that sometimes results in sensory overload and psychological meltdown. One of the ways that AB tries to control his anxiety is by ‘stimming’, in his case, fiddling with any material within his reach, as this has a calming effect. This may include unconsciously touching other people’s (men’s or women’s) clothing, bags, etc. When challenged, AB doesn’t have the language to explain or apologise. These features of AB’s ASD are compounded by poor ‘proprioception’ and ‘theory of mind’.⁶⁸ Contact that AB would perceive as harmless can be misperceived by others who do not understand stimming, sensory overload, theory of mind and poor proprioception.”⁶⁹

In this case, AB travelled to university and work successfully for a number of years before being arrested on two occasions after accusations of unwanted touching of female passengers. On both occasions, AB was not ultimately charged and his treatment by the police involved both procedural irregularities and a failure to recognise his condition adequately (including not recognising his need for an appropriate adult).⁷⁰ Without an adequate understanding of stimming, the communication issues of AB, or of autism generally, one can see a clear path to misinterpretation by officers or the public, resulting in unfounded suspicion of an offence and inappropriate use of power. The limitations of both reasonable suspicion and necessity as safeguards arguably provide insufficient protection for vulnerable people when coupled with a deficit of understanding.

Broader research on police interactions with autistic suspects validates many of the concerns expressed in this chapter, with common themes surrounding “communication, identification, signposting and referral, autism-

⁶⁵ Foucault, M, *Abnormal: Lectures at the College de France 1974-1975* (trans by Burchell, G) (2003, London: Verso).

⁶⁶ Bartlett P, Sandland R, ‘Policing mental disorder’, in Bartlett P, Sandland R (Eds.), *Mental Health Law: Policy and Practice* (4th Ed.) (2013, OUP: Oxford), 280.

⁶⁷ Kapp S, Steward R, Crane L, Elliott D, Elphick C, Pellicano E, Russell G, ‘People should be allowed to do what they like’: Autistic adults’ views and experiences of stimming’ (2019) *Autism* 23 (7), 1782; see also Leekam, S, Prior, M, Uljarevic, M, ‘Restricted and repetitive behaviours in autism spectrum disorders: A review of research in the last decade’ (2011) *Psychological Bulletin*, 137.

⁶⁸ ‘Proprioception’ broadly describes the ability perceive body movements and the position of the body in space, affecting motor control (for more, see Han J, Waddington G, Adams R, Anson J, Liu Y, ‘Assessing proprioception: A critical review of methods’ (2016) *Journal of Sport and Health Science* 5 (1); and Blanch E, Reinoso G, Chang M, Bodison S, ‘Proprioceptive Processing Difficulties Among Children With Autism Spectrum Disorders and Developmental Disabilities’ (2012) *American Journal of Occupational Therapy* 66 (5). ‘Theory of mind’ is the “ability to interpret the beliefs, intentions and emotions of others” (Brewer N, Young R, Barnett E, ‘Measuring Theory of Mind in Adults with Autism Spectrum Disorder’ (2017) *Journal of Autism and Developmental Disorders* 47, 1927.

⁶⁹ Bubb S, ‘Building Rights: A report to the Keeping Bristol Safe Partnership Board. Review of Bristol’s policies and actions for people with learning disabilities and autism’ (May 2021):

https://www.bristol.gov.uk/documents/20182/5395291/Building_Rights.pdf/f8b0fe05-bdf0-de44-e14a-0f684e0a6f95?t=1623649850966 [last accessed: 16 July 2021].

⁷⁰ *Ibid.* Issues relating to appropriate adults will be discussed in Section 2, below.

specific training and guidance.”⁷¹ Communication between autistic suspects and legal professionals can be a problem at multiple stages – for example, in response to questions during S&S or in police interview – and for various reasons. Autistic individuals may engage in “social echolalia”, where they respond “in a way that could appear as if they have accurately understood a question when in fact this might not be the case.”⁷² This form of ‘camouflaging’ – which operates by either “hiding behaviour that might be viewed as socially unacceptable or artificially ‘performing’ social behaviour deemed to be more neurotypical” – can present significant problems in identifying and protecting vulnerable autistic suspects,⁷³ because “they [may] appear to be in possession of a greater level of awareness about their current situation context than is the case.”⁷⁴ Whilst there is significant debate as to the cause of echolalic and camouflaging responses, they may in part be explained by issues with executive function, which can make it difficult to “to plan and organise information, including responding to open or ambiguous questions”;⁷⁵ the “distinct memory profile” of autistic individuals, which is incompatible with typical questioning styles;⁷⁶ and “difficulty in their ability to construct and relate a coherent narrative.”⁷⁷ Such responses arguably represent a coping mechanism to compensate for such challenges in social communication. Additionally, 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 Vermuelan as “context blindness”.⁷⁸ This can include failing to disclose that they are autistic: something which could help an officer or other professional understand the suspect’s responses.⁷⁹ Otherwise, officers or others may misunderstand the suspect, 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.”⁸⁰ This could be particularly problematic if an autistic individual is compliant and suggestible, and inaccurately accepts the truth of accusations presented to them.⁸¹

Communication is, of course, also non-verbal, through general behaviours and demeanour. In terms of autistic individuals, “certain behaviours could be labelled as violent or disruptive, whereas the lived reality of an individual on the spectrum is that these behaviours are expressions of feelings of anxiety and distress in a particularly challenging situation.”⁸² Considering the potential for anxiety in the context of S&S and arrest (and other police interactions), there is a significant risk of misunderstanding, unnecessary or inappropriate use of power by officers, and negative experiences for autistic individuals.⁸³ In *ZH v Commissioner of Police of the Metropolis*, an autistic 19 year-old with epilepsy, significant learning difficulties, and communication problems was removed from a swimming pool by officers; forcibly restrained and arrested; and handcuffed alone in the back of a police van.⁸⁴ The High Court found that the police used unnecessary force and were ordered to pay damages. Even more troublingly, on arrival at the scene the officers were informed that ZH was autistic, particularly sensitive to touch, and that “time and patience would have been sufficient” to resolve

⁷¹ I Dickie, S Reveley, A Dorrity, ‘The criminal justice system and people on the autism spectrum: perspectives on awareness and identification’ (2018) *Journal of Applied Psychology and Social Science*, 4 (1), 17.

⁷² *Ibid.*, 9; see Attwood, T, *The complete guide to Aspergers Syndrome* (2007, London: Jessica Kingsley Publishers); for further discussion of the function of echolalia in communication of autistic individuals, see Sterponi L, Shankey J, ‘Rethinking echolalia: repetition as interactional resource in the communication of a child with autism’ (2014) *Journal of Child Language*, 41 (2).

⁷³ Lai, M.,C., Lombardo, M.,V., Ruigrok, A. N.V., Chakrabarti, B., Auyeng, B., Szartmari, P., Happe, F. & Baron-Cohen, S, ‘Quantifying and exploring camouflaging with men and women with Autism’ (2017) *Autism* 21(6), 690.

⁷⁴ Dickie, I, Reveley, S and Dorrity, A, ‘Adults with a diagnosis of autism: personal experiences of engaging with regional criminal justice services’ (2019) *Journal of Applied Psychology and Social Science*, 4 (2), 56.

⁷⁵ *Ibid.*, 57; though recent empirical evidence challenges the alleged role of executive function issues in such behaviours – see Jones C, Simonoff E, Baird G, Pickles A, Marsden A, Tregay J, Happe F, Charman T, ‘The association between theory of mind, executive function, and the symptoms of autism spectrum disorder’ (2018) *Autism Research* 11 (1).

⁷⁶ [K Maras, C Dando, H Stephenson, A Lambrechts, S Anns, S Gaigg 'The Witness-Aimed First Account \(WAFA\): A new technique for interviewing autistic witnesses and victims' \(2020\) *Autism* 24 \(6\), 1450.](#)

⁷⁷ *Ibid.*

⁷⁸ Vermuelan, P, *Autism as context blindness* (2012, Kansas: AAPC Publishing).

⁷⁹ Though not necessarily – see the case of ZH, below.

⁸⁰ Dickie et al. (n 63), 65.

⁸¹ Criminal Justice Joint Inspection (n 3), 26. Though evidence suggests that autistic individuals are not necessarily more suggestible or compliant than neurotypical individuals – see Maras K, Bowler D, ‘Brief report: Suggestibility, compliance and psychological traits in high-functioning adults with autism spectrum disorder’ (2012) *Research in Autism Spectrum Disorders* 6 (3).

⁸² Dickie et al. (n 63), 53.

⁸³ See Haas K, Gibbs V, ‘Does a Person’s Autism Play a Role in Their Interactions with Police: The Perceptions of Autistic Adults and Parent/Carers’ (2021) *Journal of Autism and Developmental Disorders* 51; and Wallace D, Herbert J, Tyler D, McGee-Hassrick E, ‘Interactions between Individuals on the Autism Spectrum and the Police: The Fears of Parents, Caregivers, and Professionals’ (2020) *Policing: A Journal of Policy and Practice*: <https://doi.org/10.1093/police/paaa059> [last accessed: 19 July 2021].

⁸⁴ [2012] EWHC 604 (QB)

the situation (which had in fact not involved any particularly problematic or threatening behaviour until the arrival of the police).⁸⁵ This demonstrates the substantial risk that autistic suspects will not only be subjected to police powers unnecessarily, but may suffer from long-term harm as a result (as ZH did).⁸⁶

Moreover, the presentation of autistic individuals – that is, the external display of behaviours associated with autism – can be highly variable.⁸⁷ This can cause two problems. First, knowledge that a suspect is autistic can lead officers to engage in responses reliant on stereotypical but often inaccurate and simplified understandings of autism (for example, that an individual will avoid eye contact, be non-verbal, or have prodigious memory skills).⁸⁸ This can lead to unreasonable expectations of an encounter with an autistic individual, which may inadvertently disadvantage them. For example, if an autistic individual does not demonstrate excellent recall of facts they might be judged as evasive, and therefore suspicious. Second, if an autistic individual appears to be socially communicative, for example through “effusive use of language... and keen grasp of grammar”, this can “distract service professionals from accurately recognising the distress and potential vulnerability of this person.”⁸⁹ In both situations, there is a mismatch between the expectation of an officer (based on a generalised understanding of autism) and the specific presentation of the individual. This demonstrates the potential complexity of such interactions, even when an officer has knowledge and awareness of an individual’s autism.

2 Police Custody and Autistic Suspects

If a suspect is arrested and not immediately bailed, PACE 1984 requires that they be taken to a police station as soon as is practicable.⁹⁰ Research suggests that suspects brought to a police station are generally detained in custody,⁹¹ normally for a period of up to 24 hours before charge.⁹² At some point, they will be interviewed by the police regarding the suspected offence, and – as part of the package of protections built into PACE 1984 – all suspects are entitled to access legal representation,⁹³ and if they are a minor or vulnerable, an appropriate adult.⁹⁴ A number of safeguards, alongside the two mentioned above, are built into the custody process with the aim of ensuring suspects’ rights are protected and that officers do not misuse their significant powers in the police station.⁹⁵ Notwithstanding this, the custody process poses a number of potential challenges for all detainees, and arguably these challenges are more acute for autistic suspects. Aside from the new and unknown procedures,⁹⁶ people and environments being faced (shortly after the potentially traumatic experience of arrest), custody will involve significant limits on freedom and privacy, with very little contact with the outside world. Autistic suspects may find the process of being booked in, searched, locked up and questioned to be confusing, stressful, and very demanding in sensory terms, with difficulty communicating this to others.⁹⁷ Moreover, officers may not fully understand and appreciate the behaviour or responses of an autistic suspect during these processes. They may perceive answers to questions and general behaviours as odd, disruptive or even threatening. Such misinterpretation can influence decisions to use powers to further detain autistic suspects; to use force to restrain them; to charge them with an offence; or (if a suspect does not ‘present’ stereotypical traits or appear to be obviously struggling) to opt not to provide access to support, such

⁸⁵ *Ibid.*, [31].

⁸⁶ *Ibid.*, see [147] – [154].

⁸⁷ Yates K, Le Couteur A, ‘Diagnosing autism/autism spectrum disorders’ (2016) *Paediatrics and Child Health* 26 (12), 513; Lai et al. (n 62), 690.

⁸⁸ Crane L, Wilcock R, Maras K, Chui W, Marti-Sanchez C, Henry L, ‘Mock Juror Perceptions of Child Witnesses on the Autism Spectrum: The Impact of Providing Diagnostic Labels and Information About Autism’ (2020) *Journal of Autism and Developmental Disorders* 50, 1515.

⁸⁹ Dickie et al. (n 63), 60.

⁹⁰ PACE 1984, s.30A.

⁹¹ Dehaghani, R, ‘Automatic authorisation: an exploration of the decision to detain in police custody’ (2017) *Criminal Law Review* 3; McKenzie I, ‘Helping the Police with Their Inquiries: The Necessity Principle and Voluntary Attendance at the Police Station’ (1990) *Criminal Law Review* 22.

⁹² PACE 1984, s.41(1).

⁹³ *Ibid.*, s.58.

⁹⁴ Home Office, ‘Code C (Revised) Code of Practice for the detention, treatment and questioning of persons by Police Officers’ (2019), [3.5(c)(ii)].

⁹⁵ Many are contained within PACE 1984, and are extensively explained in the long-running ‘bible’ of police station practice: Cape E, Hardcastle M, Paul S, *Defending Suspects at Police Stations* (2020, Legal Action Group).

⁹⁶ Though not necessarily if the individual has previous experience of the CJS. Nevertheless, the experience will not necessarily be identical (or even similar).

⁹⁷ Criminal Justice Joint Inspection (n 3), 43.

as an appropriate adult.⁹⁸ Equally, in safeguarding the interests of suspects, lawyers and appropriate adults (or other professionals like healthcare professionals) may also struggle to fully understand autistic suspects without appropriate knowledge and training.⁹⁹ Like officers, this can lead to misinterpretation of the suspect's needs and failure to appropriately facilitate their engagement with an investigation (or indeed challenge its continuation).¹⁰⁰

2.1 Process, Environment and Interviews

Existing evidence suggests that the experiences of autistic suspects in custody are generally negative.¹⁰¹ As part of the process described above, officers and others (such as defence lawyers) must provide a variety of information and explanations to suspects as to what is happening and why. Some of these are required by law (for example, in PACE 1984 and its Codes of Practice);¹⁰² others simply represent good practise in all custody situations.¹⁰³ In the context of an autistic suspect, Holloway *et al* have argued that “if important legal information is not conveyed in an accessible way, this could lead to autistic detainees making ill-informed decisions in custody”, whether in relation to their immediate circumstances or long-term wellbeing.¹⁰⁴ A slightly different but related example is illustrative of this danger: an autistic suspect might experience an overwhelming desire to leave the custody environment as quickly as possible due to its particularly oppressive nature;¹⁰⁵ this can lead them to agree to anything that would facilitate that – such as declining a lawyer,¹⁰⁶ accepting a caution, or confessing to an offence.¹⁰⁷ In short, if a suspect misunderstands information provided to them about what is happening or experiences custody as overwhelmingly oppressive, they become “more vulnerable to adverse outcomes.”¹⁰⁸ Holloway *et al* have suggested that whilst adjustments could be made to make custody a more accessible experience for autistic suspects, this may be hampered by “barriers to communication between neurotypical and autistic individuals.”¹⁰⁹ In this sense, achieving a fair and accessible experience for suspects requires not only knowledge regarding autism generally, but also the suspect's autistic profile specifically and the ability (and willingness) to effectively adjust communication, processes and environments. Without doing, so the likelihood of unfair and inaccurate outcomes is heightened. Unfortunately, research suggests that training on and knowledge of autism amongst officers in E&W has been historically inadequate for these purposes (though appears to be better than for other neurodivergent conditions).¹¹⁰

⁹⁸ See Dehaghani R, Bath C ‘Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C’ (2019) *Criminal Law Review* 3; Dehaghani R, *Vulnerability in Police Custody Police decision-making and the appropriate adult safeguard* (2020, Routledge: Abingdon)

⁹⁹ The recent evidence review identified the importance of securing the ‘right’ appropriate adult, who understood neurodivergent conditions (Criminal Justice Joint Inspection (n 3), 42).

¹⁰⁰ Bath C, Dehaghani R, ‘There to help 3: The identification of vulnerable adult suspects and application of the appropriate adult safeguard in police investigations in 2018/19’ (2020, National Appropriate Adult Network), 15.

¹⁰¹ Holloway C, Munro N, Jackson J, Phillips S, Ropar D, ‘Exploring the autistic and police perspectives of the custody process through a participative walkthrough’ (2020) *Research in Developmental Disabilities* 97.

¹⁰² For example, if a custody officer opts to detain a suspect in custody, they must explain the grounds for doing so (PACE 1984, s.37(5)); a suspect must be informed of their right to a lawyer and their right to have someone informed of their arrest (Code C, [3.5]).

¹⁰³ For more on this, see sources like *Defending Suspects* (n 84); College of Policing, ‘Authorised Professional Practice: Detention and Custody’ (December 2020): <https://www.app.college.police.uk/app-content/detention-and-custody-2/?s=> [last accessed: 19 July 2021]; and multiple reports by HMICFRS, which provide guidance on best practice.

¹⁰⁴ Holloway *et al.* (n 87), 2.

¹⁰⁵ More on this below. Also, see generally Skynns L, Wooff A, ‘Pain in police detention: a critical point in the ‘penal painscape?’’ (2021) *Policing and Society* 31 (3).

¹⁰⁶ Skynns L, ‘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) *British Journal of Criminology*, 49 (3).

¹⁰⁷ See Dehaghani R, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) *Social & Legal Studies* 30 (2), 254; Woodbury-Smith R, Dein K, ‘Autism Spectrum Disorder (ASD) and Unlawful Behaviour: Where Do We Go from Here?’ (2014) *Journal of Autism and Developmental Disorders* 44, 2738; and Pearse J, Gudjonsson G, Rutter C, ‘Police interviewing and psychological vulnerabilities: predicting the likelihood of a confession’ (1998) *Journal of Community & Applied Social Science* 8 (1), which highlights that confessions are the result of ‘the interaction of a number of variables’ including ‘custodial pressure’ (at 3).

¹⁰⁸ Holloway *et al.* (n 87), 2.

¹⁰⁹ *Ibid.*

¹¹⁰ Chown N, “‘Do You Have Any Difficulties That I May Not Be Aware of?’” A Study of Autism Awareness and Understanding in the UK Police Service (2010) *International Journal of Police Science & Management* 12 (2); Holloway *et al.* (n 87); Hepworth D, ‘A critical review of current police training and policy for autism spectrum disorder’ (2017) *Journal of Intellectual Disabilities and Offending Behaviour* 8 (4); Chown N, Debbaudt D, Beardon L, Scott J, Cossburn K, ‘Autism and operational policing accepted version with version of record statement’ in Volkmar F, Loftin, R., Westphal, A. & Woodbury-Smith, M. *Handbook of Autism Spectrum Disorder and the Law* (2021, New York: Springer); Criminal Justice Joint Inspection (n 3).

Considering the generally alien nature of custody suites and the highly restrictive regimes in place, cells and surrounding environments can create significant “sensory stress” for autistic suspects, as they are “often noisy, brightly lit and busy.”¹¹¹ The risk of overload for 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 knowledge, training, time and resources to recognise and manage these needs appropriately.¹¹² As such, it has been argued that there is a “need to implement a range of additional support in police custody and to make changes to the custody environment, police procedures and current policies.”¹¹³ Evidence suggests a variety of, largely, local and low-cost adjustments are being utilised for neurodivergent individuals in custody, with examples including eye masks, ear defenders, and fidget toys for sensory needs;¹¹⁴ and verbal explanations, ‘walk throughs’ of scenarios, and picture guides for communication needs.¹¹⁵ However, these are by no means guaranteed, are risk-assessed before use, and not consistently or universally deployed.¹¹⁶ In terms of adjusting physical environments, it has been highlighted that custody suites, like much of the criminal justice estate, may be “old and difficult to adapt.”¹¹⁷ If they can be, such adjustment requires time, planning and financial investment. A direct example of such an adaptation is a new ‘autism-friendly’ police custody suite constructed in Nottinghamshire,¹¹⁸ which has been spearheaded by the Nottinghamshire Autism Police Partnership (NAPP) – an organisation focused on making existing custody facilities and processes more appropriate for autistic detainees.¹¹⁹ More broadly, the Criminal Justice Inspectorates have recommended that consideration of neurodivergence “should also inform the building of new custodial establishments and the refurbishment of existing sites.”¹²⁰

Interviews in police custody can be particularly challenging for autistic suspects, as well as being one of the most difficult aspects of custody for officers to manage in this context.¹²¹ Aside from police interviews being oral, pressured, intrusive and personal, traditional styles of questioning are arguably structured in a manner appropriate for neurotypical individuals, by being more open or “free”; and by limiting the supply of information and explanation to suspects in order to elicit an account and avoid influencing that account.¹²² Such questioning may lead to autistic suspects simply agreeing with officers’ assertions or suggestions in interview, which can potentially lead to an unfair and inaccurate outcome (such as a false confession);¹²³ or to shutting down, evading or misinterpreting questions, which can generate suspicion, self-incriminate, or lead to adverse inferences.¹²⁴ Moreover, the manner in which the interview is conducted – such as the environment and its length – may be inappropriate for an autistic suspect. Crane *et al* found that adults and carers for autistic suspects were “largely dissatisfied” with interviews, highlighting a lack of breaks and inappropriate interview rooms which create sensory stress.¹²⁵ They did identify “pockets of good practice”, including “avoiding particular question types and allowing extra time for interviewees to process questions during interview”;¹²⁶ additionally, the involvement of appropriate adults and well-informed lawyers was thought to be beneficial for reducing “interrogative pressure in interviews.”¹²⁷ However, research suggests that identification of the

¹¹¹ Criminal Justice Joint Inspection (n 3), 44. See also Holloway *et al.* (n 87), 7.

¹¹² *Ibid.*, 10.

¹¹³ *Ibid.*

¹¹⁴ Criminal Justice Joint Inspection (n 3), 45.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* 44.

¹¹⁷ *Ibid.*

¹¹⁸ Jarram M, ‘New cells for autistic prisoners to be built in £17m Radford Road custody suite’ (Nottinghamshire Live, 10 January 2020): <https://www.nottinghampost.com/news/nottingham-news/new-cells-autistic-prisoners-built-3725279> [last accessed: 19 July 2021].

¹¹⁹ University of Nottingham, ‘Nottinghamshire Autism Police Partnership’: <https://www.nottingham.ac.uk/research/groups/autismandpolicing/index.aspx> [last accessed: 19 July 2021].

¹²⁰ Criminal Justice Joint Inspection (n 3), 10.

¹²¹ L Crane, K Maras, T Hawken, S Mulcahy, A Memon, ‘Experiences of Autism Spectrum Disorder and Policing in England and Wales: Surveying Police and the Autism Community’ (2016) *Journal of Autism and Developmental Disorders* 46 (6), 2035.

¹²² Maras K, Dando C, Stephenson H, Lambrechts A, Anns S, Gaigg S, ‘The Witness-Aimed First Account (WAFA): A new technique for interviewing autistic witnesses and victims’ (2020) *Autism* 24 (6).

¹²³ See Gudjonsson G, Gonzalez R, Young S, ‘The Risk of Making False Confessions: The Role of Developmental Disorders, Conduct Disorder, Psychiatric Symptoms, and Compliance’ (2021) *Journal of Attention Disorders* 25 (5).

¹²⁴ Under s.34 Criminal Justice and Public Order Act 1994.

¹²⁵ Crane *et al* (n 102).

¹²⁶ *Ibid.*, 2038.

¹²⁷ *Ibid.*

need for appropriate adults in custody is currently poor.¹²⁸ There are low rates of provision generally, and at least 550 suspects identified as being autistic by Liaison & Diversion services were detained without access to an appropriate adult in 2018/2019.¹²⁹ Equally, access to lawyers in custody is variable, with approximately half of suspects not requesting legal advice, and even fewer receiving it.¹³⁰ For those that do, research suggests that lawyers may have similar problems to police officers in terms of knowledge and capacity to appropriately support autistic suspects.¹³¹

2.2 The 'snowball effect' of the custodial experience

Put together, the detention and interrogation of an autistic individual by police officers in an oppressive environment with little or no support suggests significant scope for miscarriages of justice. Indeed, the various potential issues identified above can, in combination, have a 'snowball effect', building on and aggravating each other to result in severe and swift escalation. This can be demonstrated by a recent example from the Independent Office for Police Conduct (IOPC) publication *'Learning the Lessons'*, which provides case studies designed to improve police practice in various areas of work. Issue 35, focused on custody, includes the case of an autistic detainee arrested for failing to pay for a taxi fare.¹³² The account of the case illustrates a number of the difficulties an autistic individual can have in custody as well as the risks of officers failing to understand or accommodate the needs of an individual. Whilst waiting to be booked in, the detainee repeatedly tried to touch a panic strip in the custody suite and asked for handcuffs to be removed multiple times, but was refused. In response, an officer suggested he "did not take things in quickly" – demonstrative of a failure to understand potential processing issues or coping strategies. The detainee informed this officer that he was autistic; yet the officer failed to share this with the custody sergeant: a crucial omission. The detainee was subsequently strip searched (without an appropriate adult); thereafter declined to have an appropriate adult and lawyer, despite his evident difficulties; and was forcibly placed in two different cells when he repeatedly tried to leave them, including being pinned to the wall and to a mattress on the floor. The account provides no evidence that the detainee was violent or threatening towards officers at any point. In contrast, he asked if detention in a cell was necessary and could be avoided, stated he was claustrophobic, wished to proceed to interview quickly, and had disclosed he was autistic. If one adds to this that he was evidently struggling to cope with detention (for a minor, non-violent alleged offence), serious questions arise regarding the appropriate use of power (including handcuffing, detention, a strip search, and use of force); and the failure to account for and accommodate evident processing and sensory issues. One of the officers was subsequently disciplined for failing to share the disclosure of the detainee – information that *could* (though not necessarily) have changed the entire scenario.

Conclusion

This chapter has sought to demonstrate, through analysis of the legal framework relating to police powers and existing evidence in the area, that there are good reasons to be concerned about the experience of autistic individuals subject to police investigation. The legal framework regulating police powers to search and arrest has long been criticised for its vagueness and low thresholds, and the consequent potential for misuse of power – particularly due to reliance on stereotyping and generalisation. In the context of autistic individuals, this represents a particular issue because of the potential for communication issues and misinterpretation of an individual's behaviour as suspicious, evasive or threatening. Reliance on stereotypical ideas about such behaviour, coupled with a lack of understanding and awareness of autism generally (or an individual's presentation specifically), create scope for unnecessary use of power. This can lead to distress for an autistic individual, draw them further into the investigative process, and cause them short and long-term harm. In custody, evidence suggests that sensory demands can add to these difficulties, leading to escalating situations of distress for autistic individuals. As such, it is crucial that officers can not only identify possible markers of

¹²⁸ Dehaghani and Bath (n 86)

¹²⁹ Dehaghani and Bath (n 86), 9.

¹³⁰ Kemp V, 'Digital Legal Rights for Suspects: Users' Perspectives and PACE Safeguards' (2018, University of Nottingham), 7: <https://nottingham-repository.worktribe.com/output/946048> [last accessed: 19 July 2021]

¹³¹ Cooper P, Allely C, 'You can't judge a book by its cover: evolving professional responsibilities, liabilities and 'judgecraft' when a party has Asperger's Syndrome' (2017) *Northern Ireland Law Quarterly* 68 (1); Helverschou, S. B., Steindal, K., Nøttestad, J. A., & Howlin, P., 'Personal experiences of the Criminal Justice System by individuals with autism spectrum disorders' (2018) *Autism* 22 (4); Criminal Justice Joint Inspection (n 3), 32.

¹³² Independent Office for Police Conduct, 'Learning the Lessons: Custody' (Issue 35, July 2019), 4-8: https://www.policeconduct.gov.uk/sites/default/files/Documents/Learningthelessons/35/LearningtheLessons_Bulletin35_July_2019_single_column.pdf [last accessed: 20 July 2021].

autism, but also understand variable presentation. As recommended by the Criminal Justice Inspectorates, this requires a common screening tool for neurodivergent individuals, effective information sharing, and better awareness and specialised training.¹³³ Officers should also engage with an individual to understand their specific needs and support them, utilising common ‘soft skills’ of listening, empathy and compassion.¹³⁴ This is not incompatible with the pursuit of a robust investigation – it is, in fact, crucial to a cooperative and engaged dialogue with a suspect, which helps rather than hinders effective police work.

Regardless of an autistic individual’s culpability, the experience of the process itself is vital in ensuring their engagement with the CJS is not unnecessarily negative. It is recognised that “the most important determinant of a positive experience with the CJS... [is] not whether the individual was found guilty by the court but that they were treated with understanding and respect.”¹³⁵ Currently, the breadth of police powers and the weakness of the relevant safeguards can lead to the inappropriate use of power on autistic individuals – regardless of whether or not officers are aware that an individual is autistic. This would suggest the need for the legal framework to be clarified and the safeguards strengthened. Considering that longstanding concerns about discriminatory use of power (particularly in relation to BAME individuals) have failed to lead to effective reform of the legal framework and use such powers, this is perhaps wishful thinking. If this is the case, then it becomes even more vital to ensure that all officers have robust knowledge and understanding of autism in order to effectively assess suspicion and necessity, and awareness of the potential difficulties an autistic suspect might face when engaging officers in this context. Otherwise, autistic individuals may simply be caught in the net of investigation, with a very real risk of harm and unfair criminalisation. The ongoing failure of the CJS to consistently and adequately accommodate the needs of autistic individuals has considerable implications for fair and accessible procedures; criminal liability; and effective outcomes for autistic persons and society generally. The Government’s aim to ensure all autistic people “get the support they need to live full and happy lives” will undoubtedly be undermined without sustained, evidence-led effort to address such issues.¹³⁶

¹³³ Criminal Justice Joint Inspection (n 3), 6.

¹³⁴ *Ibid.* 9.

¹³⁵ Dickie *et al.* (n 59), 66.

¹³⁶ HM Government (n 7), 3.