

# Neurodivergence in the CJS and the role of the Bar (1)

Thinking differently, engaging differently: the first of this two-part series by Dr Tom Smith looks at the experience of neurodivergent individuals in the criminal justice system and how barristers can mitigate/aggravate the challenges

It is perhaps an understatement to say that the criminal justice system (CJS) and those who work within it currently face a toxic mix of substantial challenges. There are numerous pressing issues – for example, the large backlog of cases (exacerbated, but not caused, by the COVID-19 pandemic); squeezed funding across the CJS (exemplified by the high-profile dispute over legal aid remuneration for barristers); and concerns about the use of custody, including a ballooning remand population and reports of extensive, long-term solitary confinement ([User Voice](#), 2022). In combination, these problems – among many others – genuinely threaten the short and long-term efficacy of English and Welsh criminal justice.

These challenges are also occurring in a context of rapid transformation of the way we ‘do’ justice. Examples might include the expanding use of remote court hearings and video link attendance for participants; the increased involvement of complex digital forensic evidence in cases; and the use of AI and machine learning in policing. As such, the system and its professionals face both existential threats which require resolution; and significant changes which demand swift adaptation.

At the same time, much of the above is underpinned by old problems (and agendas). The issue of funding is not new; indeed, the Bar strikes across Summer 2022 have been driven by more than two decades of failure to uplift rates of pay ([Independent Review of Criminal Legal Aid](#), 2021). The case backlog is, in part, a result of the 2010 Coalition government’s court closure programme ([McConville & Marsh](#), *The Guardian*, 2020). The desire to speed up proceedings, reduce cost, and promote efficiency (however the latter word might be interpreted) are long-running policy objectives of both Conservative and Labour administrations. Some old problems, however, have been receiving new recognition and attention. One of these areas is neurodivergence.

## Barriers to engagement in the CJS

Whilst not a set term, neurodivergence commonly describes cognitive development which varies from the typical, primarily related to and affective of communication, learning, attention, sensory processing, and mood regulation (among other aspects of cognition and behaviour). Commonly recognised neurodivergent conditions include Autism, Attention Deficit and Hyperactivity Disorder (ADHD), and Dyslexia among numerous others.

Any individual drawn into the CJS – as suspects, defendants, victims or witnesses – generally face significant challenges due to the stressful, complex and specialised nature of criminal proceedings. This is acute for vulnerable persons, including those with physical and mental health issues. However, the combination of neurodevelopmental and behavioural differences with the inherent nature of the CJS can make engagement particularly challenging for neurodivergent individuals.

Evidence suggests that significant barriers to a positive and effective experience remain at all stages, including in policing, courts and prisons ([Criminal Justice Joint Inspection](#) (CJII), July 2021). Criminal justice processes often involve verbal interaction; unfamiliar routines and environments; and are chaotic, fast-paced and pressured. All of these features may be very challenging for neurodivergent individuals to cope with. Neurodivergent individuals may find it challenging to understand and engage with forms of communication and language used in police stations and court rooms, which will generally be attuned to neurotypical norms – for example, the use of open questions, idiomatic language, or abstract concepts may be inaccessible for autistic individuals. The complexity, length and stressful nature of proceedings in court may place strain on the ability of individuals with ADHD to attend to and engage with what is happening around them (or to them). The nature of a prison environment may be highly distressing for individuals with sensory processing needs – for example, the noise or smell may be overwhelming (for some, akin to torture). In short, features of neurodivergence in the context of the CJS can present significant barriers to fair, effective and quality engagement.

#### ‘Patchy and inconsistent provision’

Researchers and practitioners (primarily, clinical) have been emphasising the importance of managing the different needs of and challenges for neurodivergent individuals in the CJS for decades (see, for example, the work of [Allely](#); [Maras](#); [Crane](#); and [Woodbury-Smith](#)). However, until recent years, policy makers had undertaken limited exploration of this – including how police, courts and prisons manage the needs of neurodivergent individuals. This was significantly ameliorated in Summer 2021, when the three CJS inspectorates published an extensive, evidence-based report on neurodivergence in the CJS, examining issues at all stages (CJII, July 2021).

This form of evidence gathering and analysis exercise (and the enhanced attention and recognition it has brought) is welcome, but is long overdue. This might be partly explained by the size of the topic. Neurodivergence embraces a range of broadly related (and often co-occurring) but distinct differences and conditions of varying complexity; and the CJS is an extensive, overlapping and unwieldy set of institutions and processes, involving multiple agencies, thousands of professionals, and millions of members of the public. In this context, an evidence gathering process is challenging, but also vital. Notwithstanding that numerous academics and non-legal practitioners have examined various aspects of this issue, the CJII review identified piecemeal and limited integration of evidence-based change, leading to ‘patchy and inconsistent provision’ for neurodivergent individuals (CJII, 2021). Generally, the CJS remains largely unaffected by many of the 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 neurodivergent individuals, with ‘serious gaps, failings, and missed opportunities at every stage of the system’ (CJII, 2021).

#### Representing neurodivergent individuals

As facilitators of access to justice, lawyers can either mitigate or aggravate these issues (in the same way they can for any vulnerable participant); they are therefore key to ensuring that neurodivergent individuals – whether as an accused person or a victim of crime – are able to engage with the CJS on an equal basis with their neurotypical peers.

This is particularly the case for barristers and advocates representing neurodivergent defendants at trial and sentence. It is clearly vital to the right to a fair trial that the accused is represented effectively by their lawyer; as part of this, barristers and advocates must discharge their duty to protect and advance the best interests of their client in a meaningful way. Moreover, the duty to assist in the administration of justice arguably demands that lawyers aid in ensuring that all defendants are able to engage with the process to which they are subjected, for reasons of both fairness and effectiveness (see, for example, Guidance Note 41 from the Bar Standards Board (BSB) Code of Conduct, 2020).

Additionally, barristers and advocates are required to ensure that the service they provide does not discriminate (directly or indirectly) against those they represent; and is delivered in a competent and diligent manner, which is built on well maintained and up-to-date professional skills and knowledge (for example, through education and training – see Guidance Note 39, BSB Code, 2020). These general principles of what one might call ‘good’ lawyering are uncontroversial and long-established, but are amorphous and open to interpretation in different contexts and with different clients.

#### A specialised approach

In the context of neurodivergent individuals, such principles arguably demand a more specialised approach which is carefully adapted to the needs of those being represented. This is particularly the case in relation to direct engagement (for example, client conferences or taking instructions); advocating for a client in court; and ensuring that clients are able to access hearings effectively through engagement with the court and other parties. Ultimately, providing good legal representation requires more than grasping the nuances of facts, case law, legislation, and procedures pertinent to a client’s cause. Good lawyering can only be realised if lawyers are also able to effectively engage with and understand the personal needs of the people they represent.

Basic duties like providing advice to and receiving instructions from a defendant are contingent on lawyers understanding and adapting to their communication style. This process may be mediated via a solicitor, though this will not necessarily be the case; nor necessarily done effectively. As such, barristers should be alive to potential challenges in this context, particularly in relation to neurodivergent individuals; they are more likely to have specific needs in relation language and communication; longer cognitive processing time (for example, in response to questions); differences in memory; and challenges with focus and attention. All can affect their ability to comprehend and communicate with lawyers and vice versa.

An example might be an autistic defendant who does not provide key information of importance to their defence because of the way in which they are asked questions. If questions utilise complex, abstract or non-literal language; or are constructed in an open manner and therefore lack a clear, discrete choice, the defendant may not realise what information is being sought; may misunderstand what they have been asked; or not be clear on how to respond (see [Dickie](#), 2018; [Maras and others](#), 2020; and [Cooper and others](#), 2022). Autistic individuals often, though not always, have difficulty understanding and using reciprocal social communication; and may interpret questions in a highly literal manner.

This barrier therefore hampers the ability of a barrister or other representative to obtain crucial information, give advice, and receive instructions; and therefore restricts their ability to effectively represent their client's best interests going forward. In this example, without recognising or adapting to the communication needs of the autistic defendant, barristers and other lawyers will find it very difficult to provide effective and fair representation. Moreover, because the specific features of neurodivergence are both atypical (that is, divergent from normal) and heterogenous (that is, highly variable from person to person), such barriers are less likely to be identified; are more likely to be acute; and ultimately more challenging to overcome than in representation of neurotypical defendants (see, for example, the work of Maras and others, 2017).

*In the next issue, Part 2 will discuss the challenges for barristers advocating on behalf of neurodivergent individuals; examine issues for barristers acting as facilitators of equal participation for neurodivergent individuals during proceedings; and consider how the Bar and the system as a whole might rise to the challenges. Toolkits for advocates working with vulnerable witnesses and defendants are available on: [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)*