

**VULNERABILITY IN POLICE CUSTODY:  
DEFINITION, IDENTIFICATION AND IMPLEMENTATION IN THE CONTEXT  
OF THE  
APPROPRIATE ADULT SAFEGUARD**

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**by**

**Roxanna Dehaghani  
Leicester Law School  
University of Leicester**

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## **Abstract**

The thesis is concerned with why police custody officers in England implement the appropriate adult (AA) safeguard or, rather, do not implement the safeguard. The main concerns are how custody officers define vulnerability (as implementation is, at least in part, based upon this definition) identify vulnerability (as vulnerability must then be identified before the AA safeguard is implemented), and why they may or may not implement the safeguard. To do so, this thesis incorporates empirical data gathered through observation of and interviews with police custody officers at two sites in England. In addition, the thesis contextualises how one can understand vulnerability more generally and, further, how the law and the courts approach vulnerability for the purposes of the AA safeguard. Lastly, this thesis examines why custody officers define, identify, and implement in a particular manner, drawing upon already existing theory on criminal justice and the law in relation to policing. However, I argue that such theories, even when synthesized, lack full explanatory power. Instead, and on the basis of applying a grounded theory approach to the data, I argue that custody officers approach their task in a manner which best suits their personal and then professional needs, taking a path of least resistance. Further, I propose a number of recommendations, highlighting the limits of each. Finally, and drawing upon the definition of vulnerability, I argue that vulnerability within police custody could be entirely reconceptualised.

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## List of Abbreviations

AA	Appropriate Adult
ACPO	Association of Chief Police Officers
AMHP	Approved Mental Health Professional
APP	Authorised Professional Practice
CDA	Crime and Disorder Act 1998
CJA	Criminal Justice Act 2003
CJPOA	Criminal Justice and Public Order Act 1994
CO	Custody Officer
DNA	Deoxyribonucleic Acid
FME	Forensic Medical Examiner
HCP	Healthcare Professional
MHA	Mental Health Act 1983
NAAN	National Appropriate Adult Network
NPIA	National Policing Improvement Agency
PACE	Police and Criminal Evidence Act 1984
PNC	Police National Computer
PND	Police National Database
RCCJ	Royal Commission on Criminal Justice
RCCP	Royal Commission on Criminal Procedure
YJCEA	Youth Justice and Criminal Evidence Act 1999

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## CHAPTER 1: INTRODUCTION – VULNERABILITY AND THE SUSPECT

*A high proportion of those who commit crime are unintelligent, weak or otherwise defective people who know nothing of the rules governing investigation.*<sup>1</sup>

### 1.1 Introduction

The above quote, although not unproblematic, may be used to underscore the plight of those facing criminal investigation. When in custody or under criminal investigation, those suspected of committing a criminal offence may feel defenceless, isolated, and apprehensive. Police custody is a pivotal point within the criminal process – it is where the case may be discontinued or pursued, it is where the individual is isolated from family and friends, it is where the police have utmost control over the suspect<sup>2</sup>, it is often when the suspect is most vulnerable,<sup>3</sup> and it is where the ‘power of the state [is] most evident’.<sup>4</sup> Of course, not every suspect who is questioned is officially detained; there are those who will undergo interview whilst attending ‘voluntarily’.<sup>5</sup> This thesis, as the title suggests, is concerned with vulnerability in police custody with a focus on adult suspects.

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<sup>1</sup> Sir Robert Mark [unreferenced] as cited in Ben Whitaker, *The Police in Society* (Eyre Methuen 1979) 136. Whitaker notes here that innocent individuals may ‘similarly be inarticulate, subnormal or merely confused’. There is, of course, no consensus on whether those with learning disabilities or mental illness have a greater propensity to commit crimes – see Mark Kebbell and Graham Davies, ‘People with intellectual disabilities in the investigation and prosecution of crime’ (2003) 8 *Legal and Criminological Psychology* 219, 220; and Tom Campbell and Chris Heginbotham, *Mental Illness: Prejudice, Discrimination and the Law* (Dartmouth 1991) 133.

<sup>2</sup> In this thesis the term ‘suspect’ will refer to those detained under suspicion of committing a criminal offence. I will use the term ‘detainee’ to describe an individual who is being detained for any other reason. It should be noted that these terms are not unproblematic.

<sup>3</sup> ‘Vulnerable’ and ‘vulnerability’ are not unproblematic terms – some of these problems should become clear within this thesis. However, it will be used in this thesis as it is the term used in legislation and guidance.

<sup>4</sup> Mike McConville and Jacqueline Hodgson, *Custodial legal advice and the right to silence* (Royal Commission on Criminal Justice Research Study No 16) (HMSO 1993) 5.

<sup>5</sup> Individuals can attend the police station voluntarily and are entitled to leave, unless placed under arrest. If a constable decides to place the individual under arrest, he or she will be informed at once (Police and Criminal Evidence Act (PACE) 1984 s 29). As such, ‘voluntary attendance’ is not exactly voluntary. The same safeguards apply to the voluntary interview as they do to the ‘detained interview’ (see Code C, para 3.21), however, it may be difficult to ensure compliance with Code C in a voluntary interview. As this thesis is concerned with those

Within this chapter I will provide the context of this thesis and address some of the key safeguards provided for the suspect during his or her time in police custody. I will discuss the background to the PACE and Code C<sup>6</sup> (but see also Codes D<sup>7</sup> and H<sup>8</sup>). Code C and certain aspects of PACE will be explored at length throughout this thesis and it is therefore important to provide an outline of the main provisions before delving any further. This chapter will explore some seminal aspects of custody, namely the purported safeguards available to the suspect in custody, as contained within PACE and Code C; a more in-depth exploration of the practicalities of custody has been reserved for discussion within the following chapter. Discussion will also extend to highlighting some of the criticisms of the safeguards under Code C and PACE – one should be mindful of these criticisms as one moves through the thesis. The aim is not, however, to explore every criticism but instead to provide a short summary of those pertinent for this thesis. Towards the end of this chapter I will also provide a chapter outline.

## 1.2 A question of justice: the introduction of PACE

Prior to the introduction of PACE in 1986, the Judges' Rules and the accompanying Administrative Directions governed the treatment of suspects in police custody. However, the rules lacked enforceability and thereby failed to adequately protect vulnerable suspects. This became apparent in the landmark pre-PACE 'Confait' case when two youths and one vulnerable adult confessed (allegedly under coercion) to causing the death of Maxwell Confait. The two youths exhibited vulnerabilities beyond their young age – Ahmed Salih (aged 14) spoke English as his second language and Ronald Leighton (aged 15) had a mental age of an eight-year-old and was extremely suggestible. The adult, Colin Lattimore, had an IQ of 75 and was susceptible to succumbing to pressure. Their vulnerabilities were largely dismissed by the

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who are detained in custody, I will not explore this any further. I will, however, return to the notion of voluntary attendance in Chapter 9.

<sup>6</sup> Home Office, *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984. Code C.* (Crown 2017). (Hereafter Code C). Unless otherwise specified, any references made to Code C refer to the 2017 Code.

<sup>7</sup> Home Office, *Code of Practice for the Identification of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984. Code D.* (Crown 2010).

<sup>8</sup> Home Office, *Revised code of practice in connection with detention, treatment and questioning by police officers under the Terrorism Act 2000. Police and Criminal Evidence Act (PACE) 1984. Code H.* (Crown 2014).

police, and evidence pertaining to their vulnerabilities was ignored at trial.<sup>9</sup> The three defendants were convicted of various offences – convictions which were not quashed until some two years later<sup>10</sup> when the Court of Appeal found that the boys could not possibly have killed Maxwell Confait. An inquiry<sup>11</sup> into the police investigation and the subsequent court decisions was established in 1976.<sup>12</sup>

Allegations of physical assault by the police officers against the three were dismissed. However, it was nevertheless recognised that the Judges' Rules were inadequate in protecting the 'vulnerable'.<sup>13</sup> The findings of the Fisher Report along with the Report of the Criminal Law Revision Committee<sup>14</sup> led to the establishment of a Royal Commission for Criminal Procedure<sup>15</sup> chaired by Sir Cyril Philips (the Philips Commission). The Report, produced by the Commission in 1981, formed the basis of PACE and the Codes of Practice and sought to achieve 'fairness, openness and workability'<sup>16</sup> whilst also highlighting the need for better protection of vulnerable suspects. As a result of these developments, the English criminal justice system has been commended for 'taking the lead'<sup>17</sup> in improving the police interview process.<sup>18</sup> For the purposes of this research, the most notable improvement was the introduction of codified provisions aiming to protect vulnerable suspects.

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<sup>9</sup> See Christopher Price and Jonathan Caplan, *The Confait confessions* (Marion Boyars 1977).

<sup>10</sup> After great persistence by Colin Lattimore's father.

<sup>11</sup> Sir Henry Fisher, *Report of an Inquiry by the Hon. Sir Henry Fisher into the Circumstances Leading to the Trial of three persons on Charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* (HC 1977/78 90) 3-5. (Hereafter Fisher Report).

<sup>12</sup> A preliminary hearing was held in 1975.

<sup>13</sup> David Brown, Tom Ellis and Karen Larcombe, *Changing the Code: Police Detention Under the Revised PACE codes of Practice* (Home Office 1992) 70. See also Fisher Report (n 8).

<sup>14</sup> Criminal Law Revision Committee, *Criminal Law Revision Committee Eleventh Report, Evidence (General)* (Cmnd 4991) (HMSO 1972).

<sup>15</sup> Royal Commission on Criminal Procedure, *The Royal Commission on Criminal Procedure Report* (Cmnd 8092) (HMSO 1981). (Hereafter RCCP).

<sup>16</sup> David Brown, *PACE Ten Years On, A Review of the Research* (Home Office Research Study No 155) (Home Office 1997) 1-2.

<sup>17</sup> Gisli H Gudjonsson, 'Psychological vulnerabilities during police interviews: Why are they important?' (2010) 15 *Legal and Criminological Psychology* 161.

<sup>18</sup> PACE has, however, also increased police powers. To some extent, the increase in powers has outweighed the safeguards. Moreover, a number of Philip's recommendations were not implemented – see for example Robert Reiner, *The Politics of the Police* (4<sup>th</sup> edn, OUP 2010). See also Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).



### 1.3 Safeguarding the (vulnerable) suspect

When in custody, the suspect has a number of rights and entitlements – (1) the right to legal advice and representation,<sup>19</sup> (2) the right to have someone informed of detention,<sup>20</sup> (3) an entitlement to read the Codes of Practice (Code C),<sup>21</sup> and (4) the right not to incriminate oneself.<sup>22</sup> The suspect's right to legal advice and representation was viewed as 'balancing' the police power to detain.<sup>23</sup> Exercise of this right can, however, be delayed upon the authorisation of an officer of rank superintendent or above, where the suspect is being detained for an indictable offence,<sup>24</sup> and where there is reason to believe that exercise of the right:

[W]ill lead to interference with or harm to evidence connected with [the offence], or interference with or physical injury to other persons; or will lead to the alerting of other persons suspected of having committed [the offence] but not yet arrested for it; or will hinder the recovery of [property obtained as a result of the offence].<sup>25</sup>

Delay may also be authorised where there are 'reasonable grounds for believing that the person detained... has benefitted from his criminal conduct, and the recovery of the value of the property constituting the benefit will be hindered by [the exercise of the right to legal advice]'.<sup>26</sup> This right is further hindered because legal advice may not be provided to those who request it, it may not always be of good quality, or it may not be in person. Further, the legal representative is not required to be a solicitor (although he or she must be an accredited or probationary representative)<sup>27</sup>, may over-identify with the police,<sup>28</sup> may not attend during police interview and, even if in attendance, may not protect the suspect from unfair

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<sup>19</sup> PACE, s 58.

<sup>20</sup> PACE, s 56.

<sup>21</sup> Code C, para 1.2.

<sup>22</sup> Otherwise known as the privilege against self-incrimination.

<sup>23</sup> See David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press 1997) 283.

<sup>24</sup> PACE, s 58 (6).

<sup>25</sup> PACE, s 58 (8) and (8A).

<sup>26</sup> PACE, s 58 (8A).

<sup>27</sup> See Code C, para 6.12.

<sup>28</sup> McConville and Hodgson (n 4).

interrogation tactics.<sup>29</sup> Some suspects may be discouraged by accessing legal advice as it could delay their detention<sup>30</sup> or they may believe that making a request for a solicitor is indicative of guilt.<sup>31</sup> Although it is financially beneficial for the lawyer to attend the police station,<sup>32</sup> recent cuts to legal aid have fettered-away the abilities of lawyers to offer effective representation for their clients in custody (and beyond) and thus have had a negative effect on the quality of legal advice.<sup>33</sup> The right to have someone informed of your detention is also not unproblematic – it can be restricted on similar grounds to the right to legal advice, however, authorisation need only be given by an officer of rank inspector or above.<sup>34</sup> These issues are perhaps further compounded by the developments in the right to silence, which, since the Criminal Justice and Public Order Act (CJPOA 1998) 1998, has been chipped-away – s 34 allows adverse inferences to be drawn from the accused’s silence. This has caused a treble disadvantage for the accused by diminishing the right to silence, devaluing legal representation, and fettering the ‘evidential protections for defendants’.<sup>35</sup> The suspect may also fail to understand the right to silence<sup>36</sup> or may view the exercise of this right as an indication of guilt.<sup>37</sup> The fettering of and/or restrictions placed upon these rights can impact negatively upon the detained suspect.

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<sup>29</sup> Satnam Choongh, *Policing as Social Discipline* (Clarendon Press 1997) 148-164. See also McConville and Hodgson (n 4); Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused: The Organization and Practices of Criminal Defence Lawyers in Britain* (OUP 1994); Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013). Both ‘the right to silence and the right to legal advice have been favourite police targets because they are represented as stemming the flow of knowledge’ – Choongh (n 29) 15.

<sup>30</sup> Vicky Kemp “‘No time for a solicitor’: implications for delays on the take-up of legal advice” (2013) 3 Criminal Law Review 184; Vicky Kemp and Nigel Balmer, ‘Criminal Defence Services: Users’ Perspectives. An Interim Report’ (Legal Services Research Centre Research Paper, 2008); Layla Skinns, “‘Let’s get it over with’: early findings on the factors affecting detainees’ access to custodial legal advice” (2009) 19(1) Policing and Society 58. Although those who are ‘repeat suspects’ may weigh the length of detention against the benefit of legal advice – see Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogodrodova and Taru Spronken, *Inside Police Custody: An Empirical Account of Suspects’ Rights in Four Jurisdictions* (Intersentia 2014) 275.

<sup>31</sup> Blackstock, Cape, Hodgson, Ogodrodova and Spronken (n 30) 380.

<sup>32</sup> *ibid* 388.

<sup>33</sup> Newman (n 29).

<sup>34</sup> PACE, s 56.

<sup>35</sup> Hannah Quirk, ‘Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange’ (2013) 64 (4) Northern Ireland Legal Quarterly 465, 467.

<sup>36</sup> Blackstock, Cape, Hodgson, Ogodrodova and Spronken (n 30) 379.

<sup>37</sup> *ibid* 380.

According to Code C, juveniles (those under the age of eighteen),<sup>38</sup> the mentally disordered and the mentally vulnerable<sup>39</sup> are to be provided with an appropriate adult (AA) on account of their vulnerability.<sup>40</sup> Vulnerable suspects ‘must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the [AA]’.<sup>41</sup> The only exception to this is where an interview is deemed urgent i.e. where it will lead to interference with, or harm to, evidence or other people; serious loss of, or damage to, property; the alerting of other potential suspects who have not yet been arrested; or will hinder the recovery of property obtained through the offence.<sup>42</sup> In such instances, an interview with a vulnerable suspect can be conducted where authorised by an officer of rank superintendent or above, where it will not significantly harm the suspect’s mental or physical state.<sup>43</sup>

In addition to their presence at interview, an AA should also be present for charging decisions,<sup>44</sup> when cautions are given,<sup>45</sup> when warnings in relation to adverse inferences are given,<sup>46</sup> when samples such as fingerprints, photographs and DNA are to be taken, or where the suspect is subject to an intimate search.<sup>47</sup> The AA’s role has a number of dimensions – he or she is present to support, assist and advise the suspect, facilitate communication between the suspect and the police, ensure that the police are acting fairly, and ensure that the suspect understands his or

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<sup>38</sup> I prefer the term ‘young suspects’ and will use this instead where possible.

<sup>39</sup> When discussing adults there seems to be a tendency within the literature to conflate the terminology. For example, the 2015 Report by the National Appropriate Adult Network (hereafter NAAN) referred generically to ‘mentally vulnerable adults’ or ‘vulnerable’ adults. Whilst later mentioning ‘mentally disordered adults’ it erred in not classifying this important category much earlier – see NAAN, ‘The Home Secretary’s Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police’ (NAAN 2015).

<sup>40</sup> See Code C. The same safeguard is available in Northern Ireland by virtue of the Police and Criminal Evidence (NI) Order 1989 and the associated Code of Practice C. A similar safeguard is also available in Scotland – see Blackstock, Cape, Hodgson, Ogodrodova and Spronken (n 30) 217.

<sup>41</sup> Code C, para 11.15. There are some exceptions to this – see Code C, paras 11.1 and 11.18 discussed below.

<sup>42</sup> Code C, para 11.1

<sup>43</sup> Code C, para 11.18.

<sup>44</sup> Code C, para 16.1.

<sup>45</sup> Code C, paras 7 and 10.12.

<sup>46</sup> Code C, para 10.11, para 10.11A.

<sup>47</sup> See Code C, Annex A para 2B.

her rights.<sup>48</sup> Although vulnerable suspects are recognised as ‘often capable of providing reliable evidence’, they nevertheless may ‘without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating’.<sup>49</sup> Special care must therefore be taken by investigating officers when questioning vulnerable suspects. Moreover, corroboration of facts should also be sought wherever possible.<sup>50</sup> The concern of reliability is something which I will return to in later chapters.

The implementation of the AA safeguard is left largely to the custody officer,<sup>51</sup> a police officer of at least the rank sergeant,<sup>52</sup> who assumes responsibility for the suspect’s rights and welfare whilst the suspect is kept in police custody.<sup>53</sup> One or more custody officers must be present at a designated police station, however, if the custody officer is unavailable, an officer of any rank may perform the custody officer’s functions (other than an officer who is involved in the investigation).<sup>54</sup> When the arrestee is brought to the custody suite, the custody officer must decide whether the arrestee should be detained (either for the purpose of securing and preserving evidence where there is insufficient evidence to charge, or for obtaining a decision from the Crown Prosecution Service (CPS) where there is sufficient evidence).<sup>55</sup> In addition to having responsibilities towards all suspects and other detainees post-charge,<sup>56</sup> the custody officer is responsible for ‘supervising custodial interrogation’,<sup>57</sup> for ensuring compliance with

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<sup>48</sup> Code C, para 11.17 in combination with Home Office and NAAN, ‘Guide for Appropriate Adults’ (Home Office 2011) and NAAN, ‘Guide to being an Appropriate Adult’. Available at <[http://www.appropriateadult.org.uk/images/pdf/2014\\_AA\\_guide.pdf](http://www.appropriateadult.org.uk/images/pdf/2014_AA_guide.pdf)> accessed 22 June 2017. See later (section 1.3.1) for greater discussion of the AA safeguard.

<sup>49</sup> Code C, Note 11C.

<sup>50</sup> *ibid.*

<sup>51</sup> Although it can be facilitated by others – see Chapter 6, particularly sections 6.4.3 and 6.4.4.

<sup>52</sup> PACE, s 36 (3). The custody officer is responsible at a designated police station – see PACE, s 35. If a custody officer is not readily available to perform his (or her) functions however an officer of any rank may do so – see PACE, s 36 (4).

<sup>53</sup> The custody officer is also responsible for the suspect or detainees’ welfare for up to 48 hours after release from police detention.

<sup>54</sup> PACE, ss 36 (1), (4) and (5).

<sup>55</sup> PACE, s 37.

<sup>56</sup> PACE, s 38.

<sup>57</sup> Barrie Irving and Ian McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (Police Foundation 1989) 5.

the Act and Codes,<sup>58</sup> and for providing information to the detainee or suspect (usually upon detention) such as the reason for detention and legal entitlements.

The custody officer must also decide, ‘in consultation with the officer in charge of the investigation and appropriate healthcare professionals as necessary’,<sup>59</sup> whether the suspect is fit for interview. Suspects should not be interviewed ‘if the custody officer considers [that interview] would cause significant harm to [their] physical or mental state’.<sup>60</sup> In particular, vulnerable suspects should always be treated as ‘being at some risk during an interview’.<sup>61</sup> Where the suspect is unable to ‘appreciate the significance of questions and their answers [or] understand what is happening because of the effects of drink, drugs or any illness, ailment or condition’ an interview must not be conducted unless authorisation is given by an officer of rank superintendent or above.<sup>62</sup> As will be explored in Chapter 4, whilst there is some overlap in the legal guidance regarding fitness for interview and the requirement for an AA, a suspect can be deemed fit for interview but with the requirement that an AA be present.

The exclusionary rules of evidence may also provide some protection for suspects, provided the case reaches the courts. For example, s 76 of PACE allows for a confession (that is ‘any statement wholly or partly adverse to the person who made it; whether made to a person in authority or not and whether made in words or otherwise’<sup>63</sup>) to be excluded at trial where the confession has been obtained through oppression or as a consequence of something said or done which was likely, in the circumstances existing at the time, to render it unreliable. However, according to s 76 (4), any evidence gathered on the basis of an excluded confession remains admissible. Such evidence can still be excluded under s 78 of PACE if the court ‘having regard to all the circumstances, including the circumstances in which the evidence was obtained [believes that] ‘the admission of the evidence would have such an adverse effect on the fairness of the proceedings that [it ought not to be admitted].’ If, according to the court, evidence does not meet the criteria set out in s 78, then such evidence will still be admitted.

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<sup>58</sup> PACE, s 39.

<sup>59</sup> Code C, para 12.3.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> Code C, para 11.18. See para 11.1a for the criteria for authorisation.

<sup>63</sup> PACE, s 82 (1).

Some defendants may also avail of a s 77 direction – this requires that, at a trial on indictment, where the prosecution case rests wholly or substantially on confession evidence, and where a confession was made by a ‘mentally handicapped’ suspect in the absence of an independent person (i.e. an AA, social worker, or solicitor)<sup>64</sup>, the court must warn the jury that the confession was given in such circumstances.<sup>65</sup>

PACE was, at least in theory, an improvement on the Judges’ Rules, however, there have been problems with its implementation. Perhaps the most criticised aspect of PACE is the role of custody officer – as McConville, Sanders and Leng have noted, the custody officer is a *police officer* and remains part of the police culture with both ‘institutional and collegial ties with other officers’.<sup>66</sup> The custody officer is mindful not to undermine the authority or question the judgement of his co-workers<sup>67</sup> and acts as a ‘facilitator, not simply a doorkeeper’.<sup>68</sup> The interplay between decisions on vulnerability and the independence, or lack thereof, of the custody officer will be highlighted later within this thesis.<sup>69</sup> The custody officer may also not be particularly well-trained – indeed, training may be minimal or may be absent altogether.<sup>70</sup> This too may impact upon his ability to understand the terms contained within Code C and, connected with that, his ability to identify vulnerability.<sup>71</sup> The custody officer may also face

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<sup>64</sup> See Chapter 4, particularly section 4.4.2.

<sup>65</sup> PACE, s 77. It should be noted that this only extends to mentally disordered and mentally vulnerable suspects in so far as they are considered ‘mentally handicapped’. The recommendation to extend this to the mentally ill or otherwise mentally disordered has clearly been ignored – see Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice* (Cmnd 2263) (HMSO 1993) 59 (Runciman Commission). (Hereafter RCCJ).

<sup>66</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 42.

<sup>67</sup> *ibid* 43. See also Vicky Kemp, ‘PACE, Performance Targets and Legal Protections’ (2014) 4 *Criminal Law Review* 278.

<sup>68</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 55.

<sup>69</sup> It is worth noting here that Choongh has highlighted that, not only do custody officers lack independence through sharing police objectives and values, they also lack independence of the cases – see Choongh, *Policing as Social Discipline* (n 29) 173. My findings were similar and some of this can be seen through the remaining chapters.

<sup>70</sup> John Coppen ‘PACE: A View from the Custody Suite’ in Ed Cape and Richard Young (eds) *Regulating Policing: the Police and Criminal Evidence Act 1984 – Past, Present and Future* (Hart 2008) 82-83. See also Criminal Justice Joint Inspectorate, *A Joint Inspection of the Treatment of Offenders with Learning Disabilities within the Criminal Justice System - Phase 1 From Arrest to Sentence* (HMIP 2014) 19 (hereafter CJJI) 17-18. In the latter study, the difference in training was marginal.

<sup>71</sup> Although, as will be indicated in Chapter 6, the identification of vulnerability may not be an easy task, even for professionals.

practical constraints in the form of CPS Charging Guidance and procedures contained within the Mental Health Act (MHA) 1983, both of which may impact negatively on the time available to perform other aspects of his role.<sup>72</sup> The booking-in procedure, often conducted when the detainee or suspect arrives at the custody suite, is time-consuming and can take around 40-50 minutes per individual.<sup>73</sup> In quieter stations, the custody officer may be expected to assume other roles, which further deplete him of his independence.<sup>74</sup> Moreover, the custody officer is not required to perform his functions over a specific period of time and, therefore, whilst some custody officers may perform their roles over weeks, months or even years, another may not know of his role until he starts his shift.<sup>75</sup> As will be explored in Chapter 6, previous research has indicated that custody officers experience difficulty when identifying vulnerability.<sup>76</sup> Other research has indicated that vulnerability can often be identified but there are issues with how custody officers make sense of this information.<sup>77</sup>

The role of healthcare professionals (HCPs) and forensic medical examiners (FMEs)<sup>78</sup> has been also subject to criticism. HCPs have been criticised for using a tick-box approach to the

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<sup>72</sup> Coppen (n 70) 85-88.

<sup>73</sup> *ibid* 85. See also sections 2.4 and 6.3 for more information on the procedures within custody.

<sup>74</sup> Keith Bottomley, Clive Coleman, David Dixon, Martin Gill and David Wall, *The Impact of Aspects of the Police and Criminal Evidence Act 1984 on Policing in a Force in the North of England* (Centre for Criminology and Criminal Justice 1991) 87-88. See also Brown, Ellis and Larcombe (n 13) 74.

<sup>75</sup> Michael Zander, *The Police and Criminal Evidence Act 1984* (5th edn, Sweet and Maxwell 2005) 136. In both sites studied custody officers worked on a permanent basis.

<sup>76</sup> See Clare Palmer and Mary Hart, *A PACE in the right direction?: The effectiveness of safeguards in the Police and Criminal Evidence Act 1984 for mentally disordered and mentally handicapped suspects – A South Yorkshire Study*. (University of Sheffield 1996); Gisli H Gudjonsson, Isabel Clare, Susan Rutter and John Pearse, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Procedure Research Study No 12) (HMSO 1993); Irving and Mckenzie (n 57). See also Tom Bucke and David Brown, *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE codes of practice* (Home Office Research Study No 174) (Home Office 1997); Corretta Phillips and David Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (Home Office Research Study No 185) (Home Office 1998); Sarah Medford, Gisli H Gudjonsson and John Pearse, 'The efficacy of the appropriate adult safeguard during police interviewing' (2003) 8 *Legal and Criminological Psychology* 253, 253. See further Chapters 6 and 7.

<sup>77</sup> Philip Bean and Teresa Nemitz, *Out of depth and out of sight* (University of Loughborough 1995) 48.

<sup>78</sup> The term HCP refers to those who are embedded within the custody suite (see section 2.4). They are required to: '[assess] patients and advising custody on their fitness to be detained,

risk assessment,<sup>79</sup> often being inadequately trained,<sup>80</sup> and lacking the sufficient competency in order to meet the suspect's healthcare needs.<sup>81</sup> This is particularly problematic as custody officers have been found to delegate the decision of whether to call an AA to the HCP.<sup>82</sup> FMEs have also been criticised for lacking specific training and failing to trigger the AA safeguard even where it was recognised that the suspect had a learning disability.<sup>83</sup>

### 1.3.1 The appropriate adult safeguard

As noted earlier in this chapter, a vulnerable suspect should be attended by the AA. The AA is supposed to 'support, advise and assist', 'ensure that the police are acting fairly', 'ensure that the suspect understands his or her rights', and 'facilitate communication', and may be particularly useful in reducing anxiety.<sup>84</sup> However, the AA safeguard is fraught with problems, which will be discussed in this section.

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charged, transferred, interviewed and released; identify vulnerable patients and advise on the necessity of additional support whilst in custody e.g. appropriate adults etc; take blood and other intimate forensic samples for analysis for cases such as drink driving; document injuries and attend court for cases which require your representation; manage and advise on chronic and acute conditions' – Group 4 Securicor, 'A Day in the Life of a Health Care Professional' available at <[http://www.g4smedicalservices.co.uk/library/files/Day\\_in\\_the\\_life\\_HCP.pdf](http://www.g4smedicalservices.co.uk/library/files/Day_in_the_life_HCP.pdf)> accessed 22 June 2017. The term FME refers to those who are typically on call-out and assist the HCP. Their role is much broader than that of the HCP and, in addition to many of the HCPs duties, it also involves: '[providing] telephone triage for both police and HCPs; [examining] victims and perpetrators of sexual offence cases; [attending] scenes of sudden and suspicious deaths to confirm life extinct' – Group 4 Securicor, 'A Day in the Life of a Forensic Medical Examiner' available at <[http://www.g4smedicalservices.co.uk/library/files/Day\\_in\\_the\\_life\\_FME.pdf](http://www.g4smedicalservices.co.uk/library/files/Day_in_the_life_FME.pdf)> accessed 22 June 2017.

<sup>79</sup> Victor Adebawale, *Independent Commission on Mental Health and Policing Report* (Independent Commission on Mental Health and Policing 2013) 21-22.

<sup>80</sup> NAAN, 'There to Help' (n 39) Paper A 6.

<sup>81</sup> Her Majesty's Inspectorate of Constabulary (HMIC), *The welfare of vulnerable people in police custody* (HMIC 2015) 97.

<sup>82</sup> NAAN, 'There to Help' (n 39) Paper A 6. See also Chapters 6 and 7, and in particular sections 6.4.3. and 7.2.3.

<sup>83</sup> 5. Indeed, in an example given on page 19 of the report, a FME stated that no AA was needed in the case of a suspect who had 'complex problems including Aspergers, anger management problems, suicidal thoughts, self-harm, self-inflicted head injury' – CJI, *Offenders with Learning Disabilities* (n 70).

<sup>84</sup> HMIC, *Welfare of vulnerable* (n 86) 99.



The AA may be a relative or friend, a volunteer, someone from a paid scheme (a professional AA), or a social worker. As such, an AA may be someone known to the suspect or someone relatively or completely unknown, such as volunteer or professional AA. Each ‘type’ of AA provision is not problem-free. Parents and other relatives (or friends) may know the suspect better and may therefore be better able to provide support, advice and assistance with communication, however, their use may also be problematic as they may: be unsupportive or may put pressure on the suspect to confess;<sup>85</sup> too readily accept police malpractice, be confrontational or advise the suspect to withhold information;<sup>86</sup> hold negative attitudes towards the police;<sup>87</sup> be too emotionally involved<sup>88</sup> or distressed to take an active role;<sup>89</sup> act in a passive manner;<sup>90</sup> and/or fail to intervene when the police are ‘haranguing, belittling or threatening’ the suspect.<sup>91</sup> These criticisms notwithstanding, relatives may be used for expediency<sup>92</sup> and may be preferred as they cost less than someone from a scheme.<sup>93</sup>

The use of social workers as AA may also be problematic: social workers may make a lesser contribution than that made by parents and:

The police may incorrectly assume that social workers are familiar with the requirements of the role and, therefore, fail to inform them of the responsibilities.

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<sup>85</sup> Brian Littlechild, ‘Reassessing the role of the “appropriate adult”’ (1995) *Criminal Law Review* 540, 542. See also Roger Evans, *The Conduct of Police Interviews with Juveniles* (Royal Commission on Criminal Justice Research Study 8) (HMSO 1993).

<sup>86</sup> Harriet Pierpoint, ‘How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?’ (2000) 22 (4) *Journal of Social Welfare and Family Law* 383, 386. I would argue that withholding information is not problematic if this is in the best interests of the suspect.

<sup>87</sup> Katie Quinn and John Jackson, ‘Of Rights and Roles: Police interviews with young suspects in Northern Ireland’ (2007) 47 *British Journal of Criminology* 234, 245.

<sup>88</sup> Pierpoint, ‘How Appropriate are Volunteers’ (n 91) 385. See also Harriet Pierpoint, ‘The Performance of Volunteer Appropriate Adults: A Survey of Call Outs’ (2001) 40 (3) *Howard Journal of Criminal Justice* 255.

<sup>89</sup> Pierpoint, ‘How Appropriate are Volunteers’ (n 86) 386.

<sup>90</sup> Evans found, in the majority of cases (74.8%) that parents were passive where acting as an AA for a young suspect - Evans (n 85) 39.

<sup>91</sup> Evans (n 85) 46.

<sup>92</sup> John Pearce, ‘Police interviewing: The identification of vulnerabilities’ (1995) 5 (3) *Journal of Community and Applied Social Psychology* 147, 150.

<sup>93</sup> When assessing the effectiveness of AAs, Pierpoint noted how volunteers seemed to have higher levels of contributions (based on self-report) – Pierpoint, ‘The Performance of Volunteer Appropriate Adults’ (n 88) 267.

Alternatively, social workers may want to avoid coming into conflict with the police if their work requires them to maintain good working relationships.<sup>94</sup>

Ideological tensions may also arise for social workers between welfare and control,<sup>95</sup> and they may be also be viewed by the suspect as ‘part of the system’.<sup>96</sup> This issue may extend too to volunteer AAs and those who are paid by a scheme. There is, moreover, no consensus on whether social workers known to the suspect are better than those who are not: those with a pre-existing relationship may be over-familiar with the suspect and may struggle to achieve impartiality but by contrast, duty social workers, whilst able to exercise neutrality,<sup>97</sup> may not be familiar with the suspect and may therefore fail to understand him or her.<sup>98</sup> Although social workers may be better trained than volunteers (and certainly more than relatives), they may require more training.<sup>99</sup>

Voluntary AAs may also pose problems. As Pierpoint highlights, volunteers tend to be from affluent areas and may have had little to no contact with the police, thus raising questions regarding the representativeness.<sup>100</sup> Matters of representativeness may be further compounded as many volunteers are retired.<sup>101</sup> Those who are not retired, i.e. those who work, may be unavailable when called upon.<sup>102</sup> Volunteers may also have a tendency for being pro-police (and, as such, anti-suspect).<sup>103</sup> Yet, the problems do not end there: volunteers may be unqualified and not very well trained<sup>104</sup> (either in relation to the criminal justice process or the

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<sup>94</sup> Pierpoint, ‘How Appropriate are Volunteers’ (n 86) 387. See also Pierpoint, ‘The Performance of Volunteers as Appropriate Adults’ (n 88).

<sup>95</sup> Pierpoint, ‘How Appropriate are Volunteers as ‘Appropriate Adults’’ (n 86) 387.

<sup>96</sup> *ibid.*

<sup>97</sup> Although the question that remains is whether the AA must be independent or neutral of the entire investigation or whether they must simply be neutral or independent of the police.

<sup>98</sup> Quinn and Jackson (n 87) 247.

<sup>99</sup> Ciaran White, ‘Re-assessing the social worker's role as an appropriate adult’ (2002) 24(1) *Journal of Social Welfare and Family Law* 55, 56-7. Hodgson has highlighted the inadequacy of the training – Jacqueline Hodgson, ‘Vulnerable Suspects and the Appropriate Adult’ [1997] *Criminal Law Review* 785, 786-77.

<sup>100</sup> See also CO16-1 in section 9.3.5.

<sup>101</sup> Pierpoint, ‘How Appropriate are Volunteers as ‘Appropriate Adults’’ (n 86) 388-9.

<sup>102</sup> *ibid* 388.

<sup>103</sup> *ibid* (n 86).

<sup>104</sup> *ibid* (n 86) 389. See also NAAN, ‘There to Help’ (n 39) 12.

needs of vulnerable individuals),<sup>105</sup> and for this reason, they may fail to spot when the police are being oppressive.<sup>106</sup> Even when they do spot oppressive tactics, they may be reluctant to intervene.<sup>107</sup> Issues with training are perhaps less pressing for those which are part of NAAN. However, the question that still remains is: how much training is enough or, perhaps more appropriately, *is training enough?*

Such issues may be further worsened by the inconsistencies in national provision.<sup>108</sup> For example, whilst some AA schemes are part of NAAN (and will thus have access to training and professional development and abide by the National Standards),<sup>109</sup> some are not.<sup>110</sup> Moreover, some AA schemes may be funded by local authorities, some are unfunded, and others may be paid from the police budget.<sup>111</sup> This latter avenue could raise issues with independence.<sup>112</sup> The patchy national provision undoubtedly has an impact upon training and the general effectiveness of AAs; the service someone receives could differ depending on where he or she is arrested (if that service is provided at all).<sup>113</sup> Difficulties in securing the AAs attendance may also lead to delays in the suspect's detention.<sup>114</sup> This could have a bearing on

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<sup>105</sup> Littlechild (n 85) 543.

<sup>106</sup> White (n 99) 64.

<sup>107</sup> Pierpoint 'How Appropriate are Volunteers as 'Appropriate Adults'' (n 86) 389.

<sup>108</sup> Known by own involvement in Home Office Working Group on Vulnerable Adults.

<sup>109</sup> See NAAN, *NAAN National Standards* (NAAN 2013). Available at <[http://www.appropriateadult.org.uk/images/pdf/national\\_standards\\_2013.pdf](http://www.appropriateadult.org.uk/images/pdf/national_standards_2013.pdf)> accessed 14 August 2017.

<sup>110</sup> NAAN, 'Our Network'. Available at <<http://www.appropriateadult.org.uk/index.php/about-us/naan-map>> accessed 14 August 2017.

<sup>111</sup> See Mark 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). Available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117683/appropriate-adult-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117683/appropriate-adult-report.pdf)> accessed 22 June 2017.

<sup>112</sup> *ibid* 17.

<sup>113</sup> Lord Bradley recommended that the AA provision was reviewed so as to 'improve the consistency, availability and expertise of this role' - Keith JC Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health 2009) 43. This had still not been rectified five years after the report was published – see Graham Durcan, Anna Saunders, Ben Gadsby and Aidan Hazard, *The Bradley Report five years on: an independent review of progress to date and priorities for further development* (Centre for Mental Health 2014). In 2017, the issue still remains.

<sup>114</sup> Harriet Pierpoint, 'Extending and Professionalising the Role of the Appropriate Adult' (2011) 33(2) *Journal of Social Welfare and Family Law* 139, 140. Quinn and Jackson (n 87)

how the interview is conducted and may influence the outcome of the case.<sup>115</sup> Such delays could mean that an AA is not provided even when called. However, Skinns' research highlights that, in relation to pre-charge detention, there is 'no significant association between the involvement of the AA and the length of detention'.<sup>116</sup>

Not only is provision patchy, there may also be ambiguity with regard to the AA's role<sup>117</sup> and the role can often be contradictory.<sup>118</sup> This is arguably in part due to inadequate information provided to the AA<sup>119</sup> but also, naturally, as a result of the AA's own interpretation of his or her role.<sup>120</sup> For example, some AAs may see their role as a safeguard for the suspects, others may believe that they are there to assist the police, others may view themselves as independent umpires (i.e. neither working on behalf of the police or the suspect),<sup>121</sup> and some may not appreciate or understand the nature of their role at all.<sup>122</sup> The role of the AA may involve welfare (such as ensuring that the suspect has had adequate food and is warm),<sup>123</sup> due process (ensuring that the suspect has understood his or her rights, can understand the questions posed

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246. See also Hodgson, 'Vulnerable Suspects' (n 99) 789. A delay may mean that an AA is not provided even when called – NAAN, 'There to Help' (n 39) 11.

<sup>115</sup> Pierpoint, 'Extending and Professionalising' (n 114) 139-40. Although note the criticisms highlighted by Quinn and Jackson – Quinn and Jackson (n 92) 251.

<sup>116</sup> Layla Skinns, 'Stop the clock? Predictors of detention without charge in police custody areas' (2010) 10 (3) *Criminology and Criminal Justice* 303 as cited in Layla Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2011) 63. Although Skinns notes the issues with her analysis – see Skinns, *Police Custody* (n 116) 63.

<sup>117</sup> The court has failed to elaborate on the role of the AA – see Harriet Pierpoint, 'A Survey on Volunteer Appropriate Adult Services' (2004) 4 (1) *Youth Justice* 32. As will be illustrated in Chapter 4, the courts have remained somewhat silent on these issues. See also Pierpoint, 'Extending and Professionalising' (n 114); White 2002 (n 99).

<sup>118</sup> See Pierpoint, 'Extending and Professionalising' (n 114). See also Pierpoint, 'How Appropriate are Volunteers as 'Appropriate Adults'' (n 86).

<sup>119</sup> HMIC, *Welfare of Vulnerable* (n 81) 91.

<sup>120</sup> Harriet Pierpoint, 'Reconstructing the role of the appropriate adult in England and Wales' (2006) 6 (2) *Criminology and Criminal Justice* 219.

<sup>121</sup> See Vicky Kemp and Jacqueline Hodgson, 'England and Wales: Empirical Findings' in Miet Vanderhallen, Marc van Oosterhout, Michele Panzavolta, and Dorris de Vocht (eds), *Interrogating Young Suspects II: Procedural Safeguards from an Empirical Perspective* (Intersentia 2016) 142.

<sup>122</sup> Hodgson, 'Vulnerable Suspects' (n 99) 789.

<sup>123</sup> Pierpoint, 'Extending and Professionalising' (n 114) 226-9. This function may, however, be for crime control – see Pierpoint, 'Extending and Professionalising' (n 114) 231.

and what his or her responses are),<sup>124</sup> crime prevention (such as why the suspect has offended without presuming guilt),<sup>125</sup> and providing emotional support.<sup>126</sup> Indeed, the purpose of the AA – as contained within Code C and the various pieces of NAAN and Home Office guidance – is not elaborated on further. For example, there is no explanation of what is meant by ‘support, advise and assist’ (what type of support? how much support?), although Chris Bath (Chief Executive of NAAN) believes that this should be interpreted as widely as possible, i.e. the AA can do whatever they wish provided they are not expressly prohibited from doing so.<sup>127</sup> The phrase ‘ensure that the police are acting fairly’ causes even greater problems as, not only is fairness difficult to define,<sup>128</sup> the AA may be unwilling to intervene and may therefore fail to perform this part of his or her role. Ensuring that someone understands his or her rights does not equate to being able to exercise these rights effectively. Finally, the term ‘facilitate communication’ possibly causes the greatest of problems as it raises issues of adequate training – is the AA able to adapt to the specific communicative needs of the suspect? – and, as I will highlight later, this means not simply getting a confession but communicating what the suspect wants to communicate, i.e. whether this means silence or deliberately misleading information, for example. Further, whilst part of the AAs role is to facilitate communication,<sup>129</sup> questions could be raised as to how effective the AA is in this regard: can the AA – particularly those who are untrained in the specific vulnerability of the suspect – assist the suspect in communicating effectively with the police? Quinn and Jackson have argued that many do not facilitate communication and indeed do not go far beyond their supportive function.<sup>130</sup>

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<sup>124</sup> Pierpoint, ‘Extending and Professionalising’ (n 114) 225-6. See also Tricia Jessiman and Ailsa Cameron, ‘The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers’ (forthcoming) *British Journal of Learning Disabilities* 1, 3.

<sup>125</sup> Pierpoint, ‘Extending and Professionalising’ (n 114) 229-30. Although Quinn and Jackson refer to this a welfare role and felt that the active AA often encouraged the suspect to ‘fess up’ – Quinn and Jackson (n 87) 247.

<sup>126</sup> Jessiman and Cameron (n 124) 4.

<sup>127</sup> Personal Correspondence, 20 June 2017.

<sup>128</sup> Although it could be, as Chris Bath suggests, something akin to fair trial rights – *ibid*.

<sup>129</sup> This is the main function of the AA, as constructed by custody officers – see section 5.6.3.

<sup>130</sup> Quinn and Jackson (n 87) 247. The supportive function could, I would argue, potentially be the main role of the AA – see sections 9.3.4 and 9.3.5. Support could, however, be a double-edged sword in that it could put the person at ease and thus encourage them to confess.

Not only can questions arise in relation to how the role of the AA is – and/or should be – defined, questions could also be raised as to the qualities that the AA is required to possess. For example, in *DPP v Blake* ‘it was held that an [AA] could not be a person with whom the young person has no empathy’.<sup>131</sup> The lack of clarity has resulted in the social construction of the role by the AA, and, unsurprisingly, by the suspect, the custody officer<sup>132</sup> and other police officers, the courts, legal advisers, FMEs, HCPs, and also potentially approved mental health professionals (AMHPs).<sup>133</sup>

The role of the AA may also have implications for legal advice. Firstly, the AA is not subject to legal privilege.<sup>134</sup> The AA is required to provide advice but questions could arise with regard to what type of advice is appropriate. And perhaps most problematically, the presence of the AA may actually undermine legal advice, particularly where that AA is a relative (although also where the AA is a professional)<sup>135</sup> as the advice of the AA may conflict with that of the solicitor or legal advisor.<sup>136</sup>

AAs are also often discouraged from being active,<sup>137</sup> to the extent that they have been criticised for being merely ‘wallpaper’.<sup>138</sup> White argues that this issue is not ameliorated by that fact that

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<sup>131</sup> [1989] 1 WLR 432 as cited in Pierpoint, ‘How Appropriate are Volunteers as ‘Appropriate Adults’’ (n 86) 388. See also Teresa Nemitz and Philip Bean, ‘Protecting the rights of the mentally disordered in police stations: The use of the appropriate adult in England and Wales’ (2001) 24(6) *Journal of Law and Psychiatry* 595. Hodgson argues that the AA may fail to have empathy – Hodgson, ‘Vulnerable suspects’ (n 99) 786-77.

<sup>132</sup> See Chapter 5 and specifically sections 5.2 and 5.3.

<sup>133</sup> An AMHP is a social worker trained to implement elements of the Mental Health Act 2007 in conjunction with medical practitioners. They have a pivotal role in assessing individuals and in deciding whether they meet the criteria to detain them without their consent and were formerly known as Approved Social Worker – CJI, *A joint inspection on work prior to sentence with offenders with mental disorders* (CJI 2009) 5.

<sup>134</sup> See Ian Cummins, ‘The Other Side of Silence’: The Role of the Appropriate Adult Post-Bradley’ (2011) 5(3) *Ethics and Social Welfare* 306. See also Littlechild (n 85); White (n 99).

<sup>135</sup> Quinn and Jackson (n 87) 248.

<sup>136</sup> *ibid* 249.

<sup>137</sup> Hodgson, ‘Vulnerable suspects’ (n 99) 790. See also Quinn and Jackson (n 87) 244.

<sup>138</sup> Hodgson, ‘Vulnerable suspects’ (n 99) 790 citing David Dixon, Keith Bottomley, Clive Coleman, Martin Gill and David Wall, ‘Safeguarding the rights of suspects in police custody’ (1990) 1 (2) *Policing and Society* 115. Pierpoint, ‘Extending and Professionalising’ (n 114) 140. Medford, Gudjonsson and Pearse have argued that the AA may add little to the police interview – Medford, Gudjonsson and Pearse (n 76) 253.

the Codes are silent on the issue of intervention.<sup>139</sup> A non-intrusive, passive AA is, however, beneficial for the police as they have not breached Code C and thus the evidence may still be admissible.<sup>140</sup> Indeed, a vulnerable suspect who is attended by an ineffective AA is not necessarily placed at an advantage over the vulnerable suspect who is not.<sup>141</sup> One could even go as far as to argue, as Pierpoint has done, that providing an ineffective AA to a vulnerable suspect could be considered a breach of human rights principles.<sup>142</sup> An effective AA is also not an absolute guarantee that the system will operate fairly: as Bean and Nemitz highlight, injustices can occur at other stages of the process, particularly because the AA is only present during the police custodial process and not thereafter.<sup>143</sup>

There have been some suggestions for reform. Pierpoint has argued in favour of professionalisation, which could bring about consistency, particularly when comparing the contributions made by parents (or arguably other relatives).<sup>144</sup> Southcott has proposed making use of mental health nurses.<sup>145</sup> This is, however, a problematic suggestion as, although mental health nurses will have training on mental health issues, they may not (or indeed are unlikely to) be trained in the legal aspects of the AA role. Moreover, if mental health nurses are embedded within the custody suite, questions could be raised with regard to their independence from police officers and the extent to which they have adopted some of the cultural norms of the custody officers. Finally, whilst they have knowledge of mental health, this may not extend to other areas that interact with suspect vulnerability such as bereavement, anxiety, or trauma.<sup>146</sup>

Notwithstanding the myriad of issues, the AA may have a positive impact on the custody process. For adults in particular, the presence of the AA can increase the likelihood that a legal

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<sup>139</sup> See White (n 99) 62.

<sup>140</sup> See Pierpoint, 'How Appropriate are Volunteers as 'Appropriate Adults'' (n 86) 386. See also Pierpoint, 'A Survey' (n 117) 40.

<sup>141</sup> Hodgson, 'Vulnerable suspect' (n 99) 790.

<sup>142</sup> Pierpoint, 'How Appropriate are Volunteers as 'Appropriate Adults'' (n 86).

<sup>143</sup> Nemitz and Bean, 'Protecting the rights of the mentally disordered in police stations' (n 131) 601.

<sup>144</sup> Pierpoint, 'Extending and Professionalising' (n 114).

<sup>145</sup> John L Southcott, 'The psychiatric nurse and the 'appropriate adult' (1999) 6 (5) *Journal of Psychiatric and Mental Health Nursing* 357.

<sup>146</sup> See section 3.3 on this point.

representative will be present,<sup>147</sup> may decrease interrogative pressure and may encourage the legal representative to take a more active role<sup>148</sup> (provided the AA does not undermine the advice given by the legal adviser, as noted above). Moreover, whilst perhaps unable to adequately facilitate communication, as noted by Quinn and Jackson, the AA is particularly useful in its supportive function. I will return to these issues in the concluding chapter.

#### 1.4 The research project: reasons and rationales

As will be addressed in the following chapter, I was concerned initially with how ‘vulnerable’ suspects were safeguarded in police custody, adopting a comparative approach. My passion for this topic was ignited by an interest in miscarriages of justice, particularly cases where vulnerabilities were exploited, or at the very least ignored, by investigative officers. During the initial literature review stage<sup>149</sup> I became interested in understanding how the legal frameworks operated within police custody, taking a comparative approach. In particular, I wanted to know how vulnerability was identified so that the safeguards (AA or otherwise) could be implemented. The scope would encompass adult suspects only, as it was here where the main problems with identification lay.<sup>150</sup>

Whilst it was recognised that similar studies had been conducted in the past,<sup>151</sup> many of these could be considered outdated. This was particularly so due to the changes in procedure and guidance. Of particular mention are the many changes in law since PACE – discussed and/or referenced throughout – which may have had an impact on police practices. Other such changes

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<sup>147</sup> Although note Robertson et al’s study where they found that there were no instances of an AA requesting legal advice on behalf of a vulnerable adult suspect – Graham Robertson, Robert Pearson and R Gibb, ‘Police interviewing and the Use of Appropriate Adults’ (1996) 7 (2) *Journal of Forensic Psychiatry* 297 as cited in Pierpoint, ‘A Survey’ (n 117).

<sup>148</sup> Medford, Gudjonsson and Pearse (n 76) 253.

<sup>149</sup> The literature review was an ongoing process.

<sup>150</sup> The decision to address adult suspect vulnerability was later reinforced when in police custody – the rules for adults were seen as discretionary whereas the rules for young suspects were viewed as mandatory – see Chapters 7 and 8, particularly 7.4 and 8.6.

<sup>151</sup> See section 1.3; see specifically Palmer and Hart (n 76). See also section 6.2.



are those to soft law or guidance such as ‘Safer Detention’<sup>152</sup> (now disbanded) and (in its place) the College of Policing Authorised Professional Practice on Detention and Custody.<sup>153</sup> The Codes have also been subject to regular revision (although they have never been ‘substantially overhauled’).<sup>154</sup> Change has also been witnessed in the operation of custody suites, in light of ‘socio-political developments’ such as neo-liberalism which, as Skinns notes, has ‘left an indelible mark on the police custody process’.<sup>155</sup> These developments have resulted in new public management (and efficiency), civilianisation and privatisation, ‘workforce modernisation’ of defence lawyering, and the increased involvement of a number of different practitioners (multi-professionalism).<sup>156</sup> The custody environment is, as Skinns, Wooff and Sprawson note, therefore ‘much improved, in part because of [public finance initiatives] enabling the building of new purpose-built facilities’.<sup>157</sup> Access to rights and entitlements is also much improved and relationships with non-warranted staff are generally positive.<sup>158</sup> Such changes may be seen to have had an impact on provision such as the AA safeguard.

Other external factors, such as the decarceration movement, have also impacted upon police custody. Bean and Nemitz, when conducting their research, noted a change between 1986 and 1995:

In the intervening years, a number of changes have taken place which indirectly affect the workings of the [AA] Scheme not least being the alleged decarceration movement whereby large numbers of psychiatric patients have been discharged from traditional mental hospitals into the community. One obvious outcome of this decarceration is for

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<sup>152</sup> Association of Chief Police Officers, *Safer Detention and Handling of Persons in Police Custody* (2<sup>nd</sup> edn, ACPO and NPJA 2012). (Hereafter ACPO).

<sup>153</sup> College of Policing, *Authorised Professional Practice: Detention and Custody* (College of Policing 2013/15) <<https://www.app.college.police.uk/app-content/detention-and-custody-2/?s=>> accessed 27 April 2016. (Hereafter *APP: Detention and Custody*).

<sup>154</sup> Skinns, *Police Custody* (n 116) 7.

<sup>155</sup> *ibid* 14.

<sup>156</sup> *ibid* 13-16.

<sup>157</sup> Layla Skinns, Andrew Wooff, and Amy Sprawson, ‘Preliminary findings on police custody delivery in the twenty-first century: Is it ‘good’ enough?’ (2017) 27 (4) *Policing and Society* 358, 359.

<sup>158</sup> *ibid* 359.

an increasing number of mentally disordered persons to be prosecuted. Another is that the police have become important agents in the promotion of mental health care.<sup>159</sup>

It was, however, similarly recognised that ‘plus ça change, plus c’est la même chose’ (the more things change, the more they stay the same).<sup>160</sup> As Skinns, Wooff and Sprawson note continuities in police custody exist because of:

the unchanging nature of the police role in society including the enduring necessity of discretion and the permissiveness of the law, as well as the enduring features of police occupational cultures, and the unchanging monopoly that the police have over the legitimate use of force.<sup>161</sup>

Whilst the changes outlined above may have altered the operation of the custody suite in some regards (and perhaps had some bearing on the AA safeguard and vulnerability), it was recognised similar outcomes to previous studies were equally possible due to the noted continuities within the custody suites. This was most certainly something I was prepared to find and the similarities with previous studies (outlined particularly in Chapters 6 and 7) are significant in and of themselves.

This thesis, therefore, sought to ascertain whether identification procedures, and the challenges faced, reflected much of the previous research on identification of vulnerability for the purposes of the AA safeguard or whether there had been changes (i.e. improvements) to identification procedures.<sup>162</sup> However, as will be seen from the Chapter Outline below, identification, rather than being the focal point, is now one chapter within the thesis. This project presently reflects the entire decision-making process from the construction of vulnerability to identification thereof and implementation of the AA safeguard. The greatest shift over the course of this project is that I no longer accept that legal regulation is the answer

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<sup>159</sup> Bean and Nemitz, *Out of depth and out of sight* (n 77) 7.

<sup>160</sup> See, for example, Chapter 6 on identification.

<sup>161</sup> Skinns, Wooff and Sprawson (n 157) 359 (references omitted).

<sup>162</sup> On this point see Chapter 6, particularly sections 6.1, 6.2 and 6.7.

(as I did in the very early stages of the PhD).<sup>163</sup> Indeed, I have recognised the centrality of discretion in police decision-making.<sup>164</sup> As I later outline, vulnerability can have multiple meanings within policing, police custody, and the criminal process, and this may further serve to complicate matters.<sup>165</sup> This thesis explores each element of the decision-making process, it adds new insights into a previously explored problem, and it critically analyses the Code C vulnerability provisions and how these are interpreted by custody officers. Further, it ties definition, identification and decision-making in relation to the AA safeguard to existing theory and adds new micro-theoretical insights into implementation of the AA safeguard. It aims to prompt renewed debate on vulnerability for the purposes of the AA safeguard<sup>166</sup> and the notion of vulnerability within police custody.

As aforementioned, the initial research question was sparked by my interest in miscarriages of justice. It is worth noting, however, that failure to identify vulnerability may not always lead to a wrongful conviction. For example in *Miller*,<sup>167</sup> evidence was excluded after expert evidence was adduced to highlight that the suspect was vulnerable. Yet, identification of vulnerability *in* police custody may have ensured that costly proceedings were avoided and that Miller's case was removed from the criminal process – a process which is, of itself, punitive.<sup>168</sup> Early identification of vulnerability can ensure that justice is delivered (or at least not delayed) and protects the integrity of the individual and the process. Contrariwise, failure to identify vulnerability can be costly, particularly given the use, within the English criminal justice

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<sup>163</sup> In the very early stages, i.e. within the first few months, I felt that any 'gap' between the law in books and the law in action was as a result of faulty legislation or guidance. After the initial literature review stage I realised that any 'gap' was a result of complex and myriad factors that will be discussed in this thesis.

<sup>164</sup> See Chapter 8, section 8.3 generally, and section 8.3.1 specifically.

<sup>165</sup> See Chapters 4 and 5. See also Roxanna Dehaghani, 'He's just not that vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (2016) 55 (4) *Howard Journal of Crime and Justice* 396.

<sup>166</sup> Something which has been largely neglected of late, with the exception of some studies mentioned throughout this thesis. Most notably, over the last 20 or so years, it has attracted little interest from a socio-legal perspective.

<sup>167</sup> Dr Gisli Gudjonsson gave expert testimony on behalf of Stephen Miller – see *R v Paris, Abdullahi and Miller* (1993) 97 Cr App R 99; [1994] Crim LR 361.

<sup>168</sup> Malcolm M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Courts* (Russell Sage 1992).

system, of plea-bargaining<sup>169</sup> and out-of-court disposals such as fines and cautions,<sup>170</sup> which may prevent later discovery of vulnerability at trial. Where the case reaches the courts, the confession (and its admissibility) may remain unchallenged. And those cases that are tried tend to end up in the magistrate's court, which has further implications for admissibility in relation to either way offences: as Sharpe points out, the magistrate's court rarely hears admissibility challenges and thus the admissibility of evidence will really only be a consideration if the defendant elects to the Crown Court or if the magistrates' court declines jurisdiction.<sup>171</sup>

Even where confession evidence is not in dispute or where a prosecution is not pursued, the identification of vulnerability may be important to, in so far as possible, protect the individual from any risk of harm or ill treatment within custody.<sup>172</sup> It also increases the likelihood that the vulnerable suspect can understand and assert his or her rights,<sup>173</sup> particularly where, as in England and Wales, the right to legal advice is triggered by a positive request.<sup>174</sup> The presence of an AA, as discussed above, has a positive impact on the provision of legal representation and the use of interrogative pressure.<sup>175</sup> Timely identification may also alert the police to behavioural or healthcare issues. For example, some vulnerable suspects may exhibit uncooperative behaviour due to issues with capacity, confusion about the process, or simply due to a feeling of suspiciousness or helplessness. This is particularly problematic as being uncooperative leads to police suspicion.<sup>176</sup> Detention in 'custody can exacerbate mental ill health, heighten vulnerability and increase the risk of self-harm and suicide.'<sup>177</sup> Early

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<sup>169</sup> The Sentence Discount Principle – see Criminal Justice Act (CJA 2003) 2003, s 144 (1).

<sup>170</sup> See CJA 2003, s 23.

<sup>171</sup> Sybil Sharpe, *Judicial Discretion and Criminal Investigation* (Sweet and Maxwell 1997) 4-5. See also Magistrates Court Act 1980.

<sup>172</sup> Although the risk assessment (as discussed in Chapter 6) may ensure that risk is identified, even if vulnerability is not. It is worth noting that torture and ill treatment are subjective – see *Ireland v UK* [1978] ECHR 1.

<sup>173</sup> See Chapters 3 and 9, particularly section 3.3. See in particular Frances Rock, *Communicating rights: the language of arrest and detention* (Palgrave Macmillan 2007).

<sup>174</sup> See PACE, s 58 (1).

<sup>175</sup> Medford, Gudjonsson and Pearse (n 67) 253.

<sup>176</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 29.

<sup>177</sup> Bradley (n 113) 7. See also Andrew Sanders, 'Can Coercive Powers be Effectively Controlled or Regulated?' in Ed Cape and Richard Young (eds) *Regulating Policing: the Police and Criminal Evidence Act 1984 – Past, Present and Future* (Hart 2008) 67. On the identification of vulnerability see Chapter 6. It is important to note that vulnerability is viewed as distinct from risk – for a comparative discussion on vulnerability and risk see Chapters 7 and 8, particularly sections 7.4 and 8.6

identification of vulnerability (or risk) is, therefore, essential to minimising harm by ensuring that appropriate care and attention is given. Finally, identification of vulnerability may also be significant in ensuring diversion from the criminal process.<sup>178</sup> The Confait case attests to how vital timely identification of vulnerability (and implementation of the appropriate safeguards) can be.

It is not simply my aim to explore the identification of vulnerability as per the definitions contained within Code C. Rather, I also argue within this thesis that vulnerability could be understood in a much broader manner. Vulnerability may manifest because the suspect is detained on police territory, is subject to police control,<sup>179</sup> and is faced with the potential criminal sanction. Such matters are exacerbated by the operation of the criminal process, i.e. such that errors remain unexposed. The AA safeguard is one way of protecting the suspect. It is, however, fraught with problems. Further, although much of the rhetoric within Code C would suggest that the main purposes of the AA is to safeguard against the provision of erroneous information (and thus suggests that the main role of the AA is to facilitate communication<sup>180</sup>), I will argue that the main function of the AA should be a supportive one. Moreover, the AA as support could be a safeguard extended to all suspects. As I will further argue in Chapter 9, if there are concerns about how a suspect can effectively communicate then perhaps another safeguard should be made available so as to adequately deal with these communicative difficulties.

This thesis is intended to be of interest to those within the academe but also to those within policy-making, policing, and lobbying. Whilst mostly empirical in nature, this work has shifted more towards the theoretical – this should become apparent throughout the thesis. The work can also be seen as a contribution to the literature on suspect's rights, police custody, police discretion, police culture, and, more broadly, police decision-making. It further contributes to debates on what vulnerability means within the context of the criminal justice process and helps

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<sup>178</sup> Crown Prosecution Service, *Diverting offenders with mental health problems and/or learning disabilities within the National Conditional Cautioning Framework* (CPS 2010) <[http://www.cps.gov.uk/legal/d\\_to\\_g/diverting\\_offenders\\_with\\_mental\\_health\\_problems\\_and\\_or\\_learning\\_disabilities\\_within\\_the\\_national/](http://www.cps.gov.uk/legal/d_to_g/diverting_offenders_with_mental_health_problems_and_or_learning_disabilities_within_the_national/)> accessed 19 May 2014.

<sup>179</sup> See Hodgson and McConville (n 4).

<sup>180</sup> As there are undoubtedly issues here.

to theorise how vulnerability is and could be conceptualised. Before outlining the substance of each chapter, I wish to highlight my overall contention – that is, not only is fundamental policy and legal change required, but so too is a different way of policing and of doing justice.<sup>181</sup>

## 1.5 Chapter outline

This thesis is comprised of three main parts addressing ‘Constructing Vulnerability’ (Part 1), ‘Identifying Vulnerability and Implementing the Appropriate Adult Safeguard’ (Part 2), and ‘Comprehending the Custody Officer Approach and Conclusions’ (Part 3). There are a total of nine chapters (including this and the concluding chapter).

Chapter 2 – ‘Methods and methodology: the birth and life of the research project’ – examines the research questions, methods, and methodology, and explicitly recognises the ontological and epistemological foundations of this research. As will become evident throughout this chapter, the research project was ever-evolving and was shaped by many factors such as access to the research sites (and the research sites chosen), the methods employed, the questions asked (and also the way they were asked) and, perhaps most fundamentally, (in light of adopting a constructivist methodology), my identity. This chapter also sets the scene for many of the subsequent chapters, particularly the empirical chapters (Chapters 5-7) and the theoretical chapters (Chapters 8 and 9), and enables these chapters to be read in context. Whilst it is recognised that it is impossible to capture the entire experience of conducting empirical research, by examining and exploring the process as it evolved, it is hoped that the reader can gain a fuller sense of the research sites and the research project.

Part 1 – ‘Constructing vulnerability’ – is the largest of the three and is comprised of three chapters, each dealing with how vulnerability is defined. The purpose of these three chapters, taken together, is to illustrate how a ‘catch-all’<sup>182</sup> notion can be restricted in legislation and, thereafter, restricted through police interpretation. A further aim is to prompt reconsideration of vulnerability, something to which I will return in Chapter 9.

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<sup>181</sup> This should become clear within Chapter 9.

<sup>182</sup> Barbara Misztal, *The Challenges of Vulnerability: In Search of Strategies for a Less Vulnerable Social Life* (Palgrave Macmillan 2011) 5.

The first chapter of Part 1 – ‘Constructing vulnerability: the concept’ (Chapter 3) – focuses on the broader question of vulnerability as a theoretical concept, drawing upon a diverse range of disciplines (feminist theory, sociology, ethics, philosophy and psychology). The diversity of the literature is particularly salient in understanding the contours of vulnerability. Within this chapter, the tensions within the literature are recognised and, particularly drawing upon Brown’s work,<sup>183</sup> the plurality of meaning is examined. Also of import is how vulnerability is understood within the psychological literature as this has largely shaped the understandings of vulnerability within Code C. These different renderings of vulnerability are significant when examining, in Chapters 4 and 5, how vulnerability is constructed within the law (and in particular by Code C) and how vulnerability is understood by custody officers. Chapter 3 also provides the theoretical basis through which to reconceptualise vulnerability (something that I will return to in Chapter 9).

Leading on from this broader, theoretical exploration of vulnerability, comes a predominantly doctrinal analysis of how vulnerability appears within PACE and Code C and how it is understood by the courts (Chapter 4). The first point of reference is how vulnerability is, or rather is not, detailed within PACE. Such an absence is significant and is later drawn upon in Chapter 8. Thereafter comes an exploration of how vulnerability is contained within Code C. Here the definitions ‘mentally vulnerable’ and ‘mentally disordered’ are explained; attention is also drawn to the inclusion of other terms such as ‘mentally incapable’. Given the relative dearth of definition contained within Code C, an analysis of supplementary guidance is provided. The chapter then turns to an examination of how the courts have interpreted (or, again, failed to interpret) vulnerability. Whilst it is accepted that the courts are not necessarily required to debate the definition of vulnerability (as their focus is on deciding whether the evidence meets the requirements of ss 76, 77 or 78 PACE), various themes do indeed arise with regard to how they construct vulnerability. These themes are later drawn out in Chapter 8, as is an examination of how the law constructs (or fails to construct) vulnerability and how the courts actions (or inactions) may be seen to contribute to how custody officers implement (or rather do not implement) the AA safeguard. The doctrinal analysis also provides, in

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<sup>183</sup> Kate Brown, *Vulnerability and Young People: care and social control in policy and practice* (Policy Press 2015).

combination with the other chapters, a fertile examination of how the definitions within PACE and Code C could be improved or reconceptualised (see, in particular, Chapter 9).

After this predominantly doctrinal discussion comes the first of the empirical chapters and the final chapter of Part 1 (Chapter 5). This chapter – ‘Constructing vulnerability: the custody officers’ – examines, in detail, how custody officers construct vulnerability. The empirical data is not restricted to an examination of the terms ‘mental vulnerability’ and ‘mental disorder’ but also unpacks how vulnerability, in its broadest sense, is understood by custody officers. This conceptualisation provides the basis for one of the arguments in Chapter 9: that vulnerability can, and should be, more broadly defined. Within this chapter, it is argued that custody officers are unable to define the terms contained within Code C (although they do have some understanding of how these terms are constructed) and instead rely on their own interpretations of the Code and of the suspect (this latter contention is further examined in Chapter 6). It is argued in this chapter that custody officers, whilst recognising the vulnerability of most, if not all suspects or detainees, restrict their focus to that of capacity and comprehension when constructing vulnerability for the purposes of the AA safeguard. It is further argued that this is different from ‘Code C vulnerability’ whereby a suspect must not understand the significance of what is said, of question or of replies, or have a mental disorder. It is thus recognised that whilst they do not comply with Code C, custody officers nevertheless know what they are looking for when deciding whether a suspect is vulnerable. To further explicate how custody officers conceptualise vulnerability in relation to the AA safeguard, this chapter also provides an in-depth analysis of how the AA safeguard is constructed by custody officers. The synergies between the ‘AA vulnerable’ suspect and the AA safeguard are evident. Also illustrated in this chapter is the conceptual congruence of vulnerability and risk (and, relatedly, the significance of risk within police custody – as examined further in Chapters 7 and 8).

In Part 2, ‘Identifying vulnerability and Implementing the AA safeguard’, the remainder of the decision-making process(es) is explored – that is, how custody officers identify vulnerability (Chapter 6) and why they decide to implement (or not) the AA safeguard (Chapter 7).

Chapter 6 – ‘Identifying vulnerability in police custody’ – examines how vulnerability was identified (i.e. by reference to previous studies), how vulnerability is identified by custody



officers (i.e. what was said and what was observed), and how vulnerability could be identified (drawing largely upon my experiences of observation). The vast ranges of sources available to the custody officer are discussed: some are used to identify vulnerability and others could be used to identify vulnerability. Undoubtedly, there are challenges with the means of identification; however, it is argued that perhaps the most significant of these challenges is the custody officer himself and his (over)reliance on his own abilities to identify vulnerability. Through the examination of the empirical data, the similarities and differences with earlier studies are evidenced. This chapter illustrates that whilst it is hoped that developments such as the increased presence of HCPs and AMHPs would lead to increased identification of vulnerability, this is not necessarily so. This, it is argued, is because HCPs and AMHPs, whilst sometimes assisting with the decision of whether to obtain an AA, lack expertise in relation to vulnerability and, more importantly, the legal requirements of Code C. Further, the increased availability of information and the improved risk assessment has ostensibly had little impact on the identification of vulnerability. It is argued that this is because custody officers largely disregard the information provided by the suspect and prefer to rely on their own observations of the suspect. These contentions are further discussed in Chapter 8.

Once vulnerability has been identified, the decision remains of whether or not to implement the AA safeguard. Chapter 7 – ‘Implementing the AA Safeguard’ – explores the reasons, both persuasive and dissuasive, for implementing the AA safeguard, drawing upon previous research and the empirical data gathered. In addition to examining why the AA safeguard may or may not be implemented for an ‘AA vulnerable’ suspect, this chapter also examines why, similarly, the AA safeguard may be implemented for a suspect who is not recognised as vulnerable by the custody officer. After examining these factors (which are particularly important when explaining the custody officer approach in Chapter 8), a comparative analysis of young and adult suspects and vulnerability and risk is provided. These two comparisons help contextualise the custody officer decision-making process and are significant when reaching Part 3. More specifically, the ‘ass-covering’ approach of the custody officer begins to manifest more explicitly in this chapter. This is further examined in Chapter 8.

In Part 3 – ‘Comprehending the custody officer approach and Conclusions’ – I draw upon earlier two chapters (specifically 3-7) to examine why the police make their decisions (Chapter

8) and to explore the grounded theory, offer conclusions and make recommendations (Chapter 9).

Chapter 8 – ‘Comprehending the custody officer approach’ – is where the theorising of custody officer decision-making begins. After providing a review of the relevant theoretical literature (specifically, crime control and due process, the bureaucratic model, and legalist-bureaucratic, culturalist, and structuralist theories), I examine how far these theories can explain the custody officer approach to vulnerability and the AA safeguard, drawing upon Chapters 4-7. After the examination of the empirical data through these theoretical lenses, I argue that these theoretical insights, particularly in isolation, explain only part of the custody officer decision-making process and urge that these theories be considered in tandem (whilst recognising that the culturalist and structuralist theories hold the most explanatory force). In addition to examining the approach to adult vulnerability, I also explore these theories in relation to young suspect vulnerability and risk. Of particular note here is how the custody officer preoccupation with risk renders vulnerability of little import.

The insights from Chapter 8 are built-upon further in Chapter 9 – ‘Concluding Remarks and Recommendations’ – where I offer the grounded theory of custody officer decision-making in relation to vulnerability and the AA safeguard. The custody officer approach of ‘covering your ass’ explains why custody officers are so obsessed with identifying and managing risk and why, despite disputing the vulnerability of many young suspects, they are nevertheless willing to implement the safeguard. It is further argued that there is a hierarchy of ‘ass-covering’ whereby custody officers prefer to minimise personal risk and then minimise professional risk, taking a path of least resistance. The approach to risk and young suspect vulnerability, when compared with adult vulnerability, is reflected through these arguments. A number of recommendations are made on the basis of these arguments: whilst some of these are recognised as unworkable, one has the potential for transforming vulnerability in police custody – that is, drawing upon Chapter 3, a complete reconceptualisation of vulnerability and the AA safeguard. This would remove discretion, more accurately reflect what it means to be vulnerable, and may more appropriately safeguard the vulnerable suspect. Finally, and mapping onto this reconceptualisation of vulnerability, a reconceptualisation of the AA safeguard is offered.

## **CHAPTER 2: METHODS AND METHODOLOGY - THE BIRTH AND LIFE OF THE RESEARCH PROJECT**

### **2.1 Introducing the research project**

This research project (and indeed any research project) and vulnerability share similar characteristics – both can mean different things to different people, both are often ill-defined (at least at the outset), both can evolve and be altered, and both are full of uncertainties. The intention of this chapter is not to present the research project as something imbued with clinical precision, for it never was such a project. Rather, the aim is to illustrate that whilst planning and forethought were required, so too was flexibility and reflexivity. In life, as in research, obstacles emerge, opportunities arise, and decisions must be made.<sup>184</sup> Although certain aspects of the project changed (as will be explored below), the aim (to assess how safeguards for vulnerable suspects operated within police custody) and the methods (observations and semi-structured interviews) remained largely consistent throughout. The research questions were, however, subject to revision, particularly in the early stages of the research. This chapter will, therefore, discuss the evolution of the research questions before exploring the process such as gaining access, obtaining ethics approval, and negotiating informal access. As I have adopted a grounded theory approach to the research, I will explore my methods, methodology, the ‘type’ of grounded theory used, and the process I have followed.

### **2.2 Questions of research and methods**

The project began life as a comparative study seeking to ascertain how vulnerability was identified and how the vulnerable were safeguarded within two jurisdictions with different characteristics – the Netherlands and England (and Wales). The comparative approach was considered for two main reasons: firstly, it was considered in light of the harmonization of

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<sup>184</sup> Even as this is written, the research is by no means a fully-grown adult. Just a person matures and grows even after he or she turns 18, so too will this research project continue to develop; just as an individual can remain vulnerable through his or her life-course, so too is this research vulnerable. In this sense, the PhD submission is neither the end nor the death of a project – instead it is the entry into adulthood with many uncertain future events still to come.

criminal procedure within the European Union,<sup>185</sup> and secondly, it was considered with the aim of furthering the understanding of vulnerability within the English (and Welsh) criminal justice system. The aim of the comparative approach was not to consider which system was ‘better’ but instead simply to learn more about each system and explore their similarities and differences.<sup>186</sup> These similarities and differences would then be set in context.<sup>187</sup> The comparative approach would have involved contrasting vulnerability within each jurisdiction, with reference to both the law in books and the law in action. These would then be situated within the wider theoretical framework of the battle model<sup>188</sup> and the family model.<sup>189</sup> It was intended that vulnerability would be situated within the battle model/family model comparison. The notion of vulnerability would also then be considered in the context of the criminal justice system, including a consideration of the legal system and legal culture.<sup>190</sup> The Netherlands and England were chosen as they were purported to subscribe to the ‘family model’ and the ‘battle’ model respectively. The two jurisdictions were also chosen because of how they were positioned within the adversarial/inquisitorial spectrum:<sup>191</sup> the Netherlands, according to van Koppen, is the most inquisitorial of all the European systems,<sup>192</sup> and England is the most adversarial. The decision to study these two jurisdictions was further supported by my ability to speak both English and Dutch fluently and my experiences of living and working in the Netherlands. Whilst these are essential, my comparative study would not be free from challenges. I was (and am) undoubtedly more socialised within the English system/culture and less so in the Dutch system/culture.<sup>193</sup> Further, as Nelken highlights, ‘bilingualism and the

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<sup>185</sup> Chrisje Brants, ‘Comparing Criminal Process as Part of Legal Culture’ in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Taylor and Francis 2011) 54. Although this would no longer be a valid justification or motivation post-Brexit.

<sup>186</sup> David Nelken, *Comparative Criminal Justice: Making Sense of Difference* (Sage 2010), 18-24; See also Nelken, *Making Sense of Difference* (n 191) 31-5; Brants (n 185) 51.

<sup>187</sup> Nelken, *Making Sense of Difference* (n 186) 35. See also Brants (n 185) 55-6.

<sup>188</sup> Herbert L Packer, *The Limits of Criminal Sanction* (Stanford UP and Oxford UP 1968).

<sup>189</sup> John Griffiths, ‘Ideology in Criminal Procedure or A Third "Model" of the Criminal Process’ (1970) 79 *Yale Law Journal* 359.

<sup>190</sup> See Brants (n 190) 53 for a discussion of legal system and legal culture.

<sup>191</sup> Although perhaps these distinctions are not necessarily helpful and merely serve to oversimplify: see Brants (n 185) 50.

<sup>192</sup> Peter van Koppen, ‘Miscarriages of justice in inquisitorial and accusatorial legal systems’ (2007) 7 *Journal of the Institute for Justice and International Studies* 50, 52. Although it is worth noting that Pakes has argued that France is the archetypical inquisitorial system – Francis Pakes, *Comparative Criminal Justice* (2<sup>nd</sup> edn, Willan 2010) 16.

<sup>193</sup> See Brants (n 185) 52.

experience of living and working in two different countries is sometimes still not enough to surmount the barrier of primary (legal and cultural) socialisation'.<sup>194</sup> Another challenge is that of language: some terms lose their meaning when translated (i.e. are lost in translation).<sup>195</sup> Thus, not only must one contend with macro-level differences<sup>196</sup> between jurisdictions, micro-level difficulties could also arise. For example, there were differences between the two jurisdictions within how 'vulnerability' was defined in the law in books: in the Netherlands, the concept '*kwetsbaarheid*' seemed narrower than the 'vulnerability' as it included only learning disability (*verstandelijke beperking*) and mental disorder (*geestelijke verstoring*). This is not to say, however, that the law in action would be any different between the two jurisdictions.

Whilst substantial progress was made on the initial three chapters (addressing the comparative criminal justice theory, comparative criminal justice systems, and comparative assessment of vulnerability in the law in books), practical difficulties soon halted the project. Access had been granted in England but was still to be granted in the Netherlands. Despite spending hours each day calling various agencies and sending countless emails, access had still not been granted by November 2014.<sup>197</sup> This, it seemed, was a blessing in disguise because, after less than three weeks in the field, my interests (and research questions) shifted. After a few days in the field I realised that not every suspect who was, in my estimation, vulnerable was being provided with an AA, and more importantly, I realised that this was not wholly due to difficulties in identification (see sections 6.2 and 6.5) but instead was, at least in part, because of how custody officers framed vulnerability (see Chapter 5, and in particular sections 5.3 and 5.4) and what factors guided their decision-making (see Chapter 7, and in particular sections 7. And 7.). My interest then shifted to how vulnerability was defined and why decisions were made in a

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<sup>194</sup> David Nelken, 'Virtually there, researching there, living there' in David Nelken (ed) *Contrasting Criminal Justice: Getting from here to there* (Dartmouth 2000) 23-46 as cited in Brants (n 185) 57.

<sup>195</sup> Nelken cites the example of the Dutch term 'gedogen': whilst it can be loosely translated as tolerance, this word does not quite capture the essence of what 'gedogen' means to the Dutch – Nelken, *Making Sense of Difference* (n 186) 68-9. See also Brants (n 190) 54 and 59. Herein lies the challenge of cultural relativism.

<sup>196</sup> See for example Packer (n 188); Griffiths (n 189).

<sup>197</sup> Access was eventually granted in June 2015. It transpired that the delay was, in part, due to a re-structuring of the Dutch police force.

particular way. Because I was now exploring very intricate nuances of definition, I decided that I would be best to address one jurisdiction only.

The overarching question within this thesis is – what influences the implementation of the AA safeguard? The main research questions, leading on from Chapter 1 are:

- How is vulnerability defined within the literature, within the law (to include the courts), and by custody officers?
- How is vulnerability identified and how can it be identified?
- What factors are taken into account when the AA safeguard is being implemented?
- How can definition, identification and implementation be explained?

These questions have been answered through empirical inquiry in combination with doctrinal elements. The approach taken is socio-legal in nature, drawing upon literature from a diverse range of disciplines, and is restricted mainly restricted to vulnerability within the context of police custody. Whilst conducting literature reviews at various stages during this project, it is worth noting that the process has not been linear – in fact, much of Chapters 4 and 7 were not written until during and after the fieldwork had been completed. Moreover, the learning curve was steep and slippery at my time at Site 1 – I had to get accustomed to custody and the research process. Yet, towards the end, and certainly during my time at Site 2, I had a clear idea of the research questions, at least those required for the empirical element of my research.<sup>198</sup>

Before I started the empirical research, I considered various methods for answering the question of how the safeguards were implemented.<sup>199</sup> These included: (1) observation of police

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<sup>198</sup> As will be discussed later, the process was iterative and some aspects ‘appeared’ or were ‘discovered’. This required that I reflected upon and reanalysed the earlier data. Moreover, aspects discovered after analysis of the interview transcripts required that I return to Site 1 for some follow-up interviews. This will be discussed in greater detail later.

<sup>199</sup> Within the following section the terminology used is specific to England. For the Netherlands the methods were to be largely similar, with a few exceptions – the custody suite is not the same across the two jurisdictions and the role of custody officer does not exist in the Netherlands. Also, given that Dutch is my second language, I may have had to video-record the booking-in procedure as I was likely to miss out on social cues between the police officer

officers when they were identifying vulnerability; (2) interviews with custody officers to ask how they identified vulnerability; (3) interviews with ‘informants’;<sup>200</sup> (4) custody officer focus group discussions; (5) analysis of custody records; and (6) surveys. Options (4), (5) and (6) were dismissed from the outset – (4) because custody officers may have been unwilling to ‘open-up’ around colleagues (thereby diminishing the richness of the data), (5) because custody records could contain ‘gaps’ i.e. differences between what was and what should have been recorded,<sup>201</sup> and (6) because I would be resigned to accepting answers at face value and unable to explore different lines of inquiry. During the research it transpired that my concerns were well-founded – there were indeed ‘gaps’ in the custody record and, whilst in hindsight custody officers were seemingly candid during interview, practical difficulties may have prevented me from successfully holding focus group interviews. For example, although custody officers were in ‘teams’ (of between two and six at each site), there were still variations in shift patterns, making it difficult to gather each team member together at any one time. Further, given that custody is a 24 hour per day, 7 days per week operation, it would have been difficult to take every officer away from their duties during their shifts. Although this could have been remedied by holding focus groups outside of working hours, custody officers were, understandably, only willing to participate in research during working hours. Whilst I did not rule-out option (3), I was predominantly interested in how *custody officers* identified vulnerability (as they were responsible for implementing the safeguard). Moreover, I felt that the use of informants could be gleaned through interviews and discussions with custody officers and, therefore, there was little need to interview ‘informants’. I was also able to observe the input of ‘informants’ during my 6 months in custody.

It may have been useful to include HCPs, FMEs, and/or AMHPs in the interview sample, given their increasing presence in the custody suite. It may also have been useful to interview suspect

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and the suspect, where the suspect and police did not speak English with each other. This may have raised practical and ethical implications.

<sup>200</sup> See Palmer and Hart (n 76). Whilst custody officers are responsible for implementing the AA safeguard (see Code C, para 3.5 (c) (ii)), others such as medical professionals, solicitors, the suspect’s family and friends, and police officers can also aid identification (see sections 6.4.3 and 6.4.4).

<sup>201</sup> Andrew Sanders, Lee Bridges, Adele Mulvaney and Gary Crozier, *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (Lord Chancellor's Department 1989).

and detainees on their experiences of detention, how they understood vulnerability, and whether they felt vulnerable. Similarly, it may have been useful to interview AAs and detention officers on their approach to vulnerability. This is something I will consider for future research and it is recognised that may be viewed as a limitation of this research and may be seen to limit the reach of the thesis. As a lone researcher, I had concerns about spreading myself too thinly and only skimming the surface. The decision to focus on custody officers was reaffirmed when I became interested in how they define vulnerability and why they make particular decisions. Thus, whilst these limitations are recognised, the restriction has proved beneficial in allowing me to provide an in-depth and nuanced account of how *custody* officers, as those ultimately responsible for implementing the AA safeguard, define, identify, and make decisions on vulnerability.

### 2.3 Access and participation

As aforementioned, I experienced difficulties gaining access to the Dutch police despite commencing correspondence in June 2014 (with the aim of commencing observations in April 2015). In stark contrast, access at Site 1 in England was negotiated within a matter of weeks – contact was initially made with the Assistant Chief Constable through a former colleague of a family member<sup>202</sup> and after providing an overview of my plans via email, access was formally granted. This was not, however, a *carte blanche* – I still had to obtain consent from each custody officer. The shift patterns at Site 1 did not allow time for a de-brief and, although an email was sent to the custody officers explaining the research, this was seemingly ignored. Nevertheless, I had the opportunity to meet custody officers and to negotiate access with each individual through a one-to-one chat.<sup>203</sup> This helped to build rapport and provided a dialogue through which custody officers could ask questions.<sup>204</sup> Although I was shown around the entire suite on the first day, I spent most, if not all, of my (close to) three months at the booking-in desk. Each day I reported to reception where, with the exception of a handful of days, access was granted with little or no explanation required.

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<sup>202</sup> This is uncommon but not unusual.

<sup>203</sup> I gained consent from around 10 officers on the first day and then from another 10 later in the first week.

<sup>204</sup> As Loftus has noted, being female means that one is perhaps viewed as unthreatening and trustworthy – see Bethan Loftus, *Police Culture in a Changing World* (OUP 2009) 204.



Access to a second site was sought in January 2015. The decision to conduct the fieldwork at a second site was taken partly so as to increase the representativeness of the data. As I will discuss in the following section, there were some similarities and differences between the two sites and it was these differences that had the potential to impact upon the implementation of the AA safeguard. I also recognized that police culture (something I explore in Chapter 8)<sup>205</sup> can differ between rank, role or shift,<sup>206</sup> but also between different police custody areas. As Skinns notes, ‘it may be that staff in police custody areas interpret and put these core characteristics into practice in ways which are shaped by the pressures of the custody environment and this, in turns, affects how they implement the law therein’.<sup>207</sup> Thus, it was felt that factors such as, inter alia, the size of the custody suite, and therefore the number of staff working within it, would have had some bearing on how vulnerability was negotiated. Although cultural differences could undoubtedly be observed between suites within the same force, it was felt that the differences were potentially greater between forces. Moreover, as many of the custody officers from Site 1 also worked at the smaller suites in the force area (and many of the custody officers from the smaller suites worked, albeit less frequently, at Site 1) it is possible that there may have been some merging of cultural attributes or perhaps the same cultural characteristics within the smaller suites. The decision was also taken partly out of practicality (so as to increase the number of participants). This could not have been done through the inclusion of a second smaller suite within the same force because, as discussed above, there was an overlap in officer provision between each of the suites. Access to a second site was sought through a Chief Inspector at Force 1 and through email contact with other police forces. The latter avenue proved successful, although in a round-about manner – I visited a potential site in mid-January but found the site to be unsuitable for practical reasons,<sup>208</sup>

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<sup>205</sup> These are characteristics such as a sense of mission, cynicism, suspicion, isolation, solidarity, pragmatism, machismo, prejudice and conservatism –Reiner (n 18) 119-32.

<sup>206</sup> As Reiner notes, police culture is ‘neither monolithic, universal nor unchanging’ and can ‘vary between different places and periods’ – Reiner (n 18) 117-18. Loftus, in her study, found cultural differences, albeit subtle, within the same police force – Loftus (n 204) 125.

<sup>207</sup> Skinns, *Police Custody* (n 116) 27-8.

<sup>208</sup> This site was excluded on the basis that I was unable to arrange transport. The custody suite (a purpose-built site) was located away from public transport links and as I do not have access to my own transport I decided that this was not feasible. These difficulties with access would have also limited the observation hours: I would have been unable to observe across a range of

however, the Chief Inspector of this site facilitated access at another site (Site 2). Whilst at first appearing problem-free, I later encountered some difficulties regarding access at Site 2 – one week prior to the proposed start-date, the Inspector requested that I undergo the vetting process.<sup>209</sup> I managed to negotiate ‘restricted’ access in the interim<sup>210</sup> – I would be permitted on site without vetting provided I was ‘assigned’ to a custody officer each day (as a short-term measure) until the staff became familiar with me. As with Site 1, formal access did not equate to informal access – the research had to be discussed with each individual officer. Again, a circular email was sent to all custody officers, although only one officer read the email. In contrast with Site 1, the reception area was unmanned, however, a call through to the custody suite was all that was required to gain access.

## 2.4 An account of the sites

Site 1 and Site 2 were both city-based custody suites – Site 1 was located in the heart of the city whereas Site 2 was situated about two miles from the city centre. The sites were significantly different in terms of size. Site 1 was over twice the size of Site 2 – the latter had approximately 40 cells whereas the former had approximately 80 fully operational cells, with an overflow capacity of around 20 additional cells. It was only infrequently that such overflow was needed: custody officers noted that these additional cells were only really required during the Christmas period (and even then, not every Christmas). Site 2 was a purpose-built custody suite whereas Site 1 had been developed into a custody suite in the 1980s. Part of the decision to observe and interview at Site 2 was taken on the basis of its smaller capacity, as I thought that here custody officers would perhaps encounter different problems.

Given the size of the suites, both sites encountered different numbers of detainees per annum and per day. The force within which Site 1 was based had approximately 35,000 through its doors per annum (although custody officers claimed that this number was much higher, i.e.

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shifts (for example, nightshift, late evening or very early morning would have been out of the question).

<sup>209</sup> In fact, due to my numerous addresses as a student (to include those in Northern Ireland, the Netherlands, Hungary, and England) vetting took some time and was not granted until May 2015.

<sup>210</sup> I met the Inspector prior to the start-date and was shown around the suite. As with Site 1, I would spend all of my time at the booking-in desk.

around 50,000 per annum) whereas the force within which Site 2 was based saw approximately 20,000 detainees per annum (again, custody officers claimed that this number was much higher, i.e. around 25,000 per annum). For the individual sites, it was thought that there were around 40-50 detainees per day (equating to 15-18,000 detainees per annum) at Site 1 and 10-30 detainees per day (equating to 4-10,000 detainees per annum) at Site 2. Even though custody officers at Site 1 would lament about how busy it was, they also seemed to take great pride in being ‘one of the largest custody suites in the country’.<sup>211</sup> Whilst the overall numbers of detainees was much higher at Site 1, it worked out at roughly the same for each custody officer, i.e. approximately 5-10 detainees per custody officer each day. At Site 2 arresting officers were encouraged to check the Police National Computer (PNC) prior to their ‘prisoner’ being booked-in and custody officers seemed to have ample opportunity to check PNC and custody records before the suspect/detainee was brought to the desk.<sup>212</sup> At Site 1, by contrast, arresting officers were not encouraged to check PNC prior to bringing their ‘prisoner’ to the booking-in desk and these checks were seemingly either not conducted by custody officers when the ‘prisoner’ was being booked-in or were hurriedly done.

In terms of legal advice and representation, Site 1 had a duty solicitor scheme (which did not seem to be successful as solicitors were often overheard complaining about the lack of clients) whereas no such scheme was available at Site 2. Both sites had ‘in-house’ embedded HCPs<sup>213</sup> and on-call FMEs. At both sites these were employed by a private firm. HCPs were available 24/7 at these two sites (although officers did comment on how, at the smaller suites within the force, HCPs were ‘shared’ between the small suites). The HCPs were responsible for safeguarding the welfare of detainees (to include assessing fitness for interview), prescribing and administering medication, and examining injuries.<sup>214</sup> AMHPs were based 24/7 at the Site 2; this provision was only adopted at Site 1 after I had left (although I did have an opportunity

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<sup>211</sup> As Choongh notes, custody officers prided themselves on the busyness of the custody suite – see Choongh, *Policing as Social Discipline* (n 29) 70. The custody officers in this study were no different.

<sup>212</sup> Due to the layout – see above.

<sup>213</sup> The prior experience of HCPs was varied: some had worked as nurses previously whereas others were paramedics. The experience of nurses was also widely varied: some had worked in general nursing, accident and emergency nursing, or mental health nursing. One had worked as an army nurse, in addition to other types of nursing.

<sup>214</sup> See also section 1.3 for a discussion of the duties of HCPs and FMEs.

to discuss this in brief upon my return).<sup>215</sup> AMHPs were responsible for making decisions in relation to the MHA 1983 (and not necessarily required to weigh-in on the implementation of the AA safeguard).<sup>216</sup> At Site 2 they also seemed to assist with decisions regarding detainee welfare more generally (thus overlapping somewhat with the role of the HCP) but by contrast, and to the annoyance and frustration of the custody officers, the AMHPs, particularly at Site 1, refused to advise on aspects outside of the role, i.e. anything beyond the MHA 1983, such as the AA safeguard.

In both forces, AAs for vulnerable adults were provided by a private company. Thus, with the exception of family and friends, AAs were professionals. However, (rather confusingly) many officers at each site often referred to the AAs as ‘volunteers’. The scheme for adults operated, at both sites, 24 hours a day, seven days a week. However, at both sites, it was recognised that it was quite difficult to secure an AA after 5pm and extremely difficult after 8pm and before 9am. Indeed, some custody officers seemed to think that the provision was unavailable after 5pm.<sup>217</sup>

In reflection of its larger size, Site 1 had around four or five custody officers on each shift. These custody officers were then assisted by between 10 and 15 detention officers per shift. Site 2 had smaller staffing numbers: there were typically between one and three custody officers on each shift, accompanied by usually two to four detention officers. Detention officers at both sites were employed by the police but were not police officers (although this was set to change as, at both sites, detention officers were soon to move to private contracts).<sup>218</sup> By virtue of their position as police staff, they could take fingerprints, photographs, footwear impressions, conduct intimate and non-intimate searches, and conduct searches so as to ascertain identity.<sup>219</sup> In addition to these duties, whilst custody officers were responsible for booking the detainee in, detention officers at both sites assisted with this procedure (typically limited to measuring the detainee, physically searching the detainee and their property, and

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<sup>215</sup> See section 2.6.

<sup>216</sup> See n 133.

<sup>217</sup> I recognise that a site with limited (or no) AA provision may have resulted in different findings. Similarly, sites with limited to no healthcare provision may have also resulted in different findings.

<sup>218</sup> See Skinns, *Police Custody* (n 116) 15 for a discussion of civilianisation and privatisation in custody suites.

<sup>219</sup> See Police Reform Act 2002. See also Skinns, *Police Custody* (n 116).

assisting with the recording of information). At both sites, detention officers were mainly responsible for detainee welfare, ensuring that detainees were fed and provided with adequate hydration; visiting the cells and checking up on the detainee as per the principles of 'Safer Detention';<sup>220</sup> monitoring the screens of the 'CCTV cells', the intercom, and the buzzer; removing the detainee from his or her cell and taking him or her back from interview; and handing the detainee over to court personnel. Although detention officers were also responsible for close-proximity observation at both sites, given relatively low staffing numbers, this was often left to a 'beat' police officer. Detention officers at both sites worked within the same team of custody officers (although at Site 2 there seemed to be a less clear divide between teams) and tended to do the same task all day, with the exception of one team at Site 1 who refused to do so and were instead on two-hourly task rotations. This caused great annoyance to the custody officers with which they worked. One custody (CO17-1) felt that this undermined the management of risk as *'if they go and check somebody at nine o'clock and then go check them again at eleven, they can personally see if the person's got any worse or deteriorated in any way. So if they pass it onto somebody else, somebody's opinion of how they are may differ'*.<sup>221</sup> CO17-1 felt that this problem was caused, in part, by the fact that detention officers in Site 1 were civilians and not police officers and could therefore not be told exactly what to do. He also felt that the situation would worsen after the private company took over, stating that there would be *'some shuddering changes'*.<sup>222</sup> As Skinns highlights, accountability may become an issue when civilians and/or private companies are introduced to police custody.<sup>223</sup>

The Inspector arrangements also differed between sites. At Site 1, the four core teams were overseen by one Inspector each, i.e. there were four Custody Inspectors in total. At Site 2, by contrast, there were no distinct 'teams', there was one Custody Inspector (who worked 8am-5pm and was therefore working, at some point, with each team) assisted by a Custody Manager (who also only worked during the day) and a team of Inspectors who would frequently visit the custody suite between the hours of 5pm and 8am. The shift patterns of the custody officers also differed: at Site 1 custody officers and detention officers worked 7am-7pm or 7pm-7am,

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<sup>220</sup> See College of Policing, *APP: Detention and Custody* (n 158).

<sup>221</sup> CO17-1 Interview.

<sup>222</sup> CO17-1 Interview.

<sup>223</sup> Skinns, *Police Custody* (n 116) 152-3. See Skinns, *Police Custody* (n 116) 157-8 for a discussion of the advantages and pitfalls of privatisation and civilianisation.

whereas at Site 2 custody officers and detention officers worked a shift of 8-10 hours across a 24-hour period and therefore seemed to have some flexibility with regard to their start and finish times. Provided there was enough time for ‘handover’ (which would typically take 15-30 minutes), custody officers and detention officers could come in later than their shift start time and go home earlier than their shift end time. ‘Handovers’ at Site 1 seemed much more rushed because of the shift periods (7am-7pm or 7pm-7am): although handovers only took 15-20 minutes, staff were required to stay slightly later or come in slightly earlier than the beginning of their shift.

Site 1 always seemed to be busy: here police officers did not have to ‘buzz’ through as they purportedly were required to do at the other suites in the force area. This meant that custody officers, in their own words, were unable to ‘*stem the flow*’ and often meant that the suite was rarely quiet. This issue was compounded by the fact that the holding cells were positioned directly opposite the booking-in desk. Custody officers therefore seemed to be under constant pressure to deal with the queues and had to do so in a very noisy environment. It also meant that there were constantly people milling-around in-front of and behind the desk. The design problems in Site 1 did not end there: the samples rooms and the CCTV monitor room were located away from the booking-in desk and there were different wings of cells in different directions. Muffled sound and loud bangs also seemed to travel from the cells to the booking-in desk. By contrast, police officers had to be ‘buzzed in’ at Site 2 and the holding cells were located on two wings off the side to the booking-in desk. This meant that the suite had, at the very least, the appearance of being less busy (as the queues were not visible). It also meant that the noise was contained away from the booking-in desk and custody officers were not afraid to ask people to be quiet. Indeed, on one of my first days observing, CO24-2 asked everyone to keep the noise down. Such a request would not have been possible at Site 1. It appeared that the lower noise levels at Site 2 seemed to make the provision of rights information<sup>224</sup> much easier. Conversations were also much easier to conduct at Site 2 than at Site 1: in the latter, we would frequently be interrupted or drowned-out by the background noise. Because the queues were not so much of an issue at Site 2 as at Site 1, the booking-in process seemed to be more leisurely (although it did not seem to take markedly more time). The samples room was located opposite the booking-in desk and the cells were contained in two corridors (one on each side

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<sup>224</sup> See section 1.3.

of the booking-in desk). The CCTV monitors were located in a 'pod' between the booking-in desks and, from here, detention officers could take and make calls and answer the buzzer and intercom. In terms of the detainees' welfare, however, the pre-release assessment was much more detailed at Site 1 than at Site 2: at the former there was an entire form to fill out with seemingly as many questions as the booking-in risk assessment, whereas at the latter detainees were simply asked 'how are you feeling right now? Do you need to speak to the nurse before you leave?' The more detailed approach was seemingly in response to a post-release detainee death at Site 1.<sup>225</sup> My first ever exposure to custody was on Day 1 at Site 1 and, although initially unsettled by the hostile smell and gloomy appearance, the overall experience was positive (although the same could not be said for a suspect or detainee).

I decided to observe at varying times of the day, typically for between 6 and 12 hours at a time. This involved early morning to mid-late afternoon, mid-morning to mid-late afternoon, midday to late evening, late afternoon to night, or nightshift (from 9 or 10 pm until very early morning, i.e. usually 6am). I usually stayed much later than my planned departure time but this depended largely on what was happening in the custody suite, i.e. if I was in the middle of recording an interaction. I was present in the custody suite for usually 4 days a week and also made the decision to, pursuant to public transport availability, attend Site 1 over the Christmas period. Although the custody suite was not busy on some of these days (the day after Boxing Day was particularly quiet), custody staff seemed to appreciate my commitment to my research and were impressed by the fact that I had taken the decision to work over the Christmas period.

For the observational stage, a total of 20 officers took part at Site 1<sup>226</sup> and 11 at Site 2. Of the custody officers asked,<sup>227</sup> three and one declined to take part at Sites 1 and 2 respectively. Practicalities such as sick leave, annual leave, and additional rest days meant that some custody officers were observed more than others, although typically the difference was negligible. The Inspector at Site 2 initially wanted to 'cherry-pick' participants (suggesting that some officers may be difficult to work with), however, I made it clear from the outset that every officer who

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<sup>225</sup> CO3-1 – see section 8.5.

<sup>226</sup> Two of these officers left shortly after research commenced.

<sup>227</sup> All officers at Site 1 were asked but one officer at Site 2 was not as we met towards the end of the observation period.

was willing to take part should be given the opportunity to do so.<sup>228</sup> At the interview stage, 15 officers<sup>229</sup> from Site 1 and eight officers from Site 2<sup>230</sup> took part.

Some custody officers were much more receptive to the research than others and took the time to explain their decisions, ask about the research, and offer insights into the project (such as discussing recent cases, offering views on policy, and giving opinions about their role and police-work in general). Custody officers also viewed the research as an opportunity to learn and, from time to time, let-off steam.<sup>231</sup> Others, whilst happy to take part, did not wish to spend quiet interludes discussing the research. Of course, there were occasions, at both sites, when the demands of custody would override the needs of the project. Both the rapport established during observation (influenced by the time spent with each custody officer during observation) and the custody officer's own personality ostensibly influenced the interview – some custody officers were more candid and chatty than others. The layout at Site 2 meant that I could sit beside the custody officer – I had my own work-station and, as such, I could follow the observation much more comfortably and was able to ask questions with minimal interruption. At Site 1, by contrast, I hovered behind the booking-in desk, moving between custody officers, observing one interaction at a time. Whilst I experienced enhanced comfort at Site 2, neither approach was 'better' than the other in terms of data collection – in both, I was able to view the entire interaction. The practical knowledge gained at Site 1 also proved useful when chatting with custody officers at Site 2, thus enabling further rapport-building. Custody officers at Site 2 also expressed an interest in the findings from Site 1. I permitted superficial discussion but was reluctant to divulge much information as I did not wish to influence the behaviour or responses at Site 2.

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<sup>228</sup> I felt that the Inspector was anxious to avoid me being placed with sergeants who did not exactly follow the letter of the law, or were impatient or curt with suspects or detainees. He was eager for me to obtain the best portrayal of the force as possible. Loftus also had a similar experience – Loftus (n 204) 204.

<sup>229</sup> In addition to the two officers who had left, two could not be interviewed for practical reasons and one did not wish to be interviewed.

<sup>230</sup> At Site 2, one custody officer did not wish to be interviewed and two could not be interviewed for practical reasons.

<sup>231</sup> There were also some differences between Inspectors. At Site 1, an Inspector took a very keen interest in the research and often made time for informal chats. Upon leaving the field, the Inspector also kept me updated with regard to changes in the suite and was more than accommodating when I requested access for additional interviews.



One particular challenge of overt observational research is ensuring that the participants are open and honest. Police research may present a further challenge given that suspicion is characteristic of police culture.<sup>232</sup> The main concern was that of the ‘Hawthorne effect’ i.e. that participants would alter their behaviour as a result of knowingly being observed. This was of little concern as custody officers had become accustomed to being observed and/or monitored – CCTV and audio-recording were in operation at both sites and records were audited monthly. Moreover, whilst initially aware of my presence, after a few days it seemed that the demands of custody had taken precedence. My assurances of confidentiality also helped to alleviate concerns. Custody officers did, however, express negative sentiments about being constantly monitored. I, therefore, made it clear that whilst I may scrutinise some behaviours or practices, my intention was not to ‘catch them out’.

## 2.5 Of methods and methodology

In the early stages of the research I considered using thematic analysis or discourse analysis with deductive or adductive methods, focusing on how far criminal justice theory informs and influences practice. However, during early observation I decided that I did not want to force my data but instead to let it speak for itself and, where appropriate, speak to existing theory. I, therefore, settled on a grounded theory approach, as will be explored later.<sup>233</sup> As aforementioned, I opted for observations *and* interviews – the former would provide me with familiarity and exposure to the field (which was particularly important given the low visibility of custody), and the latter would provide the nuance and detail, and would allow me to explore definition in greater depth.<sup>234</sup> Observations would provide an opportunity to build rapport and guide the interview schedule, and interviews would allow custody officers to give their voice to the research. As I wanted to explore meaning and process rather than to generalise, I rejected quantitative methods. Qualitative research, by contrast, aims to capture the individual’s point

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<sup>232</sup> Reiner, *The Politics of the Police* (n 18) 121-2.

<sup>233</sup> Grounded theory does not typically lend itself to a multi-site approach, however, given the similarities between the sites the data was not viewed as comparative.

<sup>234</sup> Something that could not really be explored with observation alone.

of view through ‘detailed interviewing and observation’.<sup>235</sup> When explaining the meaning of qualitative, Denzin and Lincoln note that it ‘implies an emphasis on the qualities of the entities and on processes and meaning that are not experimentally examined or measured’<sup>236</sup> and that ‘qualitative researchers stress the socially constructed nature of reality, the intimate relationship between researcher and what is studied, and the situational constraints that shape inquiry. They seek answers to questions that stress *how* social experience is created and given meaning’<sup>237</sup>. This can be contrasted with ‘quantitative studies [which] emphasize the measurement and analysis of causal relationships between variables, not processes...’<sup>238</sup>

Of course, it is important to recognise the limitations of qualitative research – data cannot be generalised, objectivity and transparency are difficult to achieve, and studies are difficult to replicate.<sup>239</sup> However, quantitative studies, whilst permitting precision and control (which qualitative research lacks), cannot explore the complexity of human beings and their interactions<sup>240</sup> – such studies ‘[fail] to take account of people’s unique ability to interpret their experiences, construct their own meanings and act on these’.<sup>241</sup> Such methods are unsuitable for projects where definition is central to answering the research questions. Therefore, for this project, quantitative methods would have provided a partial or limited answer to the questions raised. Qualitative research, by contrast, allows the researcher to develop closeness to the research participants and thus gain a more nuanced, in-depth account of the social world that he or she is examining, whilst also appreciating the challenges and constraints of everyday life.<sup>242</sup> For a project such as this, the advantages of a qualitative study far outweigh the disadvantages.

### 2.5.1 Situating the methodology

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<sup>235</sup> Norman Denzin and Yvonna Lincoln, ‘Introduction: Disciplining the Practice of Qualitative Research’ in Norman Denzin and Yvonna Lincoln (eds), *The SAGE Handbook of Qualitative Research* (4<sup>th</sup> edn, SAGE 2011) 9.

<sup>236</sup> *ibid* 8.

<sup>237</sup> *ibid*.

<sup>238</sup> *ibid*.

<sup>239</sup> See Alan Bryman, *Social research methods* (4<sup>th</sup> edn, OUP 2012) 405-6.

<sup>240</sup> Robert Burns, *Introduction to Research Methods* (4<sup>th</sup> edn, SAGE 2000) 9.

<sup>241</sup> *ibid* 10.

<sup>242</sup> Denzin and Lincoln (n 235) ‘Introduction’ 8.

As a starting point, the social world can be understood through two methodological approaches<sup>243</sup> – positivism and interpretivism (also known as constructionism). Positivism, as an approach to social research, ‘seeks to apply the natural science model... to investigations of social phenomena and explanations of the social world’.<sup>244</sup> It aims to establish cause and effect – in essence, there is no such thing as a random event.<sup>245</sup> Moreover, positivism posits that events exist independently of individual experience – they occur whether or not people choose to recognise them. As such, there is an objective reality that is out there to be discovered, one that exists independently of the researcher or indeed of anyone else.<sup>246</sup> Positivists value standardised, routine procedures in order to generate data which is truthful, valid, and reliable. Interpretivists, by contrast, assert that the world is socially constructed – the researcher and researched react to process and, as such, it is impossible to gain an objective knowledge of the social world.<sup>247</sup> The research participant must, therefore, be provided with the opportunity to ascribe his or her meaning to the research and, whilst the researcher may have a particular goal in mind, it is best to allow participant responses to flow freely and openly rather than prompting particular replies.

Given the chosen method of data collection and analysis,<sup>248</sup> it is also important to explore the symbolic interactionist perspective.<sup>249</sup> As Blumer highlights, ‘symbolic interactionism rests ... on three simple premises’.<sup>250</sup> Firstly, ‘that human beings act toward things on the basis of the meaning that the things have for them’.<sup>251</sup> These things can be:

[P]hysical objects, such as trees or chairs; other human beings, such as a mother or a store clerk; categories of human beings, such as friends or enemies; institutions as a

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<sup>243</sup> There are of course many additional methodological approaches that can be taken. For the purposes of this research only these two opposing methodological stances will be discussed.

<sup>244</sup> Martyn Denscombe, *Ground Rules for Good Research: a 10 point guide for social researchers* (Open University Press 2002) 14.

<sup>245</sup> *ibid* 14.

<sup>246</sup> *ibid* 15.

<sup>247</sup> *ibid* 18-20.

<sup>248</sup> It should be noted that grounded theory is both a tool (i.e. a method) and a methodology. It influences data collection *and* data analysis.

<sup>249</sup> See for example Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Prentice-Hall 1969).

<sup>250</sup> *ibid* 2.

<sup>251</sup> *ibid*.

school or a government; guiding ideals, such as individual independence or honesty; activities of others, such as their commands or requests; and such situations as an individual encounters in his daily life.<sup>252</sup>

Secondly, symbolic interactionism posits that reality is not perceived as ‘out there’ ready to be discovered, but instead developed through interaction with others.<sup>253</sup> Thirdly, human beings react to and interpret their social world and derive meaning from their interactions and surroundings through an interpretative process.<sup>254</sup> The social world and the social actor are intertwined and interconnected – one cannot exist without the other. For the symbolic interactionist, ‘the meanings that things have for human beings are central in their own right’<sup>255</sup> and ‘[t]o ignore the meaning of things toward which people act is seen as falsifying the behavior under study’.<sup>256</sup> There are, of course, as Blumer points out, other approaches that share the ‘simple premise that human beings act toward things on the basis of the meaning of such things’<sup>257</sup> but where symbolic interactionism differs from these other fields of study is in its focus on how meaning ‘aris[es] in the process of interaction between people’<sup>258</sup> – ‘[t]he meaning of a thing for a person grows out of the ways in which the other person acts toward the person with regard to the thing’.<sup>259</sup> Accordingly, the researched and the researcher respond not to an independently existing reality but to his or her social understanding of reality. Meaning is a social product, created through how things are defined in interaction between people.<sup>260</sup> Finally, for the symbolic interactionist, ‘the use of meaning by a person’<sup>261</sup> is not simply an ‘application of the meaning so derived’<sup>262</sup> but instead ‘involves an interpretative process’.<sup>263</sup> From this perspective, by combining interviews and observations, the researcher can produce a richer and fuller description of the social world that he or she is studying.

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<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*

<sup>255</sup> *ibid* 3.

<sup>256</sup> *ibid.*

<sup>257</sup> *ibid.*

<sup>258</sup> *ibid* 4.

<sup>259</sup> *ibid.*

<sup>260</sup> *ibid* 5.

<sup>261</sup> *ibid.*

<sup>262</sup> *ibid.*

<sup>263</sup> *ibid.*

## 2.5.2 An account of the methods

For both practical and methodological reasons, observation and interviews were important.<sup>264</sup> Of course, interview data can be more beneficial than observational data<sup>265</sup> and, as will become apparent in Chapters 5, 6 and 7, this thesis relies upon interviews much more than observations. The observations were, however, an important constituent of the research – they allowed me to understand the social world of the custody officer and improved the interview schedule. Without observation, it is possible that the interview questions, and therefore the data, would have been misguided. In this section I will describe the methods in more detail.

### 2.5.2.1 Observation

Observation (as a non-participant) began earlier than anticipated,<sup>266</sup> with the first stage commencing in early November 2014 and concluding in late January 2015, spanning close to three months. The first day was largely spent gaining access but I was nevertheless able to observe five ‘vulnerability interactions’<sup>267</sup>. Observation at Site 2 commenced in early April 2015 and concluded in mid-late June 2015, again spanning close to 3 months. My predominant focus was on the interaction(s) between the suspect and the custody officer.

Observational notes typically included:

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<sup>264</sup> In my view Palmer and Hart’s study suffered from the absence of observation. Whilst able to combine what ‘informants’ stated with what custody officers said, they were unable to observe interactions between suspects and custody officers. As such, they were very much reliant on what their participants said. Through observation I was able to compare what was seen with what was heard. I was also guided towards key issues that impact upon the implementation of the safeguard such as how custody officers define vulnerability and why they call an AA. On this point see also Chapter 6.

<sup>265</sup> For the advantages of qualitative interviewing over observation see Bryman (n 239) 494-6.

<sup>266</sup> As a result of gaining access with relative ease – see section 2.3.

<sup>267</sup> These are interactions where the AA safeguard could have been considered. I also recorded other interactions – for example, where individuals were being detained for a failure to appear at court.

- the custody officer's code (which I had assigned). These have been numbered 1-31 (COs 1-20 at Site 1 and COs 21-31 at Site 2). I then added -1 or -2 to reflect the site number.
- the nature (if relevant) and purpose of the interaction
- the alleged offence/matter (and whether this was a 'PACE' matter)
- the behaviour and demeanour of the detainee/suspect (if notable)
- the information provided by the detainee/suspect e.g. medical condition<sup>268</sup>
- other information available to the custody officer
- any additional, probing questions asked by the custody officer (if appropriate)
- the nature of the probing questions (if significant)
- the length of the interaction (if notable)
- the outcome of the interaction

The outcome of any decision on the AA safeguard was ascertained through the following (frequently in combination):

- calls made to obtain an AA
- the presence of the AA (at any stage of the custody process)<sup>269</sup>
- discussions between the custody officer and the medical professional(s), the detainee/suspect, or the arresting/investigative officer(s)
- my discussion(s) with the custody officer<sup>270</sup>
- information from the custody record (to which I had occasional supervised access) indicating that an AA had been/was to be requested

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<sup>268</sup> Through time, it transpired that the type of illness and the use of medication were fundamental to the implementation of the safeguard (see Chapters 5, 6 and 7, particularly sections 5.4, 5.5.1 and 6.4.6). Notes made after this discovery were, therefore, more detailed. Some notes prior to this discovery also, by chance, included more detailed information.

<sup>269</sup> Whilst vulnerability may be, or have been, identified by someone other than the custody officer, this nevertheless illustrates that the custody officer had implemented the safeguard.

<sup>270</sup> This, of course, could be subject to change – for example, if the HCP, FME or AMHP deemed it unnecessary (see Chapter 7, particularly section 7.2.3). This does, however, indicate that the custody officer believed that an AA was needed, even if the HCP, FME or AMHP did not.

I did not have a data capture sheet but instead took short-hand detailed notes on a small notepad, typing-up the notes each day upon leaving the field. Each note was later re-organised and numbered. To comply with ethics, I avoided recording any information relating to the participant's characteristics or identity, beyond what was required (as above). As observation was restricted to the booking-in desk, information on the setting was implicit. Some data was deleted due to withdrawal of consent and some days yielded more data than others. Moreover, due to the staffing numbers at Site 1, it was impossible to avoid observing on days when non-participating custody officers were present. There were therefore occasions when I would sit in the suite all day and observe only a few interactions. This was less of an issue at Site 2. Site 1 yielded a total of 96 vulnerability observations and eight informal chats with custody officers, discussing issues of 'vulnerability' (broadly defined).<sup>271</sup>

Site 2 yielded a total of 103 vulnerability observations<sup>272</sup> and a total of nine informal chats with custody officers concerning issues of 'vulnerability'.<sup>273</sup> Observational notes, whilst providing context, an introduction to the research setting, and an opportunity to see decision-making in operation, were somewhat limited. I was able to speculate but unable to fully understand why custody officers were making their decisions or how they defined vulnerability.<sup>274</sup> As such, interview data was invaluable.

#### 2.5.2.2 Interviews

Semi-structured interviews<sup>275</sup> were conducted upon concluding the observation period i.e. towards the end of my time at each site. This was ideal as it provided time for the interview

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<sup>271</sup> There were numerous chats (approximately 50) about other areas of policing or issues such as risk. Vulnerability did not seem to feature very high on the 'agenda'.

<sup>272</sup> The cell capacity did not have much of an impact on observations as I could only observe one interaction at a time.

<sup>273</sup> Again, there were chats about other areas of policing.

<sup>274</sup> These two elements are crucial to understanding why the safeguard is often unimplemented. See Chapters 5 and 7.

<sup>275</sup> The initial interview schedule and the revised interview schedule are contained in Appendices 1 and 2, respectively. It should be noted that these served merely as a guide and questions were more open than how they appear on the interview schedules. As explained later in section 2.5, I returned to Site 1 to ensure that the questions asked and the themes emerging were consistent throughout.

schedule to develop in light of the observational findings. Interviews were conducted from late January to early February 2015 between 7.30am and 10am at Site 1 and in late June 2015 at various times at Site 2.<sup>276</sup> The number of interview participants has been noted above. Interviews lasted an average of 41 minutes and 43 minutes at Sites 1 and 2 respectively. At Site 1, I conducted a minimum of two and a maximum of four interviews in one day. At Site 2, this was between one and three. Interviews were recorded using a dictaphone and were transcribed on the same day.

Semi-structured interviews, whilst advantageous,<sup>277</sup> are not without their disadvantages. Because I did not want to lose meaning and wanted participants to ascribe their own meaning to the research, structured interviews were rejected. Unstructured interviews were also rejected as they can prevent data from being discovered. Semi-structured interviews seemed a suitable compromise. The schedule was not followed rigidly but I ensured I covered each of the questions. I tried, so far as possible, to reflect upon what the interviewee had said and to allow this to lead me into the following question, whilst also careful to avoid repetition. The attempt was to be more conversational and less interrogational, with the interview schedule serving as a reminder or check-list.<sup>278</sup> The interview commenced with questions about the custody officer's role, then moved onto questions regarding risk (due, in part, to the conceptual similarities with vulnerability<sup>279</sup> and the fact that custody officers seemed to find this topic easier to discuss), and then to questions of vulnerability and the AA safeguard.<sup>280</sup> The structure of the schedule allowed custody officers to ease into the interview by starting with less demanding topics before moving onto more challenging areas of discussion. Interviews were conducted within an interview room (i.e. at the workplace). This would not have been the ideal place to interview non-police participants, however, custody officers are familiar with this environment and, as such, I did not see anything problematic with holding the interviews here.

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<sup>276</sup> The morning slot was the only available time at Site 1. The timing was more flexible at Site 2 due to shift overlap during 'handover' periods (at Site 1 this was around 15 minutes; at Site 2 around 1-3 hours). The timing of interviews at both sites was agreed with Inspectors beforehand.

<sup>277</sup> See Burns (n 240) 424-5.

<sup>278</sup> Virginia Braun and Victoria Clarke, *Successful qualitative research: a practical guide for beginners* (Sage 2013) 94.

<sup>279</sup> See Brown (n 183).

<sup>280</sup> See n 275 above.



I did make some adjustments to the room to lessen the adversarial atmosphere such as moving the chairs so that one was not directly facing the other. The location was more ideal than the custody desk itself.<sup>281</sup>

There were, however, differences between what was stated at interview and what was overheard during observation. For example, CO21-2 was discussing mental health with some detention officers when I added that it is estimated that 1 in 4 people have mental health problems at any given time. CO21-2 then quipped ‘everyone has mental health problems these days’, adding that ‘women are the cause of all mental health problems’. At interview, however, CO21-2 took a much more sensitive approach to the issue of mental health. This speaks to the idea of ‘audience segregation’,<sup>282</sup> i.e. CO21-2 portrayed a different self in front of his colleagues to the self he depicted at interview. This reinforces the importance of conducting observation, in addition to interviews. Also, some officers, although thankfully very few, gave what seemed like ‘text-book’ or ‘professional’ answers.<sup>283</sup> Other officers offered candid responses at interview.

## 2.6 Challenges and considerations

As noted above, the process was comfortable and, overall, enjoyable. As with each research project, this study presented a number of challenges such as participant refusal to take part, ethical considerations, ‘going native’, and general research-related anxieties. The first few days provided not just my first exposure to custody, but also my first exposure to empirical research. Crises were not uncommon – sometimes I felt insufficiently knowledgeable, other times I felt that I would miss a big ‘eureka’ moment. It is possible that, as a novice researcher, I was more vigilant than I would have been had I been an expert. I decided, nevertheless, to embrace the uncertainty and to adapt if and when required. As analysis and data collection were concurrent, ‘gaps’ could appear – the most notable of which required that I return to Site 1 to conduct some

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<sup>281</sup> As noted above, CCTV and audio-recording were installed at the custody desk. Interview rooms had audio-recording installed but this could be switched on and off. Also, the custody desk was often noisy and interruptions were likely.

<sup>282</sup> Erving Goffman, ‘Embarrassment of Social Organisation’ (1956) 57 *American Journal of Sociology* 990-1064. See also Erving Goffman, *The Presentation of Self in Everyday Life* (Allen Lane 1969).

<sup>283</sup> Although these may have been honest and truthful responses.

additional interviews. As I conducted more interviews I discovered some common themes – themes that were ‘missed’ in the earlier interviews. These themes related specifically to whether the felt the terms under PACE and/or Code C were useful or whether they could be improved (CO1-1, CO2-1, CO3-1, CO8-1, CO13-1, CO14-1, CO16-1, CO17-1, CO20-1); whether custody officers felt they needed any additional training in relation to vulnerability under PACE and/or Code C (CO3-1, CO16-1); what their opinion was of the use of the AA for young suspects (CO8-1, CO13-1, CO14-1, CO16-1, CO20-1); and how they would define the word ‘vulnerable’ (CO1-1, CO2-1, CO3-1, CO8-1, CO13-1, CO14-1, CO16-1, CO17-1, CO20-1). I read the interview transcripts closely in order to identify the nature of the ‘gap’ and the interview within which the ‘gap’ appeared. I returned to Site 1 in July 2015 to close these ‘gaps’ by asking additional questions. Thankfully, the transcripts of CO4-1, CO9-1, CO10-1, CO11-1, CO12-1 and CO18-1<sup>284</sup> contained sufficient information so as not to require an additional interview.<sup>285</sup>

‘Going native’ is not uncommon and I most certainly experienced this during the research. For example, I was adopted as ‘part of the team’,<sup>286</sup> and my advice was often sought on charging decisions or for feedback on the risk assessment.<sup>287</sup> In order to avoid any ethical conundrums, whilst maintaining good relations with the research participants, I explained that my expertise was limited in that I only taught specific aspects of criminal law.<sup>288</sup> With regard to the risk assessment, I explained that I was neither an HCP nor a police officer but that I would perhaps adopt a different approach to both. Of course, custody officers continued to favour their own approach to assessing risk and vulnerability. My own interpretation of vulnerability was, of itself, vulnerable to ‘going native’ – there were moments when I would begin to adopt, albeit momentarily and infrequently, the custody officer’s construction of vulnerability.<sup>289</sup> This led me to question the value of my research. However, upon leaving the field each day and

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<sup>284</sup> CO4-1 and CO18-1 had retired, CO9-1 and CO10-1 were on long-term sick leave, and CO11-1 and CO12-1 were on annual leave.

<sup>285</sup> See Appendices 1 and 2.

<sup>286</sup> The day I left Site 1, the custody staff expressed sentiments to the effect that they would miss my presence. Moreover, at Site 2 custody staff referred to me as ‘one of the family’.

<sup>287</sup> See also section 2.6.

<sup>288</sup> Loftus similarly claimed a lack of in-depth knowledge to overcome this problem – see Loftus (n 204) 205.

<sup>289</sup> See Chapter 5 in particular, specifically sections 5.3 and 5.4.

reflecting on the data, I realised that the research was worthwhile – it did not matter that the suspects were not, in the eyes of the custody officer, vulnerable.<sup>290</sup> Rather, the differences in definition were, of themselves, interesting to explore and unpack. As time passed by, I became more attuned to the signs of ‘going native’, thereby making it easier to rectify. That said, whilst ‘out of the ordinary’<sup>291</sup> activities<sup>292</sup> were initially the cause of excitement or anxiety, over time they merged into the mundane.

Informed consent was required to comply with ethics standards – this was done informally, through a one-to-one chat, and formally, through the participant information<sup>293</sup> and informed consent forms.<sup>294</sup> As mentioned above, I assigned a code to each custody officer so that I could maintain confidentiality. The observation of other individuals within the custody suite, most pertinently detainees and suspects, also raised ethical concerns. This was tackled by (1) placing a notice at various points throughout the custody suite (to inform others of my presence and to provide information similar to that given to the custody officer)<sup>295</sup> and (2) ensuring that all information gathered on the detainees/suspects was non-identifiable. I decided not to provide direct information as this would impede the booking-in procedure. Moreover, as the detainee or suspect was not the research subject or participant there would be minimal focus on them and a notice was deemed sufficient, particularly given the presence of other individuals (solicitors, lay visitors and HCPs, inter alia) in the custody suite. That said, I was prepared to explain the research (if asked), and to cease observations (if requested). It is unclear whether every individual passing through the custody suite read the notice and, as discussed further below, I was often mistaken for a mental health worker, a solicitor, an independent custody visitor, and a police officer by the police and non-police alike.

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<sup>290</sup> It can depend on one’s construction of vulnerability – see Chapter 3, particularly section 3.4.

<sup>291</sup> At least for a researcher with no first-hand experience of policing.

<sup>292</sup> Such as unusual alleged offences; detainees or suspects singing, shouting, or banging on the custody desk or cell doors; and alleged or actual illicit drug-consumption.

<sup>293</sup> Appendix 3.

<sup>294</sup> See Appendix 4.

<sup>295</sup> See Appendix 5.

## 2.7 Reflecting on my time at the custody suite

As Loftus highlights, the researcher's personal biography, and in particular characteristics such as age, class, gender, and ethnicity, can have an impact upon how he or she is perceived by the police and how the researcher positions him or herself in the field.<sup>296</sup> It is worth noting, before I explore my own experiences as a researcher, that policing is a male-dominated field. Custody was even more male-dominated: only one (CO15-1) of my research participants at Site 1 was female (she was the only woman working full-time and on a permanent basis at Site 1) and all of my participants at Site 2 were male (there were no female custody officers working at Site 2). I questioned, as Loftus did, 'how far my own gender prevented me from accessing the dominant male and sometimes heterosexist culture',<sup>297</sup> and whilst I was not necessarily excluded, the experience of researching the field would have undoubtedly been different for a male researcher.<sup>298</sup> Most certainly, my gender may have had a role to play in the custody staff's perceptions of me as an undergraduate student (particularly at Site 1). One notable event occurred when I was sitting in the PACE Inspector's<sup>299</sup> office and having a general chat with him about police custody. After about a 15-minute chat, a senior police officer arrived at the PACE Inspector's office and immediately assumed that I was the PACE Inspector's daughter. The PACE Inspector seized the opportunity to poke fun at this senior officer and claimed that it was 'bring your daughter to work day'. The senior officer thought nothing of this and proceeded to ask me about how I was progressing with my A-Levels. Upon noting my discomfort, the PACE Inspector burst into laughter, telling the senior officer that I was a university researcher who was conducting research into custody. After chuckling at how he had been fooled, the senior officer politely asked how I was enjoying my time at Site 1, whether I was being appropriately 'looked-after', and whether I had yet been placed on tea-making

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<sup>296</sup> See Loftus (n 204) 206.

<sup>297</sup> *ibid.*

<sup>298</sup> Westmarland raises the issue of being a woman researcher in a male-dominated field – Louise Westmarland, *Gender and Policing. Sex, Power and Police Culture* (Willan 2001) 9-10.

<sup>299</sup> This particular PACE Inspector took me under his wing, and took great pride in showing me around the site and telling me about his experiences in the police force but also discussed personal matters such as family life with me. We also discussed personal matters. He facilitated my return to the site in July 2015.

duties.<sup>300</sup> He did not seem uncomfortable with my presence and it is very possible that this is because I was a young woman and was therefore viewed as non-threatening and trustworthy.<sup>301</sup> Officers also often confided in me (which perhaps led to the richness and depth of my interview and observation data) and one jokingly (or perhaps seriously) asked if I wanted to babysit his children.<sup>302</sup> I was also asked on occasion about my relationship status and had young male probationers and detention officers make advances towards me. Indeed, the day I left Site 1, I was asked for my phone number by one male detention officer on behalf of a younger male detention officer. During my time at Site 2 I was also asked for my phone number on a few occasions by young police officers who had come in with their 'prisoner'. These experiences were however infrequent and atypical.

Other aspects of my identity seemed to be sources of interest. During the risk assessment (at both sites) when custody staff commented on how it was 'easy' to tell someone's ethnic background, I disagreed. At this point they recalled the booking-in of various individuals and boasted about how they were able to accurately guess their ethnicity without asking. They then commented on how I was 'obviously white', and I explained that they were wrong, as although I pass for white, I am actually of mixed heritage. It seemed that passing for 'white' allowed me to '[fit] in with the dominant ethnicity of the organisation',<sup>303</sup> yet my true ethnic background also ostensibly allowed me to establish common ground with minority ethnic officers.

My identity as a researcher would also cause confusion or disbelief: although I had, so far as possible, made everyone aware of my presence, there were often many staff who would arrive on shift without knowing that I, a PhD researcher, would be based there. I was frequently mistaken for a Home Office official, a custody visitor, an HMIC Inspector, a 'government mole',<sup>304</sup> or someone from human resources (this was unsurprising as at both sites the detention officers were being moved onto private contracts and many were fearing redundancy). Indeed, many individuals, even when informed, were in disbelief. This is perhaps an indication of the suspiciousness endemic within the police force.<sup>305</sup> My taking of field notes was also regarded

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<sup>300</sup> Unnumbered interaction, Site 1.

<sup>301</sup> See Loftus (n 204) 206. See also Louise Westmarland, 'Blowing the whistle on police violence: ethics, research and ethnography' (2001) 41 (2) *British Journal of Criminology* 523.

<sup>302</sup> Loftus (n 204) 206.

<sup>303</sup> *ibid*, 207.

<sup>304</sup> Loftus had a similar experience - see Loftus (n 204) 304.

<sup>305</sup> See Reiner (n 18). See also Loftus (n 204).

with some suspicion and I would be frequently asked about what I had written. Although I did not wish to raise suspicions further, I also did not want my notes to be censored. I explained that whilst I was happy to have conversations and answer some questions, my notes for my own purposes and probably would not be of use to them.<sup>306</sup> I also explained that the force would be provided with a copy of my thesis and that individual custody officers could request their own copy (as advised in the Participant Information form – see Appendix 3).

Despite the signage to alert of my presence (see Appendix 5), detainees too mistook me for someone other than a researcher, i.e. I was a social worker, a mental health worker, or a solicitor. On one occasion, a detainee who wanted to be assessed under the Mental Health Act 1983, refused to interact with custody staff as he wished for me to assess him. I explained that I was not a nurse but rather a researcher who was observing the custody officers. Whilst momentarily accepting this explanation and beginning to answer the risk assessment questions, he, on three occasions, shifted his focus to again ask me to assess him.<sup>307</sup> This clearly raises ethical questions regarding the third party understanding of the researcher's role. I was also not entirely convinced that custody officers understood the purpose or focus of my research. CO4-1 once proceeded to discuss 'something that you're looking at', explaining that whilst NHS policies allow some level of self-harm, the police have to prevent detainees from harming themselves. At this point, the conceptual congruence of vulnerability and risk in police custody became blatantly obvious.<sup>308</sup>

Accessing the dominant culture was perhaps made easier by the fact that, whilst I myself have never worked for a police organisation, I come from a family of police officers (father, two uncles, grandfather, grandmother, and brother) and was, in addition to being able to understand some of the basic lingo, was also seen to be able to empathise with the many challenges faced by police officers. It is also possible that this aspect of my background influenced custody officers when they were deciding to take part (they were mostly aware of how I had secured access, as discussed in section 2.3 above). Whilst I had some knowledge of policing, the perceived lack of knowledge regarding the 'nuts and bolts' (i.e. practical realities) of custody gave me the opportunity to ask naïve questions and perhaps also gave the officers a sense of

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<sup>306</sup> Loftus took a similar approach – see Loftus (n 204) 208-9.

<sup>307</sup> Interaction 16, Site 1.

<sup>308</sup> Chat with officer 53, Site 1. See Chapters 3, 8 and 9, particularly sections 3.4, 7.4 and 8.6.

satisfaction from being the ‘experts’. By the time I reached Site 2 I had already gained a significant amount of ‘nuts and bolts’ knowledge and, although the custody officers were not aware of which site I was based at, they were aware that I had already undertaken a study in another police force. Custody staff, and in particular custody officers, were keen to know about my experiences of Site 1 and, more specifically, about its strengths and weaknesses. At times during my observations they would ask whether, in my opinion, Site 2 was better than Site 1 in specific regards. As I was keen to avoid influencing their words or actions, I tried, so far as possible, to avoid these conversations, simply stating that each site was different and I had yet to get a grip on which processes were ‘better’, if there was indeed such a thing. I also informed them that I was not formally assessing either site but instead exploring vulnerability and the implementation of the AA safeguard.

My outside interests – going to the gym and weightlifting, and listening to punk rock and heavy metal – also proved useful when gaining respect and getting to know the custody staff: I was able to talk at length with many of the custody staff about gym and dietary regimes and I spoke to CO1-1 at length about our shared passion for heavy metal. These experiences and interests allowed me to engender positive relations with the custody staff and also perhaps eradicated (or lessened) the image of an ‘out-of-touch’ academic.<sup>309</sup> My presence at the custody suite over the Christmas period (see section 2.4) also proved useful as I was viewed as industrious and interested rather than a ‘dossing academic’.

## 2.8 The Process and the Analysis: a grounded theory

As discussed above, before commencing the fieldwork I deliberated somewhat on the method of analysis before settling on grounded theory. The next question was ‘whose grounded theory and why?’. Grounded theory was initially developed by Barney Glaser and Anselm Strauss<sup>310</sup> as a way of conceptualising data, yet since its inception in 1967 it has undergone numerous changes. For my own personal preferences, the approach proposed by Glaser and Strauss

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<sup>309</sup> See Loftus (n 204) 207.

<sup>310</sup> Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine 2009).

appeared too positivistic and the methods employed by Strauss and Corbin's<sup>311</sup> post-positivist grounded theory seemed too prescriptive to the extent that I felt they could limit the emerging theory. Charmaz's constructivist<sup>312</sup> grounded theory approach<sup>313</sup> was the most appealing, particularly because it allowed for reflexivity, greater flexibility, and did not demand objectivity. The focal point for Charmaz's grounded theory is *meaning* – as Gibson and Hartman note, 'the key thing... about Charmaz's understanding of coding is her emphasis on *understanding* and the promotion of *interpretation*. It is quite clear that for her, grounded theory is all about producing redescrptions of participants' lives'.<sup>314</sup> Charmaz's approach provides the researcher with 'flexible analytical guidelines that enable [them] to focus their data collection and to build middle-range theories'.<sup>315</sup> By 'us[ing] methodological strategies developed by Barney Glaser... yet build[ing] on the social constructionism inherent in Anselm Strauss's symbolic interactionist perspective',<sup>316</sup> it bridges the gap between positivism and symbolic interactionism. Further, by 'view[ing] knowledge as located in time, space, and situation and tak[ing] into account the researcher's construction of emergent concepts',<sup>317</sup> it is situated somewhere between positivism and post-positivism. Constructivist grounded theory does not assume that theory or data are 'discovered'. Instead, theory and data are co-constructed by the researcher and the researched and are influenced by the researcher's perspectives, values, and beliefs – because knowledge is constructed, there can be multiple truths. The researcher is, therefore, part of this process of construction and has his or her own preconceptions and views of the field. This is permissible provided the researcher is clear about his or her preconceptions from the outset. For example, as alluded to here, and as will be explained in subsequent chapters, my construction of vulnerability differs from that of the

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<sup>311</sup> Juliet Corbin and Anselm Strauss, *Basics of qualitative research: techniques and procedures for developing grounded theory* (3rd edn, SAGE 2008).

<sup>312</sup> "'Constructivists" are not a homogenous group' – Barry Gibson and Jan Hartman, *Rediscovering Grounded Theory* (SAGE 2013) 51. For example, whilst my approach is similar to Charmaz's and adopts the same process of grounded theory, Charmaz is solely concerned with meaning while I am also focused on process – see Gibson and Hartman (n 312) 67.

<sup>313</sup> Kathy Charmaz, *Constructing grounded theory: a practical guide through qualitative analysis* (SAGE 2006).

<sup>314</sup> Gibson and Hartman (n 312) 84.

<sup>315</sup> Kathy Charmaz, 'Grounded Theory Methods in Social Justice Research' in Norman Denzin and Yvonna Lincoln (eds) *The SAGE handbook of qualitative research* (4<sup>th</sup> edn, SAGE 2011) 360.

<sup>316</sup> *ibid* 365.

<sup>317</sup> *ibid*.



custody officer and, whilst I believe in my own construction, I also accept that the custody officer's construction is valid.

The process of grounded theory is important when illustrating that grounded theory has been used, particularly because grounded theory is not simply a method of analysis but also dictates process (data collection, interpretation, and writing). Grounded theory is set apart from other methods of qualitative study on the basis of the following criteria, whereby the grounded theorist must:

- conduct data collection and analysis simultaneously in an iterative process;
- analyze actions and processes rather than themes and structure;
- use comparative methods;
- draw on data (e.g. narratives and descriptions) in service of developing new conceptual categories;
- develop inductive categories through systematic data analysis;
- emphasize theory construction rather than description or application of current theories;
- engage in theoretical sampling;
- search for variation in the studied categories or process; and
- pursue developing a theory rather than covering a specific empirical topic.<sup>318</sup>

As discussed above, data collection involved analysing and reanalysing the data as I collected new data. Analysis began immediately and was conducted daily until July 2015. It was initially conducted manually so as to maintain closeness with the data, however, I later switched to NVivo 10<sup>319</sup> as it was almost impossible to manage the vast amount of data without technological assistance. During this time, I wrote memos describing and elaborating on, inter alia, the codes and the relationships between the codes. Further data collection and further

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<sup>318</sup> See Kathy Charmaz, 'Studying the experience of chronic illness through grounded theory' in Graham Scambler and Sasha Scambler (eds) *New directions in the sociology of chronic and disabling conditions: Assaults on the lifeworld* (Elsevier 2010) as cited in Charmaz, 'Grounded Theory Methods' (n 315) 364.

<sup>319</sup> Computer Assisted Qualitative Data Analysis Software.

analysis shaped the ‘emergent iterative process’.<sup>320</sup> Not only did I compare codes with other codes, I also compared participant responses. The focus of the empirical research was purely on meaning and process. Analysis began with open line-by-line coding (initial coding), which became more focused as the codes took shape and the theory emerged (focused coding).<sup>321</sup> Links were established between codes where relationships became apparent and some codes were consolidated or merged with others. I allowed the data to guide analysis and whilst I was aware of some of the existing theory,<sup>322</sup> I only made connections where this was clear.<sup>323</sup> In fact, a great deal of the literature review occurred during and after data collection. I also continued collecting data during the analysis and would frequently re-analyse my data as codes and themes emerged and developed. As will be clear from Chapter 9, theory has emerged – one which perhaps synthesises elements of other theories but which could also be considered as a theory in its own merit. In Chapter 8, I have explored how the emerging analysis fits with current theoretical conceptions, where appropriate.<sup>324</sup> Throughout the thesis, examples of the ‘negative case’ are also given. The overall aim was to explore not merely definition, identification, and decision-making in relation to vulnerability, but also to explain why custody officers construct and interpret the law in this manner.<sup>325</sup> The theory began to emerge towards the end of January 2015 but continued to evolve until the period at Site 2.<sup>326</sup> Because the process was iterative, it was not a matter of one stage ending and the other beginning. With regard to theoretical sampling, I took this to mean a re-analysis of or reflection on the data to ascertain whether the theory can explain what is going on. Exposure in the field through observation allowed me to treat the interviews as my stage for theoretical sampling.

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<sup>320</sup> Charmaz, ‘Grounded Theory Methods’ (n 315) 360.

<sup>321</sup> Gibson and Hartman (n 312) 84.

<sup>322</sup> Preconceptions or pre-existing motivations and interests can exist but this ‘should not drive the collection and analysis of data’ – Gibson and Hartman (n 312) 48. I had in mind Dey’s approach that one must work with an open-mind rather than an empty head – Ian Dey, *Qualitative Data Analysis: A User-Friendly Guide for Social Scientists* (Routledge 1993). Indeed, Glaser and Strauss recognized that ‘the researcher does not approach reality with a tabula rasa’ – Glaser and Strauss (n 310) 3. As I have noted in Chapters 8 and 9, not one single existing theory speaks entirely to the research problem.

<sup>323</sup> See Chapter 8, particularly sections 8.6, 8.7 and 8.8.

<sup>324</sup> This allows the researcher ‘to enrich the analysis’ – Nick Pidgeon and Karen Henwood, ‘Using grounded theory in psychological research’ in Nicky Hayes (ed) *Doing qualitative analysis in psychology* (Taylor and Francis 2013).

<sup>325</sup> See Chapters 5-9.

<sup>326</sup> Even after this the name of the theory changed.

Many researchers have been criticised for failing to produce theory whilst claiming to use a grounded theory approach, i.e. by not producing ‘fully-fledged’ grounded theory.<sup>327</sup> I am confident that I have embarked on a grounded theory process and have a grounded theory outcome, however, this research may too attract such criticisms – in particular, one may refute that what is presented in Chapter 9 constitutes a theory. It is therefore worth noting that the grounded theory process may also be used to provide ‘sharpened thematic analyses’.<sup>328</sup>

## 2.9 Concluding remarks: a journey towards theory

Within this chapter the narrative of the research project has been described and explored. In research, as in life, there are constraints and constants. That said, throughout the process it was imperative that I remained flexible and reflexive taking each (research) day as it presented itself. The research did not start out as planned and, whilst the overall scope of the project remained constant, the specific aspects of inquiry developed along the way. The journey required that I leapt over hurdles, took decisions with careful consideration, and remained mindful of my ontology and epistemology throughout. Getting the seat of one’s trousers dirty meant getting involved in the messy and complicated – this was daunting, challenging, and demanding but always exciting and, above all, rewarding. Striving for perfection is perhaps a noble (or naïve) aim, however, one must accept that qualitative research is, by its very nature, an imperfect endeavour. By combining methods and working tirelessly and meticulously, I have managed to provide an in-depth and nuanced account of the topic under investigation. By immersing myself in the field, I have developed a strong sense of the various occurrences within custody and was able to ask meaningful, inquisitive, and pertinent questions. It is hoped that this chapter has given the reader sufficient insight so that he or she may move through the remainder of the thesis with a sufficient understanding of the theoretical, doctrinal, empirical, and practical aspects of this research.

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<sup>327</sup> Pidgeon and Henwood (n 324) 268.

<sup>328</sup> Charmaz, ‘Grounded Theory Methods’ (n 315) 366.

## CHAPTER 3: CONSTRUCTING VULNERABILITY – THE CONCEPT

*The body is a social phenomenon: it is exposed to others, vulnerable by definition.*<sup>329</sup>

### 3.1 Introduction: vulnerable constructs

It is a pertinent time during which to study vulnerability – there has been increasing academic interest in the concept, it has become a ‘zeitgeist’<sup>330</sup>, and the question of vulnerable suspects in police custody has been somewhat neglected from a socio-legal perspective in England since the mid-1990s.<sup>331</sup> Given that vulnerability is becoming increasingly deployed in public discourse and within academic writing, one could argue that it is ‘at risk’ of, or ‘vulnerable’ to, losing its power or meaning. It is, moreover, not an unproblematic term – classing an individual as ‘vulnerable’ can, for example, serve to disempower them, particularly where the individual him or herself does not self-identify as vulnerable.<sup>332</sup> This chapter aims to capture the essence of this often ill-defined and elusive concept, and explore the various threads of vulnerability. Not only will this set the context for the remaining chapters (particularly Chapters 4 and 5), it will also allow for a more critical appraisal of the law in books *and* the law in action. As this study is socio-legal and interdisciplinary in nature, the aim is to cast the net far and wide. Of course, I will not provide a full review of vulnerability, but will instead offer an overview of the core aspects. I will consider how vulnerability is framed within legal psychology, an academic discipline which has largely informed Code C and PACE. I will also explore the five manifestations of vulnerability as set out by Kate Brown in her monograph, ‘Vulnerability and Young People: care and social control in policy and practice’,<sup>333</sup> many aspects of which speak to the data within this thesis.<sup>334</sup> I will also latterly address how constructions of vulnerability

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<sup>329</sup> Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2010) 33.

<sup>330</sup> Brown (n 183) 5.

<sup>331</sup> See Chapter 1, particularly sections 1.3 and 1.4.

<sup>332</sup> Michael Dunn, Isabel Clare and Anthony Holland, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’ (2008) 28 (2) *Legal Studies* 234.

<sup>333</sup> Brown (n 183).

<sup>334</sup> See, in particular, Chapter 5.

differ depending on subject and purpose, and allude to how vulnerability could be reconceptualised.<sup>335</sup> Before doing so, I will make some general comments on vulnerability.

### 3.2 A glance at vulnerability

According to the Oxford Dictionary, vulnerability is defined as ‘expos[ure] to the possibility of being attacked or harmed, either physically or emotionally’.<sup>336</sup> This dictionary definition is insufficient if one’s aim is to arrive at a nuanced and in-depth understanding of ‘vulnerability’.

[D]ictionary definitions stress that vulnerability refers to human liability to being wounded, susceptibility to wounds or external injuries, or to being mistreated, exploited, taken advantage of. They also point to such characteristics of an individual as weakness, defencelessness, helplessness, exposure and liability.<sup>337</sup>

The dictionary definitions contain just one facet of vulnerability – that is emotional or physical harm – and is something which is inherently negative. Yet, not only can vulnerability be construed as something ‘bad’ i.e. ‘being at risk’, it can also denote a positive characteristic i.e. ‘being in touch with one’s feelings’.<sup>338</sup> Vulnerability does, more typically, give rise to notions of exposure to risk, a lack of control, or difficulty responding to or overcoming adversity.<sup>339</sup> The way in which the label of vulnerability is applied can also differ between groups and can depend upon individual or group characteristics.<sup>340</sup> It may also differ across culture, geographical location, and/or time. For example, as Misztal notes, the American approach is largely founded on issues around natural disasters and ‘risk to basic needs and terrorism’.<sup>341</sup> In stark contrast, the British position, particularly in the social sciences, utilises vulnerability as a ‘yardstick’ by which to disentangle ‘problems and feelings connected within experience of

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<sup>335</sup> I will draw further upon these elements in Chapters 4 and 9.

<sup>336</sup> Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th edn, OUP 2008) 1621.

<sup>337</sup> Misztal (n 187) 1.

<sup>338</sup> Carole Levine ‘The concept of vulnerability in disaster research’ (2004) 15 (5) *Journal of Traumatic Stress*, 395-396.

<sup>339</sup> Misztal (n 182) 2.

<sup>340</sup> See Chapter 4 (particularly section 4.9) for a discussion on the different ways in which vulnerability can be deployed within the context of the criminal process.

<sup>341</sup> Misztal (n 182) 31.

uncertainty, fragility and a lack of agency’.<sup>342</sup> Vulnerability is intangible and can perhaps only be deeply understood through one’s own lived experience. It is socially constructed, coloured, and clouded by the lens of one’s social world and influenced by one’s own understanding, conceptions, and experiences. As such, each individual may have his or her own way of ‘being vulnerable’ or of ‘feeling vulnerable’. Similarly, that which makes one person feel vulnerable may not trigger the same feelings in another. And, of course, it depends on what one *means* by ‘vulnerable’. The research participants of this thesis are no different – custody officers construct their own renderings of vulnerability guided by their own views, experiences, and beliefs.<sup>343</sup> There is not one single agreed-upon definition – vulnerability can mean a wide array of different things. The core problem, it seems, is that the label of ‘vulnerability’ is often applied without clear and careful consideration as to what one hopes to achieve in doing so.

### 3.3 Psychological vulnerability and (false) confessions

The legal psychological approach sees vulnerability as something as largely innate<sup>344</sup> i.e. connected with physical, although more so psychological, factors. The legal psychological approach is important for two main reasons – Code C seems to be largely informed by the categories of vulnerability set out within legal psychological discourse,<sup>345</sup> and legal psychologists have undertaken significant work within this area.<sup>346</sup> Psychological vulnerabilities, whilst extensively researched within the field of legal psychology, have no ‘generally agreed definition’.<sup>347</sup> In the context of police custody, vulnerability is understood as ‘psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information which is inaccurate, unreliable or misleading’.<sup>348</sup> Such

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<sup>342</sup> *ibid.*

<sup>343</sup> Although, as will be explored in Chapter 5, there is a large degree of consensus between custody officers as to what makes someone ‘vulnerable’ for the AA safeguard.

<sup>344</sup> See section 3.4.

<sup>345</sup> See section 3.3 and Chapter 4.

<sup>346</sup> Most notably Gisli H Gudjonsson.

<sup>347</sup> Ray Bull, ‘The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice’ (2010) 15 (1) *Legal and Criminological Psychology* 5 as cited in Gudjonsson, ‘Psychological vulnerabilities during police interviews’ (n 17) 166.

<sup>348</sup> Gisli H Gudjonsson, ‘The psychological vulnerabilities of witnesses and the risk of false accusations and false confessions’ in Anthony Heaton-Armstrong, Eric Shepherd, Gisli H

vulnerabilities are ‘potential “risk factors” rather than definitive markers of unreliability’<sup>349</sup> and the ‘vulnerable’ are viewed as such ‘because they may not fully understand the significance of the questions put to them or the implications of their answers [or] are unduly influenced by short-term gains (e.g. being allowed to go home) and by the interviewer’s suggestions’.<sup>350</sup> Those with less than average intellectual ability (i.e. those potentially falling under the ‘mentally vulnerable’ category)<sup>351</sup> ‘may feel intimidated when they are being interrogated by people in authority’<sup>352</sup> and ‘are often more willing and open to suggestion’.<sup>353</sup> Behavioural problems such as attention-deficit/hyperactivity disorder (ADD/ADHD) may also make individuals particularly susceptible to giving false confessions.<sup>354</sup>

The capacity of the suspect to cope with police interviews, as Gudjonsson and MacKeith have argued, depends on the ‘circumstances (the nature and seriousness of the crime, pressure on the police to solve the crime), ... interactions ..., personality, and health (physical and mental health, mental state’.<sup>355</sup> However, later work of Gudjonsson<sup>356</sup> has categorized this differently, by identifying four ‘types’ of vulnerability relevant to detainees or suspects. One of these is

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Gudjonsson and David Wolchover (eds) *Witness testimony: Psychological, investigative and evidential perspectives* (OUP 2006) 68.

<sup>349</sup> Gudjonsson, ‘Psychological vulnerabilities during police interviews’ (n 17) 161. This article discusses vulnerability in relation to victims, witnesses, and suspects.

<sup>350</sup> Gisli H Gudjonsson, ‘Confession Evidence, Psychological Vulnerability and Expert Testimony’ (1993) 3 *Journal of Community and Applied Social Psychology* 117, 121.

<sup>351</sup> See Chapters 1 and 4, particularly section 1.3.

<sup>352</sup> Gisli H Gudjonsson and James A MacKeith, ‘Learning disability and the Police and Criminal Evidence Act 1984. Protection during investigative interviewing: A video-recorded false confession to double murder’ (1994) 5 *Journal of Forensic Psychiatry* 35-49; Gisli H Gudjonsson, ‘“I’ll help you boys as much as I can”: How eagerness to please can result in a false confession’ (1995) 6 *Journal of Forensic Psychiatry* 333-42 as cited in Michel St-Yves, ‘The psychology of rapport: five basic rules’ in Tom Williamson (ed) *Investigative Interviewing: Rights, Research and Regulation* (Cullompton Willan 2006) 98.

<sup>353</sup> Isabel Clare and Gisli H Gudjonsson, ‘The vulnerability of suspects with intellectual disabilities during police interviews: A review and experimental study of decision-making’ *Mental Handicap Research (Journal of Applied Research in Intellectual Disabilities)* (1995) 8 (2) 110 as cited in Michel St-Yves, ‘The psychology of rapport: five basic rules’ (n 357) 98.

<sup>354</sup> Brendan M O’Mahony, Becky Milne and Tim Grant, ‘To Challenge, or not to Challenge? Best Practice when Interviewing Vulnerable Suspects’ (2012) 6 *Policing* 301, 302.

<sup>355</sup> Gisli H Gudjonsson and James MacKeith, ‘Disputed confessions and the criminal justice system’ Maudsley Discussion Paper No. 2 (Institute of Psychiatry 1997) as cited in Gudjonsson, ‘Psychological vulnerabilities during police interviews’ (n 17) 167.

<sup>356</sup> Gisli H Gudjonsson, ‘The psychological vulnerabilities of witnesses’ (n 348) 61-75.

explicitly contained within Code C. The first category is mental disorder, which includes mental illness, learning disability, and personality disorder.<sup>357</sup> The second category encompasses abnormal mental states such as anxiety, phobias, bereavement, intoxication, withdrawal and mood disturbance.<sup>358</sup> The third category is intellectual functioning, and the fourth is personality (to include traits such as suggestibility, compliance and acquiescence).<sup>359</sup> The third and fourth categories, whilst potentially being considered ‘mental vulnerabilities’,<sup>360</sup> are not contained explicitly within Code C.<sup>361</sup> Moreover, as will be indicated in Chapter 5, these other ‘types’ of vulnerability, in the absence of mental disorder, seem to be neglected by custody officers and Code C. Vulnerabilities such as personality traits are, however, ‘regularly admitted as evidence to challenge admissibility and the weight of the confession evidence’.<sup>362</sup> Further, not all conditions have a straightforward interplay with vulnerability: for example, as recognised within the psychology literature, personality disorder causes complex issues as it is connected with ‘criminal propensity, dishonesty, and disregard for others’ and there is a ‘limited scientific knowledge about how it impacts on unreliability in police interview’.<sup>363</sup>

It has been noted that those with a mild learning disability may experience difficulty communicating with others or may be awkward in doing so and have to make an effort in order to be sufficiently well-understood, particularly in unfamiliar situations. Their limited communication skills may make it challenging for them to easily interpret questions and statements from others.<sup>364</sup> They may also have problems handling information such as understanding and memory, problems with regulatory functions such as attention, inhibition and planning, and deficient problem-solving abilities such as self-regulation and being able to

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<sup>357</sup> See Chapter 4, and more specifically section 4.3, for discussion of mental disorder.

<sup>358</sup> These could be viewed as temporary innate vulnerabilities or situational vulnerabilities.

<sup>359</sup> Gudjonsson, ‘The psychological vulnerabilities of witnesses’ (n 348) 61-75.

<sup>360</sup> See Chapter 4 for a discussion of mental vulnerability, particularly sections 4.2, 4.3 and 4.8.

<sup>361</sup> See Chapter 4, particularly sections 4.2 and 4.8.

<sup>362</sup> Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley 2003) 3. As Gudjonsson’s quote indicates, this evidence is to be adduced at the trial stage i.e. when the courts are considering the admissibility of evidence. This therefore requires that the case reaches the courts and the courts consider such evidence to be unreliable – see Chapter 4, particularly section 4.4.

<sup>363</sup> Gudjonsson, ‘Psychological vulnerabilities during police interviews’ (n 17) 167.

<sup>364</sup> Xavier Moonen, Marjolein de Wit and Marjolein Hoogeveen, ‘Mensen met een licht verstandelijke beperking in aanraking met politie en justitie’ (2011) 90 (5) *Proces*, tijdschrift voor strafrechtspiegeling 235.



take perspective.<sup>365</sup> They may also be compliant and easily influenced, usually out of a desire to please those who are asking questions. They may also be easily led and may not fully understand the seriousness of the situation.<sup>366</sup>

Interestingly, negative life-events have also ‘been found to impact considerably upon interviewee susceptibility to misleading information and negative feedback incorporated within an interview’.<sup>367</sup> As such, ‘interviewees with a high number of negative life-events may more easily accept any misleading information put forward to them, as well as be more prone to shifting their initial answers in response to interrogative pressure’.<sup>368</sup> On this basis one could argue that most, if not all suspects, may be ‘vulnerable’, if vulnerable is taken to mean potentially at ‘risk’ (i.e. potential for providing unreliable information rather than a ‘definitive marker of unreliability’<sup>369</sup>). Gudjonsson and MacKeith detailed how a 17-year-old youth falsely confessed to two murders during police interview. Initially, he did not have legal representation, yet also later confessed during a second interview when assisted by the duty solicitor. These misleading admissions were also made to prison staff and a fellow inmate whilst on remand. The authors noted that:

The confession elicited by the police appeared very detailed and apparently convincing. The confession subsequently by chance proved to be false. It appears to have resulted from persistent pressure and psychological manipulation of a man who was at the time distressed and susceptible to interrogative pressure.<sup>370</sup>

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<sup>365</sup> *ibid* 239.

<sup>366</sup> Peter M van den Bergh ‘Verstandelijke handicap in zedenzaken’ in Peter J van Koppen, Dick J Hessing, Harald LGJ Merckelbach, Hans FM Crombag, *Het Recht van Binnen: Psychologie van het Recht* (Kluwer 2002) 538-9.

<sup>367</sup> Kim E Drake, Ray Bull and Julian CW Boon, ‘Interrogative Suggestibility, Self-Esteem, and the Influence of Negative Life Events’ (2008) 13 *Legal and Criminological Psychology* 299, 306. This could be viewed as a situational vulnerability – see later in this chapter.

<sup>368</sup> *ibid*.

<sup>369</sup> Gudjonsson, ‘Psychological vulnerabilities during police interviews’ (n 17) 166.

<sup>370</sup> Gisli H Gudjonsson and James A MacKeith, ‘A proven case of false confession: psychological aspects of the coerced-compliant type’ (1990) 30 (4) *Medicine, Science and the Law* 329, 329.

A detailed psychological assessment ‘indicated a clear improvement in the man's ability to assert himself and to cope with interrogative pressure’.<sup>371</sup> What was most striking about this case was that this man was of ‘average intelligence, suffered from no mental illness and his personality was not obviously abnormal’.<sup>372</sup> Whilst this ‘man’ would be considered vulnerable on account of his young age,<sup>373</sup> a similar situation could arise in relation to someone above the age of 18.

Physical illnesses may also create or exacerbate vulnerability – for example, illnesses such as epilepsy, diabetes, and heart problems have been known to lead to heightened agitation and distress, and may therefore impair the accuracy and reliability of a confession.<sup>374</sup> Physical illnesses can render someone vulnerable for the purposes of special measures at trial, but they have not been incorporated into the definition of vulnerability, for the purpose of the AA safeguard, in police custody.<sup>375</sup>

Although not all vulnerable suspects may falsely confess, possession of a vulnerability can lead an individual to do so. Gudjonsson discusses three main types of false confession. The first is voluntary false confession, which is a confession offered in the absence of police pressure. Such confessions can arise either through a ‘morbid desire for notoriety’<sup>376</sup>, ‘an unconscious need to expiate guilt over previous transgressions via self-punishment’,<sup>377</sup> an ‘inability to distinguish facts from fantasy’,<sup>378</sup> ‘a desire to aid and protect a real criminal’<sup>379</sup>, or ‘the hope for a recommendation of leniency’.<sup>380</sup> To this, Gudjonsson also adds the desire to take revenge on another person.<sup>381</sup> Such false confessions may be produced by those with mental health problems, such as schizophrenia, depression, or personality disorder, and even where such

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<sup>371</sup> *ibid.*

<sup>372</sup> *ibid.*

<sup>373</sup> See Code C.

<sup>374</sup> Gudjonsson, Clare, Rutter and Pearse (n 81) 16.

<sup>375</sup> See section 4.9.

<sup>376</sup> Gudjonsson, *Psychology of Interrogations* (n 362) 194.

<sup>377</sup> *ibid* 195.

<sup>378</sup> *ibid.*

<sup>379</sup> *ibid.*

<sup>380</sup> *ibid.*

<sup>381</sup> *ibid.*

individuals are of above average intelligence.<sup>382</sup> The second, the coerced-compliant confession, arises due to pressures from the police for instrumental gain such as being allowed to go home ‘earlier’, having the interview brought to an end, or to be avoid being locked-up in police custody.<sup>383</sup> As Gudjonsson highlights:

The suspect’s perceived immediate instrumental gain of confessing has to do with an escape from a stressful or an intolerable situation. The suspect may be vaguely or fully aware of the potential consequences of making a self-incriminating confession, but the perceived immediate gains outweigh the perceived and uncertain long-term consequences... Suspects may naively think that somehow the truth will come out later, or that their solicitor will be able to sort out their false confession.<sup>384</sup>

Such false confessions can arise, *inter alia*, in the absence of mental disorder, but where the suspect is prone to anxiety and abnormally succumbs to interrogative pressure, or where the suspect has a learning disability.<sup>385</sup> The third type of false confession is the coerced-internalised false confession, which may occur ‘when suspects come to believe that they have committed the crime they are accused of, even though they have no actual memory of having committed the crime’.<sup>386</sup> This type of false confession is associated with memory distrust syndrome and may occur when the suspect has no memory of the what they were doing at the time of the alleged offence or when the suspect, whilst having memory of what he or she was doing at the time of the alleged offence at the outset of the police interview, comes to distrust his or her memories as a result of ‘subtle manipulative influences by the interrogator’.<sup>387</sup> These false confessions can arise where the suspect suffers from black-outs due to heavy alcohol consumption, where the suspect has poor self-esteem and easily succumbs to pressure, or where the suspect is eager to please.<sup>388</sup>

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<sup>382</sup> *ibid* 218-224.

<sup>383</sup> *ibid* 196.

<sup>384</sup> *ibid*.

<sup>385</sup> *ibid* 224-233.

<sup>386</sup> *ibid* 196.

<sup>387</sup> *ibid* 197. See also *ibid* 196-7.

<sup>388</sup> *ibid* 233-242.

Thus, vulnerability to confess falsely or otherwise is ostensibly broader than that (at least explicitly) recognised under Code C. The adoption of a legal psychological approach to vulnerability could lead to a widening of the Code C vulnerability provisions.

### 3.4 Principal manifestations of vulnerability

The legal psychological discourse surrounding vulnerability seems to focus predominantly on innate vulnerabilities, i.e. mental factors or physical factors which result in vulnerable mental states. Innate vulnerability can, however, encompass much more. Such vulnerability is bound-up with the intrinsic qualities and tied to ‘aspects of the life-course’<sup>389</sup> such as young age, old age, impairment (whether physical, mental or sensory) and mental health problems. Theories of innate vulnerability posit ‘individuals as “at risk” in a way that can be modified by action, but where some risk will always remain’.<sup>390</sup> In addition to permanent or developmental states, innate vulnerability can also be used to ‘refer to temporary biological states associated with elevated fragility and which inspire protective responses, such as acute illness or pregnancy’.<sup>391</sup> As will be illustrated in Chapter 4, Code C relies predominantly on an innate conceptualisation of vulnerability.<sup>392</sup>

‘Circumstances or transgressions’<sup>393</sup> can also create vulnerability and evaluate one’s fragility.<sup>394</sup> Brown has termed this ‘situational vulnerability’<sup>395</sup> – something which ‘tends to be associated with the active input of a human third party or a structural force, but is also imagined to contain elements of individual agency or choice’.<sup>396</sup> Situational vulnerability results from

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<sup>389</sup> Brown (n 183) 29. See generally Brown (n 183) 29-31.

<sup>390</sup> *ibid* 29.

<sup>391</sup> *ibid*.

<sup>392</sup> Brown has noted that the notion of disability as vulnerability has divided disability theorists with some writers being ‘highly critical of understandings that advance disabled people as innately vulnerable, arguing that such a construction is disempowering and patronising’ - Brown (n 183) 30. As I have argued elsewhere, whilst physical characteristics are recognised as vulnerabilities for the implementation of special measures, they are not recognised as vulnerabilities for the AA safeguard. See Chapter 4.

<sup>393</sup> Brown (n 183) 31.

<sup>394</sup> *ibid*.

<sup>395</sup> Brown (n 183) 31-33.

<sup>396</sup> *ibid* 31.

political, personal, social, economic, or environmental factors. Those viewed as situationally vulnerable may be ‘victims’ or ‘victims of circumstance’ to whom we owe certain ‘social or statutory duties’.<sup>397</sup> Brown cites those such as Roma people, homeless people, women involved in prostitution, asylum seekers, drug users, poorer people and prisoners as situationally vulnerable.<sup>398</sup> It could, of course, also include those brought into police custody.<sup>399</sup> However, situational vulnerability and transgression have an uneasy relationship – such vulnerability is linked with notions of ‘deservingness’, thus incorporating behavioural elements.<sup>400</sup> Situational vulnerability can be, for example, gendered – ‘women [are] more firmly located within “vulnerability” classifications due to their being more inclined to behave with deference and accept dependence’.<sup>401</sup> Because suspects may have behaved problematically, or be perceived to have done so by custody officers, their vulnerability could be challenged – they may be seen as ‘to blame’ for ‘landing themselves’ in custody.<sup>402</sup> In particular, those who have failed to take advantage of opportunities to avert harm to themselves may be apportioned all, if not at least some, of the blame for the circumstances which befall them.<sup>403</sup>

Vulnerability can likewise be tied to social disadvantages and spaces of vulnerability.<sup>404</sup> This rendering of vulnerability, whilst now being used in social science work, finds its origins in geographical and environmental studies.<sup>405</sup> This notion of vulnerability has been used to describe ‘social exposure to natural or environmental hazards, or more broadly as a way of bringing social and economic disadvantage and “coping capacity” into focus’.<sup>406</sup> Such vulnerability operates more on a macro-level and will therefore not be explored within this thesis.

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<sup>397</sup> *ibid.*

<sup>398</sup> *ibid.*

<sup>399</sup> See Chapters 5 and 9, particularly sections 5.2 and 9.3.4 and 9.3.5.

<sup>400</sup> Brown (n 183) 32.

<sup>401</sup> *ibid* 33 (footnote omitted).

<sup>402</sup> This has parallels with the presumption of guilt, which is a characteristic of the crime control model – see section 8.2.1.

<sup>403</sup> See Robert Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press 1985) 129.

<sup>404</sup> Brown (n 183) 33-36.

<sup>405</sup> *ibid* 33.

<sup>406</sup> *ibid* 33.

Vulnerability is also closely tied with risk, its ‘conceptual [cousin]’<sup>407</sup> – these two terms are often used interchangeably. Vulnerability was used as another word for risk in police custody – it was more clearly understood and conceptualised in relation to ‘risk factors’ than in terms of the AA safeguard.<sup>408</sup> There are, however, some key differences between the two. As Brown notes, vulnerability has ‘more pronounced ethical connotations’,<sup>409</sup> particularly given its ‘potent overtones of the duty of care’<sup>410</sup> and its closer links with ‘compassion and responsibility’.<sup>411</sup> It is also more successful in disguising its ‘controlling undertones’.<sup>412</sup> Vulnerability is ‘more remote in terms of potential harm’<sup>413</sup> – it relates to a *potentiality* for harm rather than a probabilistic calculation (which is associated with risk).<sup>414</sup> Vulnerability and risk also differ with regard to their ‘particular behavioural associations’<sup>415</sup> – the label of ‘vulnerable’ is tied to notions of weakness and frailty and one’s ability to ‘perform’ their vulnerability.<sup>416</sup> As will be evidenced in Chapter 5, the ability to perform vulnerability may present difficulties for suspects brought into police custody.

Vulnerability, whilst specific to individuals or groups of individuals, can also be considered as a characteristic possessed by all – ‘vulnerability arises in the first place from our embodiment, which carries with it the imminent or ever-present possibility of harm, injury, and misfortune’.<sup>417</sup> It is universal<sup>418</sup> and ‘defines our humanity’.<sup>419</sup> Turner views this universal

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<sup>407</sup> *ibid* 15.

<sup>408</sup> See sections 7.4 and 8.6.

<sup>409</sup> Brown (n 183) 42.

<sup>410</sup> *ibid*.

<sup>411</sup> *ibid*. See also Goodin, *Protecting the Vulnerable* (n 403).

<sup>412</sup> Brown (n 183) 42 (original emphasis).

<sup>413</sup> *ibid*.

<sup>414</sup> *ibid*. Although as Brown also notes, the implications are such that ‘as a net-widening mechanism, vulnerability could extend further than risk’ – Brown (n 183) 42.

<sup>415</sup> *ibid*.

<sup>416</sup> *ibid* 43.

<sup>417</sup> Martha A Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha A Fineman and Anna Grear (eds) *Gender in Law, Culture, and Society: Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 20. See also Martha A Fineman, ‘Feminism, Masculinities, and Multiple Identities’ (2013) 13 Nevada Law Journal 101; Martha A Fineman, ‘Evolving Images of Gender and Equality: A Feminist Journey’ (2009) 42 New England Law Review 101.

<sup>418</sup> Brown (n 183) 36-39.

<sup>419</sup> Bryan Turner, *Vulnerability and human rights* (Pennsylvania State University Press 2006) 1.

vulnerability as ‘common and uniform’,<sup>420</sup> i.e. that we are all equal in our vulnerability because of ‘the arbitrary contingencies of human existence’,<sup>421</sup> however, other scholars have pointed towards the varying nature of human vulnerability, such as Fineman when she notes:

While it must initially be understood as universal and constant when considering the general human condition, vulnerability must be simultaneously understood as particular, varied, and unique on the individual level. Two forms of individual difference are relevant. The first form of difference is physical: mental, intellectual, and other variations in human embodiment. The second is social and constructed, resulting from the fact that individuals are situated within overlapping and complex webs of economic and institutional relationships.<sup>422</sup>

Vulnerability is, therefore, not experienced in the same way by all people – there are some who may be more vulnerable, who may be perceived as being more vulnerable, or who may feel more vulnerable. Vulnerability may also manifest in different ways or for different reasons – Misztal, for example, has identified three forms of vulnerability. The first is dependency on others – we are vulnerable because of our dependence on others for our self- realization, and thus our development of self- confidence, self- respect, and self- esteem.<sup>423</sup> Vulnerability may also manifest through the predicament of unpredictability (a fear of the uncertain future) and by the predicament of irreversibility (as a result of having been wronged or harmed in the past)<sup>424</sup> – Misztal’s second and third forms of vulnerability, respectively. Butler’s work also speaks to a universal and uniting vulnerability, as she notes, ‘one insight that injury affords is that there are others out there on whom my life depends, people I do not know and may never know. This fundamental dependency on autonomous others [is] not a condition that I can will

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<sup>420</sup> *ibid* 9.

<sup>421</sup> *ibid* 109.

<sup>422</sup> Fineman, ‘Equality, Autonomy, and the Vulnerable Subject’ (n 417) 21. Although more recent conversations with Professor Fineman would suggest that she is moving away from this varying notion of vulnerability towards an invariable notion of vulnerability (as discussed at a recent seminar at Cardiff University – July 2016).

<sup>423</sup> Misztal (n 182) 47.

<sup>424</sup> Misztal notes these as two additional forms of vulnerability – *ibid* 48-49.

away'.<sup>425</sup> We have at best limited control over others, even going as far as to say that we have *no* control over others, thus rendering our lives precarious and unpredictable.

### 3.5 Competing constructions of vulnerability

As noted earlier, vulnerability can have both positive and negative connotations.<sup>426</sup> Similarly, vulnerability can be used for the furtherance of either supportive or coercive agendas. Using sex work as a case study, Munro and Scoular explored the multiple meanings of vulnerability and identified two strategies – whilst vulnerability can be ‘relied upon by those seeking improved social justice as a mechanism by which to identify, problematise and compel state responses to a universal condition of precarious dependency’,<sup>427</sup> it can also be ‘used as a category of neo-liberal governance which legitimates state encroachment whilst constructing vulnerable individuals as “risk-managers” who must behave “responsibly” in the face of disadvantage’.<sup>428</sup> Similarly, vulnerable individuals may be conceptualised as dangerous and therefore ‘require extra control’ as well as deserving ‘extra support’.<sup>429</sup>

Moreover, as Beckett notes, the varying definitions of vulnerability allow for policymakers to ‘convey legitimacy on different types of policy towards vulnerable groups’.<sup>430</sup> On a similar point, McLaughlin has argued that ‘the government, campaign groups and many mental health professionals... have a low opinion of people’s ability to negotiate and transcend the problems of contemporary social and political life, and they have a vested interest in viewing us as sick and irrational’<sup>431</sup>. This serves to ‘other’ vulnerable individuals and may result in stigmatisation, which ‘marks them as lesser, imperfect, and deviant, and places them somehow outside of the

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<sup>425</sup> Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) xii.

<sup>426</sup> Levine (n 338).

<sup>427</sup> Vanessa E Munro and Jane Scoular, ‘Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK’ (2012) 20 (3) *Feminist Legal Studies* 189, 189.

<sup>428</sup> *ibid* 189.

<sup>429</sup> Brown (n 183) 33.

<sup>430</sup> Angharad Beckett, *Citizenship and Vulnerability: disability and issues of social and political engagement* (Palgrave Macmillan 2006) as cited in Misztal (n 89) 32. See also Misztal (n 182) 29.

<sup>431</sup> Kenneth McLaughlin, *Surviving Identity: Vulnerability and the Psychology of Recognition* (Routledge 2012) 127.



protection of the social contract as it is applied to others'.<sup>432</sup> Further, it may call into question the 'vulnerable' person's autonomy<sup>433</sup> or may serve to create a category of 'invulnerable'. On this latter point Fineman notes:

[P]erhaps the most insidious effect of segmenting society and designating only some as constituting vulnerable subpopulations is that such a designation suggests that some of us are not vulnerable. Those who stand outside of the constructed vulnerability populations are thus fabricated as invulnerable.<sup>434</sup>

Code C is not unproblematic in this sense – whilst the AA safeguard is used to provide something to vulnerable suspects rather than to legitimise an encroachment on their lives, much of the wording of Code C<sup>435</sup> lends itself to notions of weakness and defectiveness.<sup>436</sup> It also suggests that those falling outside of the designated categories do not, and will not, ever require protection. Moreover, as I will explain in Chapter 4, suspect vulnerability is conceptualised in a different manner to victim vulnerability – whilst varying concepts may be important for practical reasons, they may also indicate some symbolic significance as well.

### 3.6 Reconceptualising vulnerability?

The vulnerability thesis, i.e. the idea of a shared, universal vulnerability, views all individuals as vulnerable. This vulnerability is not necessarily something that disappears – it is omnipresent. Whilst the vulnerability thesis 'can alert us to the universal precariousness of human existence... and can act as a unifying theoretical catalyst through which society could potentially be transformed',<sup>437</sup> it is not this that provides the basis for reconceptualising

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<sup>432</sup> Fineman, 'Equality, Autonomy, and the Vulnerable Subject' (n 417) 16.

<sup>433</sup> Vulnerability and autonomy seem to have an uneasy relationship – Fineman attempts to replace the autonomous subject for the vulnerable one – *ibid.* See also Johnathan Herring, *Vulnerable Adults and the Law* (OUP 2016). Diduck suggests that vulnerability and autonomy are inseparable and one cannot exist without the other – see Alison Diduck, 'Autonomy and Vulnerability in Family Law: The Missing Link' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013).

<sup>434</sup> Fineman (n 417) 16.

<sup>435</sup> See sections 4.2 and 4.9.

<sup>436</sup> Code C does, however, contain a caveat – see section 4.2.

<sup>437</sup> Brown (n 183) 36.

vulnerability, at least not in its entirety. In the context of daily life many individuals can make choices that are advantageous to their long-term well-being (placing long-term implications over short-term gains). It is rather the coercive nature of the custody and the criminal process that create a situational vulnerability, and it is upon this basis that the proposition for broadening vulnerability in the context of police custody can be sustained. Within the following section I will address how police custody can create or exacerbate vulnerabilities. I will return to this in Chapter 9.

As I have noted above, vulnerability, as is currently contained within Code C, encompasses mainly innate characteristics. It can, however, also be situational.<sup>438</sup> Moreover, vulnerability could be viewed as the risk or exposure of self-incrimination<sup>439</sup> or providing unreliable or misleading information.<sup>440</sup> Vulnerability could also manifest through the risk of self-harm or suicide, whether deliberate or unintentional,<sup>441</sup> or could be captured by the notion of mental harm such as trauma. More broadly, it can also be thought as a feeling – simply being in custody may arouse feelings of precariousness, unease or discomfort. Being brought into police custody could also be detrimental to one's physical health or can increase one's levels of agitation and distress.<sup>442</sup> It is not unconscionable to propose that many individuals entering police custody may have recently experienced a bereavement or relationship breakdown and may therefore feel an increased sense of vulnerability. The act of being brought into custody may also trigger negative emotions and thus feelings of vulnerability. Similarly, the act of being detained may also heighten vulnerability for the suspect or detainee. Within custody the suspect may contemplate the possibility that he or she may face criminal sanction. Even where the police have no intention of pursuing the case beyond custody,<sup>443</sup> the process may be the punishment.<sup>444</sup> Factors such as the suspect's age, ethnicity, gender, mental state and previous

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<sup>438</sup> I will elaborate more upon this in section 4.9.

<sup>439</sup> Potentially heightened by the fact that adverse inferences can now be drawn from silence – see section 1.3.

<sup>440</sup> This latter element is the basis for vulnerability under Code C and the AA safeguard.

<sup>441</sup> This is more accurately conceptualised as 'risk' and is dealt with in a different manner – see section 7.4.

<sup>442</sup> See Gudjonsson, Clare, Rutter and Pearse (n 76) 16.

<sup>443</sup> See Satnam Choongh, 'Policing the Dross: A Social Disciplinary Model of Policing' (1998) 38 (4) *British Journal of Criminology* 623. See also Choongh, *Policing as Social Discipline* (n 29).

<sup>444</sup> Feeley (n 168).

convictions or confessions; the nature and seriousness of the alleged offence; access to legal advice; the presentation or strength of the ‘evidence’; and the amount of interrogative pressure may also increase one’s propensity to confess<sup>445</sup> or increase vulnerabilities. The length and nature of detention also, undoubtedly, may have some bearing on one’s vulnerabilities. One must remember that when the detainee or suspect is ‘locked-up’ it is not what is actually happening but rather what the individual perceives to be happening that may exacerbate his or her feelings of isolation, desperation, and despair. Police detention results in the restriction of liberty, constrained contact with friendly forces (i.e. family and friends) and limited control over everything but the most intimate bodily functions.<sup>446</sup> The dynamics of the relationship between the police (who have ‘the upper hand through information, physical and territorial control’<sup>447</sup>) and the suspect could result in an inescapable vulnerability for even the most articulate, steadfast, and strong-willed individual. As Gudjonsson has noted, even with markedly improved legal provisions, any type of custodial interrogation is coercive when viewed in terms of police power and control.<sup>448</sup> It may be, moreover, massively stressful for the suspect.<sup>449</sup> In sum, the nature of custodial detention has an adverse effect on the suspect’s ability to make decisions pursuant to his or her own interests.<sup>450</sup> Vulnerability can therefore materialise because the suspect is greatly impacted by the actions of, for example, the police.<sup>451</sup>

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<sup>445</sup> See Gudjonsson, *The Psychology of Interrogations* (n 362) 140-51.

<sup>446</sup> The police may also search one’s intimate orifices – see PACE, s 55.

<sup>447</sup> Jacqueline Hodgson, ‘Adding Injury to Injustice: The Suspect at the Police Station’ (1994) 21 *Journal of Law and Society* 85, 90. See also McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 37-38.

<sup>448</sup> Gudjonsson, *The Psychology of Interrogations* (n 362) 25.

<sup>449</sup> *ibid.* Gudjonsson also suggested that coercion in police interviews may lead to Post-Traumatic Stress Disorder, however, a direct link has yet to be established.

<sup>450</sup> Irving and McKenzie (n 57) 24.

<sup>451</sup> See Robert Goodin, ‘Exploiting a Situation and Exploiting a Person’ in Andrew Reeve (ed) *Modern Theories of Exploitation* (SAGE 1987) 167 as cited in Jennifer Collins, ‘The Contours of Vulnerability’ in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013) 32. As Collins notes, Goodin has identified four circumstances where the person may be vulnerable – (1) that the person is unfit or unable to play in games of advantage, (2) that the person has renounced playing advantage for themselves, (3) that the person is no match for the other person, and (4) that the person is in a position of grave misfortune – see Collins 33-37. Suspects in police custody could be said to meet all, if not at least one, of these circumstances.

### 3.7 Concluding remarks

In the absence of a recognised interdisciplinary term, vulnerability continues to generate ‘continuing confusion’,<sup>452</sup> to the point where it is an ‘unclear, catch-all concept’.<sup>453</sup> Vulnerability can be either a force for good or a means for permitting state encroachment. It can be something negative or something positive. It can, in essence, mean many things and nothing at all.<sup>454</sup> ‘Vulnerable people are not... an homogenous group’<sup>455</sup> and this makes it very difficult to arrive at a clear definition of vulnerability. Further, it depends on what one interprets this vulnerability to be – no two individuals are vulnerable in exactly the same way.

This chapter has drawn from a wide array of disciplines in order to uncover what vulnerability means. By identifying the five manifestations discussed by Brown,<sup>456</sup> one may arrive at a better understanding of what it means to be vulnerable. However, a definitive conceptualisation may be difficult to reach. This chapter has provided a basis upon which to critically assess Code C and has addressed how vulnerability could be conceptualised in the context of custody. I will return to this contention in Chapter 9. The main message is that vulnerability is inherent and exists within us all. This does not disappear when entering police custody, in fact it is exacerbated by or becomes apparent when in police custody. However, Code C does not conceptualise vulnerability as inherent – as I will explore in the following chapter, it focuses on innate, and to a lesser extent, situational vulnerability, also neglecting many facets of both. Within the following chapter I will look at how Code C and the courts conceptualise vulnerability. Moving through Part 1, one will see how this broad notion is filtered by Code C and then further distilled by custody officers.

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<sup>452</sup> Misztal (n 182) 5.

<sup>453</sup> *ibid.*

<sup>454</sup> As Collins notes, vulnerability ‘has a reasonably firm core, but has scope for uncertainty at its margins’. Collins points to HLA Harts notion of core and penumbra – Collins (n 451) 29. See also HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, Clarendon Press 2012).

<sup>455</sup> Law Commission, *Mentally Incapacitated and other Vulnerable Adults: Public Law Protection* (Law Com No 130, 1993) at para 2.22.

<sup>456</sup> Brown (n 183) discussed above.

## CHAPTER 4: CONSTRUCTING VULNERABILITY – PACE, CODE C AND THE COURTS

### 4.1 Introduction

As noted in the Chapter 3, vulnerability is difficult to define. Similarly, vulnerability for the purposes of implementing the AA safeguard may also be problematic. Within this chapter I will provide an overview of how the law, in the context of the criminal justice system, and more specifically within police custody, defines vulnerability. I have identified two main sources through which to do so – Code C and the courts. PACE, beyond the exclusionary rules on evidence (ss 76 and 78) and the s 77 direction to the jury, does not contain any information on the definition of vulnerability nor on identification or implementation. Instead, Code C provides this ‘guidance’. Within this chapter I will address how Code C defines vulnerability, specifically for adult suspects, and how it constructs the role of AA.<sup>457</sup> I will also explore how the courts have interacted with vulnerability and the AA safeguard in cases where questions over admissibility were raised for non-implementation of the AA safeguard.<sup>458</sup> Whilst not a legal document, because of its use as national authoritative guidance, the College of Policing Authorised Professional Practice (APP) on Detention and Custody will also be examined.<sup>459</sup> As illustrated below in section 4.2, Code C refers to the MHA; the Code of Practice to the MHA elaborates on the definition contained within Code C and so will be discussed within this chapter.<sup>460</sup> To make a small comparative point, I will also explore how the criminal justice system approaches the vulnerability of witnesses/victims and defendants, and how vulnerability is conceptualised within a social care setting. Such conceptualisations are useful

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<sup>457</sup> I will return to these in Chapter 5.

<sup>458</sup> I will rely predominantly (but not solely) on the cases mentioned in Zander, *The Police and Criminal Evidence Act 1984* (n 75).

<sup>459</sup> College of Policing, ‘APP: Detention and Custody’ (n 153). Code C signposts custody officers towards the APP – see Code C, Notes for Guidance 3E. The APP aims to ‘significantly [reduce] the amount of national guidance in circulation’ and provides a national guidance hub for police officers – see College of Policing, ‘College Newsletter Archive, February 2014, Authorised Professional Practice – guiding the Service’ <<http://www.college.police.uk/News/archive/2014feb/Pages/news-APP.aspx>> accessed 27 April 2016.

<sup>460</sup> Department of Health, *Mental Health Act 1983: Code of Practice* (TSO 2015) 206 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/396918/Code\\_of\\_Practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396918/Code_of_Practice.pdf)> accessed 10 November 2015.

for the purposes of critical assessment and exploring how vulnerability is understood by custody officers<sup>461</sup> when reaching Chapter 5. Latterly, I will critically assess these definitions and their potential problems.<sup>462</sup> As mentioned in Chapter 1, there is an overlap between fitness for interview and the AA criteria – this overlap will be explored in this chapter. The last element within this chapter is an examination of Code C and the manifestations of vulnerability (as explored in Chapter 3).

#### 4.2 Code C and PACE: constructions of vulnerability and the AA safeguard

As noted above, PACE does not provide a definition of vulnerability. However, s 77 could be considered as providing a part-definition. Section 77 (3) explicates the term ‘mentally handicapped’, that is a person who is ‘in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning’. Section 77 allows for a jury direction where a mentally handicapped person has confessed in the absence of an independent person and where the prosecution case rests wholly or substantially on the confession. The background to this provision illustrates the restrictive nature of PACE: whilst it was initially intended that confessions made by any vulnerable suspect would be excluded, the government felt that this should be ‘curtailed by the public interest principle’<sup>463</sup> and instead the clause covered mentally handicapped suspects only, and even then in restrictive circumstances (as outlined above).<sup>464</sup> As noted in Chapter 1, the recommendation that s 77 be extended to include those who are mentally ill or otherwise mentally disordered was ignored.<sup>465</sup>

The term ‘mental handicap’ was used in previous versions of Code C, such as the 1991 Code of Practice:

If an officer has any suspicion, or is told in good faith that any person of any age may be mentally incapable of understanding the significance of questions put to him or his

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<sup>461</sup> See Chapter 5 on this latter element, particularly section 5.2.

<sup>462</sup> This is important when reaching Chapters 8 and 9.

<sup>463</sup> Sharpe (n 171) 79.

<sup>464</sup> *ibid.*

<sup>465</sup> See RCCJ (n 65) 59.

replies, then that person shall be treated as a mentally disordered or mentally handicapped person for the purposes of this this Code.<sup>466</sup>

Both s 77 and the earlier versions of Code C require ‘mental handicap’ (i.e. serious impairment), however, the current Code C definition of vulnerability is less restrictive. For example, whilst at the time of Palmer and Hart’s study, poor educational attainment could not be included within the Code C definition, it seems now that it can.<sup>467</sup> The guidance under Code C, in relation to adult suspects (i.e. those 18 and above), considers those who are ‘mentally disordered’ or ‘mentally vulnerable’ as ‘vulnerable’ and thus requires that an AA is provided.<sup>468</sup> Whilst these categories are separate, one could imagine a situation where someone is both ‘mentally disordered’ and ‘mentally vulnerable’, i.e. mentally vulnerable independently of or as result of the mental disorder. These definitions are elaborated upon within the Code where it states:<sup>469</sup>

*‘Mentally vulnerable’ applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. ‘Mental disorder’ is defined in the [MHA] 1983, section 1(2) as ‘any disorder or disability of mind’. When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an [AA] called.*<sup>470</sup>

As noted in Chapter 1, the AA is present to support, assist and advise the suspect, facilitate communication between the suspect and the police, and ensure that the police are acting fairly.<sup>471</sup> The AA performs not only a communicative function but also a supportive and

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<sup>466</sup> Code C 1991, para 1.4 as cited in Bean and Nemitz, *Out of Depth and Out of Sight* (n 77) 6.

<sup>467</sup> See Palmer and Hart (n 76) 35.

<sup>468</sup> See Code C, specifically para 3.5.

<sup>469</sup> For a critique of the status of this guidance see Dehaghani, ‘He’s just not that vulnerable’ (n 170). The last sentence refers to doubt – this will be discussed later in this chapter and in greater detail in Chapter 6.

<sup>470</sup> Code C, Notes for Guidance para 1G.

<sup>471</sup> Code C, para 11.17 in combination with Home Office and NAAN (n 48).

advisory function<sup>472</sup> and is expected not to act simply as an observer,<sup>473</sup> although in reality the AA may find it difficult to interject. The AA is someone independent from the police inquiry i.e. they must not be a police officer or someone employed for, or engaged in, police work. A solicitor or independent custody visitor may not act as an AA.<sup>474</sup> In the case of adult suspects, the AA should be:

- (i) a relative, guardian or other person responsible for their care or custody;
- (ii) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police;
- (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.<sup>475</sup>

Although it is typically preferred that an AA for those with mental disorder or mental vulnerability is someone with experience or training in relation to those vulnerabilities, the wishes of the suspect are, if practicable, respected.<sup>476</sup> The AA must act in the best interests of the suspect whilst respecting his or her wishes – for example, the AA should consider whether legal advice is required and may request that a solicitor attends the police station, however, the suspect is not forced to see a solicitor if he or she is ‘adamant that [he or she] do not wish to do so’.<sup>477</sup> The AA is not, however, subject to legal privilege and, as such, where a legal representative is present, a private consultation without the AA should be arranged.<sup>478</sup> There are also many other problems with the safeguard, as discussed in section 1.3.1.

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<sup>472</sup> See also Chapter 5. As Cummin notes, the protective (or, as I have termed, ‘supportive’) function is not one which many adults avail of due to the deficiencies with identification – Ian Cummins, ‘Boats against the current: Vulnerable adults in police custody’ (2007) 9 (1) *The Journal of Adult Protection* 19, 23. See Chapter 6 (sections 6.2 and 6.5) for a discussion of the deficiencies with the identification processes.

<sup>473</sup> Code C, para 11.17.

<sup>474</sup> Code C, Notes for Guidance 1F. In the past, a solicitor or independent custody visitor could act as an AA – see later. See also Chapter 8 where the custody officer’s approach to this is discussed.

<sup>475</sup> Code C, para 1.7.

<sup>476</sup> Code C, Notes for Guidance 1D.

<sup>477</sup> Code C, para 6.5A. It is likely however that, should the AA be present, the suspect may be more likely avail of his or her right to legal advice.

<sup>478</sup> Code C, Notes for Guidance 1E.



The rationale for providing the safeguard, as mentioned in Chapter 1, is as such:

*Although ... people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating.*<sup>479</sup>

As also mentioned in Chapter 1, Code C also urges that special care be taken by investigating officers when questioning vulnerable suspects, and corroboration of facts be sought wherever possible.<sup>480</sup> Where there is ‘any doubt about a person’s ... mental state or capacity’<sup>481</sup> an AA should be involved. Further, as reiterated in the Code:

If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, or mentally incapable of understanding the significance of questions or their replies that person shall be treated as mentally disordered or otherwise.<sup>482</sup>

For the first, and only time, in Code C the phrase ‘mentally incapable’<sup>483</sup> is also introduced. I will assess these inconsistencies later in this chapter.

#### 4.3 Additional constructions of vulnerability

Other than that explored above, Code C does not elaborate further on definitions of vulnerability. Yet, this does not mean that custody officers are not provided<sup>484</sup> with further definitions. For example, custody officers may consult the College of Policing APP on

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<sup>479</sup> Code C, Notes for Guidance 11C.

<sup>480</sup> *ibid.*

<sup>481</sup> *ibid.*

<sup>482</sup> Code C, Annex E para 1. I will return to this ‘benefit of the doubt’ test later in this Chapter and in Chapter 6. See also College of Policing, *APP: Detention and Custody* (n 153).

<sup>483</sup> Code C, Annex E para 1.

<sup>484</sup> Whether or not they consult this guidance is another matter – see Roxanna Dehaghani, ‘Custody Officers, Code C and Constructing Vulnerability: Implications for Policy and Practice’ (2017) 11(1) Policing 74. See also Chapter 5.

Detention and Custody, particularly the provisions on mental ill health and learning disabilities.<sup>485</sup> The guidance does not provide a definition of ‘mental disorder’ but rather ‘mental ill health’ which ‘is used broadly to refer to all those matters relating to mental health problems’<sup>486</sup> and can include ‘mental disorders, mental illness, mental health needs and many of the issues that fall within the MHA 1983 of mental disorder and the ... Code C definition of mentally vulnerable’.<sup>487</sup> Mental ill health ‘also covers people who are experiencing mental distress at the time they come into contact with the police, whether or not they have been formally diagnosed or have previously received mental health services’.<sup>488</sup> The guidance also includes information on ‘learning disabilities or difficulties’, citing the definition of the former, as per the MHA 1983 s 1(4), as ‘a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning’.<sup>489</sup> The guidance explains how a learning disability may affect the person concerned, in that it:

[M]ay be mild, moderate or severe and affects the way a person learns and communicates. It results in a reduced ability to learn new skills, adapt to and cope with everyday demands, understand complex information or, in some cases, to live independently. Most people with a learning disability look physically the same as the general population, although some may have clear physical characteristics, for example, people with Down’s syndrome (which is classed as a learning disability).<sup>490</sup>

The guidance also requires that those ‘with learning disabilities/difficulties should have an [AA] when being dealt with in a custody environment’.<sup>491</sup> It does not distinguish between learning disability and learning difficulty, however, it does discuss how there can be ‘varying

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<sup>485</sup> College of Policing, *APP: Detention and Custody, Detainee Care, Mental ill health and learning disabilities* (College of Policing 2013/15) <<https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/mental-ill-health-and-learning-disabilities/>> accessed 1 June 2016. (Hereafter *APP: Mental ill health*).

<sup>486</sup> *ibid.*

<sup>487</sup> *ibid.*

<sup>488</sup> *ibid.*

<sup>489</sup> *ibid.*

<sup>490</sup> *ibid.* This information is important when considering the responses of custody officers when asked to define vulnerability (see Chapter 5 and specifically sections 5.2, 5.3, 5.4 and 5.5).

<sup>491</sup> *ibid.*

degrees of learning disability’.<sup>492</sup> Furthermore, the guidance mentions ‘mental vulnerability’ and adds to the Code C guidance by highlighting how a suspect may be ‘mentally vulnerable’ but ‘not be considered to be experiencing a mental illness by an HCP’,<sup>493</sup> thus cautioning that a medical diagnosis is not required for this category of vulnerability.

As noted above, Code C refers to mental disorder, that is ‘defined in the [MHA] 1983, section 1(2) as “any disorder or disability of mind”’.<sup>494</sup> Code C does not elaborate further but a comprehensive (although not exhaustive) list is found within the Code of Practice of the MHA 1983 which cites the following clinically recognised conditions as ‘mental disorders’<sup>495</sup>:

- Affective disorders, such as depression and bipolar disorder
- Schizophrenia and delusional disorders
- Neurotic, stress-related and somatoform disorders, such as anxiety, phobic disorders, obsessive compulsive disorders, post-traumatic stress disorder and hypochondriacal disorders
- Organic mental disorders such as dementia and delirium (however caused)
- Personality and behavioural changes caused by brain injury or damage (however acquired)
- Personality disorders
- Mental and behavioural disorders caused by psychoactive substance use
- Eating disorders, non-organic sleep disorders and non-organic sexual disorders
- Learning disabilities
- Autistic spectrum disorders (including Asperger’s syndrome)
- Behavioural and emotional disorders of children and young people<sup>496</sup>

The MHA 1983 Code of Practice also provides a definition of learning difficulty, ‘a state of arrested or incomplete development of the mind which includes significant impairment of

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<sup>492</sup> *ibid.*

<sup>493</sup> *ibid.*

<sup>494</sup> Code C, Notes for Guidance 1G.

<sup>495</sup> Only the information required has been contained within this list.

<sup>496</sup> Department of Health, *Mental Health Act 1983: Code of Practice* (n 460) 26.

intelligence and social functioning'<sup>497</sup> or a 'significantly reduced ability to understand new or complex information, to learn new skills, and reduced ability to cope independently which starts before adulthood with lasting effects on development'.<sup>498</sup> Critical assessment of these pieces of guidance will be reserved for later in this chapter.

HMIC have also explicated the definition of 'vulnerability'. Their definition extends far beyond Code C, to include:

- mental health problems;
- learning difficulties;
- physical illness or disability;
- alcohol and/or substance misuse;
- age and
- race<sup>499</sup>

This definition more accurately aligns with the myriad ways in which someone can be vulnerable.<sup>500</sup>

Within the following section I will address how the Courts construct vulnerability, focusing exclusively on cases where they were considering the admissibility of evidence under s 76 for breach of the AA provision under Code C.<sup>501</sup>

#### 4.4 Vulnerability in the courts

As discussed in Chapter 1, s 76 of PACE allows for a confession ('any statement wholly or partly adverse to the person who made it; whether made to a person in authority or not and whether made in words or otherwise'<sup>502</sup>) to be excluded at trial where the confession has been

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<sup>497</sup> *ibid* 206.

<sup>498</sup> Department of Health, *Valuing People: a new strategy for learning disability for the 21st Century* (White Paper, Cm 5086, 2001) 14.

<sup>499</sup> HMIC, *Welfare of Vulnerable* (n 81) 17.

<sup>500</sup> See section 3.4.

<sup>501</sup> Failure to comply with any of the Codes under PACE shall not, of itself, render the custody officer liable to civil or criminal proceedings – see PACE s 67 (10).

<sup>502</sup> PACE s 82 (1).

obtained through oppression or as a consequence of something said or done which was likely, in the circumstances existing at the time to render it unreliable. The failure to provide an AA can constitute such circumstances.<sup>503</sup> Further, s 78 allows the exclusion of evidence at the court's discretion, if the court finds that 'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that [it] ought not admit it'.<sup>504</sup> Within the following section I will explore the admissibility cases, dealing firstly with instances where a breach was not condoned and latterly addressing cases where a breach was condoned.<sup>505</sup> In doing so I aim to achieve two goals – to give the reader a sense of the courts' constructions of vulnerability and to provide context for an argument upon which I will build in Chapter 8.

#### 4.4.1 The courts: condemning the breach

The case of *R. v Aspinall*,<sup>506</sup> concerned a s 78 challenge where the appellant (A), who was schizophrenic, had been convicted of conspiracy to supply a Class A controlled drug. A had advised the custody officer of his condition, who then arranged for A to see the police surgeon. The surgeon noted that, whilst A suffered from schizophrenia and was on regular medication, he was lucid in thought and oriented in time and space.<sup>507</sup> Upon request by A, the custody officer arranged for a second assessment to be conducted by another police surgeon who confirmed the probable diagnosis of paranoid schizophrenia and that A was adhering to his medication regime, was not in need of further treatment and was probably fit to be interviewed. A was interviewed without an AA present. Evidence was adduced at trial attesting to A's mental illness, that he had been held in a secure unit for six months in 1993, and had been admitted to hospital during an acute psychotic episode in 1996. Yet, the psychiatrist, upon an examination of A sometime after the police interview, indicated that A was 'likely to have understood the nature of the procedure and questions, and would have been able to answer

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<sup>503</sup> As will be made clear elsewhere in this thesis, relying on exclusion of evidence at trial is perhaps not the most effective response if one wishes to ensure compliance with the Codes.

<sup>504</sup> As Sharpe notes, the term 'fairness' is open to judicial interpretation - Sharpe (n 171) 10.

<sup>505</sup> n 460.

<sup>506</sup> [1999] 2 Cr App R 115.

<sup>507</sup> This was a similar criteria used by HCPs during observation – see section 6.4.3.

questions'<sup>508</sup> but 'might have been less able to cope with questions about his role, with the possibility that he might have given answers which he thought were likely to result in his early release from custody'<sup>509</sup>. He also had 'a degree of passivity and lack of assertiveness'.<sup>510</sup> In considering the appeal, the Court noted that, as per Code C para 1.4 combined with Note 1G, A had a mental illness and the custody officer was aware of this, thus requiring that A was attended by an AA. The court also noted the absence of legal advice, with the exception of a brief conversation with the duty solicitor, which 'compounded the unfairness arising from a breach of the Code of Practice'.<sup>511</sup> The trial court had erred by wrongly assuming that the lucid state of A removed the need for an AA to be present. Rather, the question was whether, in line with s 78, the admission of the evidence would have 'such an adverse effect upon the fairness that it should be excluded'.

In another case, *R. v Kenny*<sup>512</sup>, the appellant (A) was unable to read or write and was convicted on his own admission (and on a *voir dire*) of burglary. A was deemed to have the mental age of a child aged nine and a half or between nine and ten and was, moreover, considered 'illiterate', with a reading age between six and six and three quarter years. It was thus submitted that he was 'mentally handicapped' (as per s 77) and that, as such, failure to provide an AA constituted a breach of Code C, relying on *R. v Raghip*.<sup>513</sup> In allowing the appeal, the court noted the guidance provided by Lord Lane CJ in *R. v Cox*<sup>514</sup> where he stated:

It seems to us that the true question was not whether the confession was unreliable or untrue so much as whether the confession, true or not, was obtained in consequence of anything done which was likely to render any confession unreliable, the burden being on the prosecution to prove beyond reasonable doubt that it was not so obtained. One

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<sup>508</sup> *Aspinall* (n 506) 118.

<sup>509</sup> *ibid.*

<sup>510</sup> *ibid.* Such traits render a suspect vulnerable, although, as will be illustrated in Chapter 6, custody officers ostensibly fail to appreciate this.

<sup>511</sup> *ibid.*

<sup>512</sup> [1994] Crim LR 284.

<sup>513</sup> (Unreported 5 December 1991) as cited in *ibid.*

<sup>514</sup> (Unreported 12 November 1990).

emphasises as well as the word ‘likely’ the words ‘in the circumstances existing at the time.’<sup>515</sup>

The court was, by their own admission, ‘reluctant’ to rule that the learned judge in the case had erred. However, the confession, considering its reliability, should not have been admitted. As there was no other evidence against A, the conviction was quashed. Similarly, in *R. v Dutton*<sup>516</sup>, the appellant (A) successfully appealed his conviction for sexual offences where the admission was made in the absence of an AA. A was born in a psychiatric ward, attended a residential school for ‘retarded’ pupils and had a mild mental handicap. The trial judge, whilst recognising that the police should have requested an AA, nevertheless allowed evidence to be put to the jury. Further, in *R. v Ham*<sup>517</sup> the appellant (A) who was ‘mentally handicapped’,<sup>518</sup> and aged just 18 years and 2 months at the time of the alleged offences, made an admission in the absence of an AA. A was interviewed twice – the first was not tape-recorded and A did not want a solicitor present; the second, where he made more extensive admissions, was tape-recorded but again A declined legal advice. A challenge as to admissibility was made on the basis of s 76 (2) and a s 77 direction was sought. The appeal was allowed as the trial judge had erred in his approach. In this case, although the detective constable had described A as ‘streetwise’, ‘quite cocky’, ‘unremorseful’ and not possessing any difficulty answering questions,<sup>519</sup> the court highlighted that ‘the prohibition in para C: 11.4 applies to juveniles as to persons who are mentally handicapped [sic], and a juvenile may well be capable of answering questions and “streetwise” or “cocky”’. One’s ability to answer questions is, therefore, immaterial. The court went on to state that an objective test is required:

It was not what the police officers here thought, if they gave any thought to it at all, about the mental condition of the person they were asking the questions of which was

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<sup>515</sup> *Kenny* (n 512).

<sup>516</sup> (Unreported case no. 4627.G1/87) as cited in Michael Ventress, Keith Rix and John Kent, ‘Keeping PACE: fitness to be interviewed by the police’ (2008) 14 (5) *Advances in Psychiatric Treatment* 369, 374.

<sup>517</sup> (1997) 36 BMLR 169, *The Times*, December 12, 1995.

<sup>518</sup> A was also deemed to be ‘at serious risk of being “easily led” or suggestible in a police interview’, had an IQ above 70 but below 80 (at 174), and had a reading age of seven years, with an average intelligence of a child of 11 (at 175).

<sup>519</sup> This is similar to a custody officer’s rationale – see Chapter 5, particularly sections 5.4 and 5.5.

material, but, as was subsequently ascertained from doctors, what the mental condition of the appellant actually was.<sup>520</sup>

It could thus be suggested that what matters is the suspect's *actual* vulnerability (i.e. whether he or she is 'mentally vulnerable' or 'mentally disordered') rather than the police *perception* of vulnerability.<sup>521</sup> As will be clear from Chapters 5 and 6, the police do, however, rely heavily on their own perceptions.

#### 4.4.2 The courts: condoning the breach

Whilst the courts, as addressed above, have excluded evidence where the AA safeguard was not implemented, they have likewise found that the failure to obtain an AA *should not* result in evidence being inadmissible. For example, in *R. v Law-Thompson*<sup>522</sup> the appellant (A), who had Asperger's Syndrome and high performing autism (with an IQ of 150), was convicted of the attempted murder of his mother. A was interviewed without an AA present – counsel argued that, where a mentally disordered defendant was interviewed in such circumstances, the court's discretion could only be exercised one way, i.e. by excluding the evidence. The appeal court, however, considered not the apparent unlawfulness or irregularity of the evidence but rather 'its effect, taken as a whole, upon the fairness or unfairness of the proceedings'<sup>523</sup> – it was necessary to illustrate how the mental disorder resulted in unreliability. A similar approach was taken in *Stanesby*<sup>524</sup> where the appellant (A), who suffered from depression, had been breathalysed without an AA present. It was found that the breath-test had been properly administered, the custody officer had acted in good faith, A was coherent and understood what he was being asked,<sup>525</sup> and the presence of an AA would have made no difference to the administration of the breath-test.

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<sup>520</sup> Waterhouse J at 177. Although see n 376 below.

<sup>521</sup> Further, in *Aspinall* (n 506) the recorder had erred by 'justif[ying] the actions of the police by reason of the presentation of the appellant, instead of considering the significance of the safeguards'. On this point see sections 5.4.1, 5.5.2 and 6.4.5.

<sup>522</sup> [1997] Crim LR 674.

<sup>523</sup> Citing Lord Nolan in *R v Khan (Sultan)* [1997] AC 558 at page 301g.

<sup>524</sup> *Mark Andrew Stanesby v Director of Public Prosecutions* [2012] EWHC 1320 (Admin) 2012 WL 1469169.

<sup>525</sup> Earlier they also mention that A appeared to understand and responded coherently to questions.



The court took a slightly different approach in *R. v Foster*,<sup>526</sup> where the appellant (A), who was of limited intelligence and was abnormally suggestible, sought to appeal his conviction for murder.<sup>527</sup> Rather than finding that there had been no breach upon failure to obtain an AA,<sup>528</sup> the court instead held that A did not meet the criteria and, in the event that he did, an independent person *had been* present.<sup>529</sup> A also argued that a s 77 direction to the jury had not been provided by the trial judge. However, the court held that A had not been ‘mentally handicapped’ and *had been* interviewed in the presence of an independent person and, as such, a s 77 direction was not required.<sup>530</sup>

#### 4.5 The courts and the AA safeguard

In order to understand how the courts construct ‘vulnerability’, it is also worthwhile discussing how they perceive the AA safeguard. Although it concerns young suspects, *R. v Weekes*<sup>531</sup> gives insight into a more general construction of AA safeguard more:

The reason for that provision of course is plain enough. Juveniles sometimes say things they do not mean; they sometimes say things because they are frightened or they express themselves badly in a way that has potential for misunderstanding. That is why the presence of a more experienced person to assist them is insisted upon in the Codes of Practice.<sup>532</sup>

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<sup>526</sup> [2003] EWCA Crim 178. Interestingly, in *Foster* the court stated that ‘the mental state of the appellant at the time was not such as to amount to an actual or perceived mental handicap that would have imposed an obligation upon the interviewing officers to arrange for the attendance of an independent person or [AA] throughout the interview process’.

<sup>527</sup> *Foster*’s interview had occurred during the period of transition between the implementation of PACE and the coming into force of PACE. PACE was, however, in force at the time of trial.

<sup>528</sup> The provisions were the ‘mentally handicapped’ provision under the Judges’ Rules, or the ‘mentally disordered’ or ‘mentally handicapped’ provisions under Code C.

<sup>529</sup> They held that the social worker, who had been present at the final interview, qualified as an AA.

<sup>530</sup> Although the direction would have been wise, given that the prosecution were dependent on the reliability of A’s confession and given A’s borderline mental state, such an omission did not render the conviction unsafe.

<sup>531</sup> [1993] 97 Cr App R 222.

<sup>532</sup> *ibid* 225.

This quote illustrates, *inter alia*, that the court is concerned with the veracity of the suspect's account and, bound-up with that, the suspect's propensity to say things out of fear or a limited expressive ability. Further, the AA is viewed as a 'more experienced person', suggesting that vulnerability arises from inexperience.<sup>533</sup> Yet, the court neither explains from where this fear derives nor refers to the supportive or welfare function of the AA. For the appellant in *Weekes*, he had '[entered] into the realm where fairness demanded that [he] was supported by somebody older who could assist him in answering the questions or advising him if he could not'.<sup>534</sup> The AA, in the case of a young suspect, is someone older but also, and alluding to the communicative function of the AA, someone who can answer questions or provide advice. Whilst not entirely clear from the statement, it is likely that this 'realm' is custody and one could, on this basis, suggest that the vulnerability arises particularly from detention in custody or from contact with the criminal process. More recently, in the case of *R (on the application of HC)*,<sup>535</sup> where the courts considered extending the AA provision to 17-year-olds, Moses LJ had indicated how vulnerability could manifest 'in the face of an intimidating criminal justice system'.<sup>536</sup>

The courts also seem to adopt an approach that suggests a solicitor can act as an AA, contrary to the guidance under Code C.<sup>537</sup> For example, in *R. v Lewis*<sup>538</sup> the court held that the solicitor and the AA performed 'very similar' roles and that where a solicitor was present the absence of an AA did not render the evidence unreliable.<sup>539</sup> As Ventress, Rix and Kent state, 'this suggested that the role of the [AA] could be incorporated into that of the solicitor, potentially negating the need for their presence at all'.<sup>540</sup> As will be illustrated in Chapter 5, and to a greater

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<sup>533</sup> See also Chapters 3 and 5 on this point.

<sup>534</sup> *Weekes* (n 531) 227.

<sup>535</sup> *R (on the application of HC) v The Secretary of State for the Home Department, The Commissioner of Police of the Metropolis* [2013] EWHC 982 (Admin).

<sup>536</sup> *ibid* at para 93.

<sup>537</sup> Code C, Notes for Guidance 1F.

<sup>538</sup> [1996] Crim LR 260.

<sup>539</sup> A solicitor can be considered an 'independent person' for the purpose of s 77 PACE but not an AA for the purposes of Code C. In the past a solicitor or independent custody visitor could act as an AA. The principle changed with 1991 Codes of Practice, however, the new principle would have applied at the time of the *Lewis* case (see Palmer and Hart (n 76) 63).

<sup>540</sup> Ventress, Rix and Kent (n 516) 377.

extent in Chapter 8, custody officers adopt a similar approach i.e. that the solicitor can replace the AA. These points aside, the court has perhaps not fully considered the role of the AA – there a number of aspects that have been neglected.

#### 4.6 Critiquing the courts’ constructions

Within the foregoing section I explored the courts’ construction of the AA. Yet the discussion was somewhat brief. In this section, I will provide a more detailed critique of the admissibility cases explored within section 4.4 above. Within this section, I will also tease out some of the problems with the courts’ approach in addition to examining some cases in greater detail.

The question for the courts in considering the absence of an AA is whether the conviction is safe and, relatedly, whether the confession is reliable (when considering s 76), whether the defendant is ‘mentally handicapped’ and confessed in the absence of an independent person (when considering s 77), or whether the admission of evidence has an adverse effect on the fairness of the proceedings (in relation to s 78).<sup>541</sup> The mere absence of an AA does not constitute automatic grounds for exclusion. Instead, each case is to be considered on its own merits.<sup>542</sup> Whilst it may, therefore, be difficult to assess exactly how the courts interpret vulnerability, some general points can be made. For example, the absence of legal advice may, when combined with the absence of an AA, render the evidence unreliable. This was considered in *Aspinall* – there was a 13-hour delay in arranging legal advice and A was interviewed with neither an AA nor legal representative present. This could, at least superficially, be contrasted with *Lewis* where the presence of a solicitor obviated the need for an AA.<sup>543</sup> Further, possessing the mental age of a child<sup>544</sup> and being considered ‘mentally handicapped’ pursuant to s 77, as in both *Kenny* and *Ham*, could encourage the court to exclude the evidence. Moreover, in both cases, not only was there a ‘mental handicap’, there was also

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<sup>541</sup> As Sharpe highlights, s 78 relates to the fairness of admitting the evidence, not whether the evidence is itself fair or unfair - Sharpe (n 171) 136.

<sup>542</sup> *Kenny* (n 517). See also *R v Gill (Rajvinder Kaur)* [2004] EWCA Crim 3245 where it was held that the mere absence of an AA does not render the evidence inadmissible, rather each case must be considered on its own merits.

<sup>543</sup> See *Lewis* (n 538).

<sup>544</sup> Here parallels could be drawn between the conceptualisation of the genuinely vulnerable suspect and a child – see section 5.4.3.

no other evidence available and, had the confession been excluded, the prosecution would not have had a case.

As the courts are assessing reliability rather than ‘mere’ absence of the AA, there are, as explored above, cases where the conviction stood, even where there had been a breach of Code C. By contrast with *Kenny* and *Ham*, in *Foster*, confession evidence was not excluded where it was given by a ‘mentally handicapped’<sup>545</sup> suspect. In this case, as with *Kenny* and *Ham*, A’s admissions at interview constituted the main prosecution evidence.<sup>546</sup> The defendant’s ability to understand the significance of what he or she says seems paramount when assessing reliability. This can be further illustrated by the approach taken in *Law-Thompson*. Instead of excluding evidence, the trial judge thought it apt to highlight A’s ‘quite exceptional intelligence’, ‘apparent and obvious ability’ for coherent and lucid self-expression, and the absence of issues with comprehension on the basis of his ‘peculiar condition’ (he was deemed to understand the importance of the questions put to him and the consequence of his answers). Such factors meant that there was nothing ‘that might be said to render his answers unreliable’.<sup>547</sup> Whilst A was mentally disordered as per the definition contained within the MHA 1983 and Code C, he presented no issues with capacity or comprehension. Moreover, A was provided with a solicitor.<sup>548</sup> As noted above, for the appeal court, it mattered not whether the police approach was unlawful but instead whether the confession is rendered unreliable (pursuant to s 76) or whether the evidence jeopardises the fairness of the proceedings (pursuant to s 78). As a final remark, the courts have gone further than refusing to exclude evidence – in *R. v Graves*<sup>549</sup>, Owen J excused the police stating that it is ‘not always easy... to have every

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<sup>545</sup> He had an IQ of 72, which indicated a mental age of 10; he was on the borderline of being a mental defective; and was highly suggestible with a strong tendency to contradict himself (*Foster* (n 526) at para 29).

<sup>546</sup> They also relied on certain circumstantial evidence which alone would have been insufficient to prove guilt.

<sup>547</sup> Whilst this may indeed be true (i.e. that the accused knew what he was saying), as I will argue in this thesis, the AA is not simply present to facilitate communication. The role also encompasses a supportive provision. This is not to say that evidence should have been excluded – the courts may well have been correct in their application of the law. Rather, the admissibility criteria do not necessarily incentivise custody officers to use the AA – see sections 8.3 and 8.4.

<sup>548</sup> See above on *Aspinall* (n 506) and *Lewis* (n 538).

<sup>549</sup> [1993] Crim LR 685.

item of the Code in mind... It is of no consolation to the public at large that the police may be criticised’.

The courts are, in some senses, bound by the instructions provided by ss 76, 77 and 78. This is not to say that they could not use their discretion to interpret such provisions more broadly, but rather that their decisions are guided by the legislation. In relation to s 78, rather than applying certain principles, Zander argues that the courts determine breach on a case-by-case basis. The courts have also, as Zander highlights, been seemingly reluctant to exclude evidence under s 78 and the Court of Appeal, more often than not, dismisses the appeal. This is not simply a practice found commonly in cases where the AA was not provided in breach of Code C but also arises in other areas where PACE and/or the Codes of Practice have been breached.<sup>550</sup> For example, the courts have allowed evidence to be admitted where a caution was not provided but was needed, such as in the cases of *O’Shea*,<sup>551</sup> *Weekes*,<sup>552</sup> *de Sayrah*,<sup>553</sup> *Allison and Murray*,<sup>554</sup> *Pall*,<sup>555</sup> *Nelson and Rose*,<sup>556</sup> *Slater and Douglas*,<sup>557</sup> *Armas-Rodrigue*,<sup>558</sup> *Devani*,<sup>559</sup> and *Senior and Senior*.<sup>560</sup> The courts have also condoned breaches where access to legal advice was wrongly refused pursuant to s 58 PACE, such as in the cases of *Alladice*,<sup>561</sup> *Dunford*,<sup>562</sup> *McGovern*,<sup>563</sup> and *Oliphant*,<sup>564</sup> or where procedural formalities were not complied with, such

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<sup>550</sup> See Michael Zander, *Zander on PACE: The Police and Criminal Evidence Act 1984* (7th edn, Sweet and Maxwell 2015) 442-3.

<sup>551</sup> [1993] Crim.L.R. 951, CA.

<sup>552</sup> Unreported, Case No. 90/859/Y4, January 11, 1991. CA.

<sup>553</sup> Unreported, Case No. 89/5270/Y3, June 25, 1990. CA.

<sup>554</sup> Unreported, Case No. 1731/A1/88, October 25, 1988, CA.

<sup>555</sup> [1992] Crim.L.R. 126, CA.

<sup>556</sup> [1998] 2. Cr.App.R. 399; [1998] Crim.L.R. 814, CA.

<sup>557</sup> [2001] EWCA Crim 2869.

<sup>558</sup> [2005] EWCA Crim 1081.

<sup>559</sup> [2007] EWCA Crim 1926.

<sup>560</sup> [2004] EWCA Crim 454, [2004] Crim.L.R. 749.

<sup>561</sup> (1988) 87 Cr.App.R 380; [1988] Crim.L.R. 608, CA.

<sup>562</sup> (1990) 91 Cr.App.R. 150; [1991] Crim.L.R. 370, CA.

<sup>563</sup> (1991) 92 Cr.App.R. 228; [1991] Crim.L.R. 124, CA.

<sup>564</sup> [1992] Crim.L.R. 40, CA.

as in the cases of *Langiert*,<sup>565</sup> *White*,<sup>566</sup> *Hoyte*,<sup>567</sup> *Walsh*,<sup>568</sup> *Dunn*,<sup>569</sup> *Bedford*,<sup>570</sup> *Wright*,<sup>571</sup> *Duffy*,<sup>572</sup> and *Dures, Dures and Williams*.<sup>573</sup> Thus, whilst accepting that PACE and/or the Codes had been breached, the courts may nevertheless hold that the admission of evidence does not render the proceedings, as a whole, unfair. A s 78 challenge, whilst helpful in some instances, does not always provide an effective remedy to breach of PACE and/or the Codes because the courts are not considering whether the evidence is unfair but rather whether the admission itself is unfair.<sup>574</sup> Admissibility challenges are also, as Sharpe points out, only often heard in the Crown Court;<sup>575</sup> defendants who are tried in the magistrate's courts are therefore at a disadvantage. McBarnet has also highlighted how the magistrates' court is replete with the rhetoric of triviality: things that go on the magistrates' court are viewed as 'straightforward', 'simplistic', and largely uninteresting.<sup>576</sup>

Whilst some common themes have emerged from the discussion of case law on non-implementation of the AA safeguard, the reality is such that cases may thus hinge on the minutiae of the facts. Given the predominance of guilty pleas and the use of summary trial (where admissibility challenges are rarely heard), reliance on s 78 (or ss 76 and/or 77) for rectifying a breach of the requirement to implement the AA safeguard for a vulnerable adult may thus be a fruitless exercise. The potential impact of the courts' approach will be explored in Chapter 8.

#### 4.7 Unfit to be interviewed or fit with an AA?

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<sup>565</sup> [1991] Crim.L.R. 777, CA.

<sup>566</sup> [1991] Crim.L.R. 779, CA.

<sup>567</sup> [1994] Crim.L.R. 215, CA.

<sup>568</sup> (1989) 91 Cr.App.R. 161, CA.

<sup>569</sup> (1990) 91 Cr.App.R. 237, CA.

<sup>570</sup> (1991) 93 Cr.App.R. 113, CA.

<sup>571</sup> [1994] Crim.L.R. 55, CA.

<sup>572</sup> [1997] N.I.J.B. 228.

<sup>573</sup> [1997] 2 Cr.App.R. 237, CA; [1997] Crim. L.R. 673.

<sup>574</sup> Sharpe (n 171) 136.

<sup>575</sup> Sharpe (n 171) 4-5.

<sup>576</sup> Doreen J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan 1981).

As the above cases have illustrated, the courts are predominantly concerned with the reliability of the evidence and/or the fairness of the proceedings, rather than the suspect's vulnerability.<sup>577</sup> There are, however, overlaps between the requirements for fitness for interview<sup>578</sup> and the AA safeguard – the main concern being whether the evidence produced can be considered reliable. These overlaps will be considered within this section.

As noted in Chapter 1, the fitness for interview criteria require that the custody officer consider whether:

(a) conducting the interview could significantly harm the [suspect's] physical or mental state; (b) anything the [suspect] says in the interview about their involvement or suspected involvement in the offence about which they are being interviewed **might** be considered unreliable in subsequent court proceedings because of their physical or mental state.<sup>579</sup>

When assessing whether a suspect should be interviewed, one must consider:

(a) how the [suspect]'s physical or mental state might affect their ability to understand the nature and purpose of the interview, to comprehend what is being asked and to appreciate the significance of any answers given and make rational decisions about whether they want to say anything;<sup>580</sup>  
(b) the extent to which the [suspect]'s replies may be affected by their physical or mental condition rather than representing a rational and accurate explanation of their involvement in the offence;  
(c) how the nature of the interview, which could include particularly probing questions, might affect the [suspect].<sup>581</sup>

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<sup>577</sup> Of course, this is not necessarily surprising given the requirements of PACE ss 76 and 78.

<sup>578</sup> For a discussion on fitness for interview, see Ventress, Rix and Kent (n 516).

<sup>579</sup> Code C, Annex G para 2.

<sup>580</sup> This is similar to Code C 1991, para 1.4 (n 471) and Code C, Notes for Guidance 1G (n 347).

<sup>581</sup> Code C, Annex G para 3.

The physical state element within fitness for interview allows a broader construction when compared with the AA safeguard where the focus is solely on mental state. However, when considering the ‘mental state’ requirements it is difficult to establish a distinction – a suspect who may fail to understand the implications of interview due to his or her mental state could be considered unfit for interview but, similarly, he or she could be deemed fit to interview but with an AA present following Note for Guidance 1G. With fitness for interview, the HCP must consider the ‘functional ability of the [suspect]’<sup>582</sup> rather than whether he or she has a medical diagnosis. As noted earlier in this chapter, the College of Policing guidance highlights how a finding of ‘mental vulnerability’ does not necessarily equate to a medical diagnosis.<sup>583</sup> Further, not only are there parallels in the wording contained within Code C, the criteria for the courts when considering admissibility is also similar<sup>584</sup> – in both cases the courts consider reliability. With the exception of the physical state requirement, it is difficult to see a clear distinction between fitness for interview and the AA requirement.

#### 4.8 A lack of clarity and consistency?

Code C recognises two distinct but potentially overlapping categories of adult vulnerability but does not elaborate any further on these two definitions, aside from providing superficial information as to why a vulnerable suspect may require an AA, i.e. that the vulnerable suspect may provide unreliable, misleading or self-incriminating evidence. In doing so, the Code C vulnerability provisions largely lend themselves to capacity or comprehension-based understandings of vulnerability. Code C does not, for example, explain that whilst individuals with mental disorder may or may not have issues with capacity or comprehension, they may nevertheless be prone to providing misleading or false information. It also does not say *how* unreliable, misleading or self-incriminating information may come about, neither does it explain that failing to ‘understand the significance of what is said’<sup>585</sup> does not necessarily equate to issues with capacity or comprehension – it could, as mentioned in Chapter 3, mean that the suspect can be influenced by short-term gains or may fail to appreciate the long-term implications of interview (the suspect understands what’s being said but wants to be released

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<sup>582</sup> Code C, Annex G para 4.

<sup>583</sup> College of Policing, *APP: Mental ill health* (n 490).

<sup>584</sup> Code C, Annex G para 2 and s 76 PACE. Although s 78 PACE assesses fairness.

<sup>585</sup> Code C, Notes for Guidance E1.



as soon as possible and will say anything to be released). The word ‘significance’ here is important. Even if not the intention of the officers, those with a fragile mental state may be easily manipulated. Such susceptibility may be difficult, if not impossible, to ascertain.<sup>586</sup>

The specific functions of the AA may provide more information on how vulnerability is to be understood. For example (as also outlined in section 1.3), the AA is required to support, assist and advise the suspect, facilitate communication, ensure that the police are acting fairly, and ensure that the suspect understands his or her rights. As also discussed in section 1.3, however, what these specific phrases mean is most certainly up for debate and AAs are often unclear about the remit of their role. Nevertheless, on this basis, the vulnerable suspect could be said to be someone who requires support, advice and assistance, may have difficulty communicating his or her side of the story, may be susceptible to unfair treatment at the hands of the police, and may fail to understand his or her rights. This latter element may be read-into further to include a suspect who is unable to adequately enforce his or her rights.

Code C is not only insufficiently explicit; it is also inconsistent – the phrase ‘mentally incapable of understanding the significance of questions or their replies’ is contained in Code C, but only once.<sup>587</sup> ‘Mentally incapable’ is ostensibly contained within the ‘mentally vulnerable’ category (i.e. those who are ‘mentally incapable’ are also ‘mentally vulnerable’) rather than acting as an extension of ‘mentally vulnerable’. As such, its inclusion is perplexing. The category of ‘mental disorder’ is also not unproblematic – there is no explanation of what it means, short of the fact that it derives from the MHA 1983 and constitutes ‘any disorder or disability of the mind’.

The College of Policing Guidance is also somewhat problematic. For example, it explains that the term ‘mental ill health’ includes ‘mental disorder’ and those suffering from ‘mental distress’. However, in doing so, it may suggest that ‘mental distress’ is distinct and independent of ‘mental disorder’ and thus potentially excluded from the Code C definition.<sup>588</sup> Perhaps the more accurate explanation is that those who are suffering from mental disorder may also be

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<sup>586</sup> I will return to this in Chapter 9.

<sup>587</sup> Code C, Annex E para 1.

<sup>588</sup> Although they could, of course, fall under the category ‘mentally vulnerable’.

considered ‘mentally vulnerable’. The relationships between these terms could be better explained. The guidance could also benefit from a discussion on learning difficulty – it does not explain the difference between learning disability and learning difficulty nor does it explain what a learning difficulty is. To do so may serve to further demarcate learning difficulty and may potentially suggest that those with learning difficulties do not require an AA. Therefore, whilst making the relationship explicit may improve the custody officer’s knowledge, it would also be wise to ensure that learning difficulties, whilst potentially distinct from learning disabilities (and therefore mental disorder) may be caught under the ‘mental vulnerability’ category of Code C. Perhaps a greater problem is where the guidance discusses ‘varying degrees of learning disability’.<sup>589</sup> Whilst cautioning that ‘those with mild learning disabilities may not receive any formal support and their needs and disability may not be obvious’<sup>590</sup>, it goes on to state that, ‘other people have profound and multiple learning disabilities and their needs may be considerable’.<sup>591</sup> Although some individuals may indeed require more support, such phrasing may suggest to custody officers that those with mild learning disabilities do not require the assistance of the AA.<sup>592</sup> The guidance also urges the police to consider how ‘extremely vulnerable and suggestible’<sup>593</sup> those with learning disabilities may be – a caution which is absent in relation to those with any other mental disorder or a mental vulnerability. The guidance is certainly less problematic than Code C in one respect – unlike Code C, it explains that those who may fit the definition of ‘mentally vulnerable’ may ‘not be considered to be experiencing a mental illness by an HCP’.<sup>594</sup> It does not, however, go any further to suggest, for example, that mental vulnerability can be brought about by circumstance.<sup>595</sup>

Such ambiguities could, however, be removed or lessened.<sup>596</sup> With regard to the category of ‘mental disorder’, the MHA 1983 Code of Practice may provide further information – it

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<sup>589</sup> College of Policing, *APP: Mental ill health* (n 485).

<sup>590</sup> *ibid.*

<sup>591</sup> *ibid.*

<sup>592</sup> See Chapters 5, 6 and 7, specifically sections 5.3, 5.4, 5.5, 6.4.6, 6.5.5, 7.3.3 and 7.3.4.

<sup>593</sup> College of Policing, *APP: Mental ill health* (n 485).

<sup>594</sup> *ibid.*

<sup>595</sup> See later discussion.

<sup>596</sup> Although the impact this would have upon the uptake of the AA safeguard is unclear. Such recommendations suggest that the guidance is at fault for non-implementation – see section 8.6.1.

includes a neither long nor complicated list of ‘mental disorders’.<sup>597</sup> At present custody officers are neither advised nor required to consult the MHA 1983 Code of Practice.<sup>598</sup> Of course, any proposed change would assume that custody officers would consult the guidance. The ‘mental vulnerability’ category could be further explicated – for example, it could include those with a recognised condition or, in the absence of a condition, a ‘mental vulnerability’ manifesting through circumstance. With regard to the first, Code C could explicate that this could include learning difficulty (a substantial impairment or obstacle) or learning disability (something which incapacitates),<sup>599</sup> cognitive impairment, special educational need or simply a temporary issue with understanding and communication. With regard to the second, Code C could illustrate how this could be something situational, i.e. feelings of precariousness as a result of disadvantage, or simply through the act of being brought into custody.<sup>600</sup> Providing further information to custody officers may facilitate their understanding of these categories and may thus improve implementation of the AA safeguard.<sup>601</sup>

#### 4.9 Manifestations of vulnerability

As discussed in Chapter 3, vulnerability can manifest in various ways. Three of these manifestations are of particular interest when considering the AA safeguard – innate vulnerability, situational vulnerability, and inherent vulnerability. The first category, as noted in Chapter 3, is tied to mental or physical factors. In this sense, Code C recognises innate vulnerability, particularly in relation to ‘mental disorder’ and, albeit to a lesser extent, in relation to ‘mental vulnerability’ (at least the ‘capacity’ element).<sup>602</sup> ‘Mental vulnerability’

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<sup>597</sup> See Dehaghani, ‘Custody Officers, Code C and Constructing Vulnerability’ (n 484).

<sup>598</sup> Moreover, I neither saw a copy of the Code in either of the two sites nor heard the Code mentioned on any occasion in custody.

<sup>599</sup> Mindroom, Learning difficulty or Learning disability? <[http://www.mindroom.org/index.php/learning\\_difficulties/what\\_are\\_learning\\_difficulties/learning\\_difficulty\\_or\\_learning\\_disability/](http://www.mindroom.org/index.php/learning_difficulties/what_are_learning_difficulties/learning_difficulty_or_learning_disability/)> accessed 10 November 2015.

<sup>600</sup> See sections 3.6 and 9.3.4.

<sup>601</sup> Although caution should be exercised – for example, at Site 2, clinically recognised conditions when entered onto the custody log or when appearing on the custody records were accompanied with the term ‘mental disorder’. This information was ostensibly ignored when making a decision on the AA – see Chapters 6 and 7 generally.

<sup>602</sup> Young age, as recognised in Code C as a vulnerability, is also an innate vulnerability.

could also be taken to mean a situational vulnerability as it refers to a ‘mental state’.<sup>603</sup> Whilst Code C recognises physical factors in relation to fitness for interview (as above), it does not recognise factors such as old age, pregnancy, or physical ill health<sup>604</sup> as grounds for the AA safeguard. The vulnerability categories under Code C are also considerably more restrictive than that for witnesses – under the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), special measures can be put in place for witnesses (to include victims) who are considered vulnerable on the basis of age or capacity. More specifically, this includes those under the age of 17 at the time of the hearing or those whose quality of evidence may be diminished as a result of a mental disorder, a significant impairment of intelligence or social functioning, or a physical disability or disorder.<sup>605</sup> The criteria here, taken in its totality, is much broader than the ‘vulnerability criteria’ under Code C. Further, the YJCEA 1999 also considers vulnerable those who may experience fear or distress when testifying. Consideration is therefore given to the nature and alleged circumstances of the offence, the age of the witness, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances of the witness, and the political or religious beliefs of the witness. Further, regard is had to the behaviour towards the witness of the accused, his or her family or associates, or anyone likely to be considered an accused or witness.<sup>606</sup> Whilst such special measures do not automatically apply to the accused, they can be implemented at the discretion of the trial judge.<sup>607</sup> Some elements of the YJCEA 1999 vulnerability criteria (such as behaviour of the accused towards the witness) may be specific to witnesses whereas other elements *could be* reflected in the Code C vulnerability provisions. In sum, the YJCEA 1999 takes a much broader view of vulnerability than Code C.

Outside of the criminal process, vulnerability can be much more *restrictively* conceptualised.<sup>608</sup> For example, the Lord Chancellor’s Department defined a vulnerable adult as ‘someone over the age of 18 who is or may be in need of community care services by reason of mental or other

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<sup>603</sup> See section 3.6. This will be addressed in Chapter 5 and, further, a normative argument provided on the basis of ‘situational vulnerability’ within Chapter 9 (section 9.3.4).

<sup>604</sup> See section 3.4.

<sup>605</sup> YJCEA 1999, s 16.

<sup>606</sup> YJCEA 1999, s 17.

<sup>607</sup> *R. (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 735. See also *R v Cox (Anthony Russell)* [2012] EWCA Crim 549.

<sup>608</sup> See for example the Mental Capacity Act 2005.

disability, age or illness and who is or may be unable to take care of him/herself or unable to protect him/herself against significant harm or exploitation'.<sup>609</sup> Within this context, the label of 'vulnerability' can be used to restrict an individual's autonomy and, for example, be used to prevent him or her from making certain decisions such as whether to maintain contact with her father<sup>610</sup> or whether she can marry.<sup>611</sup> This more restrictive deployment of vulnerability is justified on the basis that it interferes negatively with the individual's autonomy and, in doing so, takes something away from them. Within the criminal process context, the label of 'vulnerability' does not prevent an individual from doing something, instead it provides them with something additional. Whilst the AA safeguard, at least to a certain extent, interferes with autonomy, the individual who is attended by an AA is still permitted to make decisions: for example, and as noted above, although an AA may request legal advice on behalf of a vulnerable adult suspect, the suspect is not forced to consult with the legal representative. As such, the vulnerable suspect still retains control over his or her own decisions. I would argue that the AA safeguard is certainly more parental<sup>612</sup> (in that it interferes with autonomy for the benefit of the suspect) than paternalist. Yet, as Sanders and Young have argued:

It is true that, in normal circumstances, people do not have things foisted on them against their will simply because someone else thinks it will be good for them. But suspects are not in normal circumstances. If they can be held in stinking conditions against their will... and questioned against their will why shouldn't they be given something that does some good against their will?<sup>613</sup>

#### 4.10 Conclusion: bringing clarification and consistency?

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<sup>609</sup> Lord Chancellor's Department, *Who Decides? Making decisions on behalf of 'mentally incapacitated' adults* (TSO 1997) as cited in Dunn, Clare and Holland (n 337) 239. There are parallels here with mental capacity – according to NAAN, vulnerable adult suspects can be presumed to have full capacity – NAAN, 'There to Help' (n 39) 8.

<sup>610</sup> *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* [2004] EWHC 2222 (Fam).

<sup>611</sup> *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867.

<sup>612</sup> James M Buchanan, 'Afraid to be free: Dependency as desideratum' (2005) 124 Public Choice 19.

<sup>613</sup> Andrew Sanders and Richard Young, *Criminal Justice* (2<sup>nd</sup> ed, Butterworths 2000) 242 as cited in Pierpoint, 'A Survey' (n 117) 39.

This chapter has explored how vulnerability is defined within PACE, within Code C, and by the courts. It is clear from the foregoing discussion that the definition of vulnerability contained within Code C is somewhat problematic and continues to cause confusion. This chapter has highlighted a number of problems with Code C – the most notable of which is the failure to be clear, concise, and consistent in relation to the provisions on adult suspects. The courts have provided little to no clarification on this. Because the focus for the courts is reliability or fairness, they do not consider excluding evidence solely because Code C provisions have been breached. In addition to a restrictive view of vulnerability, and despite such an approach being prohibited within Code C, the courts also take the view that a solicitor can perform the same role as an AA.<sup>614</sup> The procedural safeguards in PACE, such as the right to legal advice, may be said to make a confession reliable (even where Code C has been breached).<sup>615</sup> Yet, these safeguards may not operate so as to effectively safeguard the suspect.<sup>616</sup> Further, the courts may employ various tactics through which to condone a breach of PACE or the Codes, such as interpreting the conduct as falling outside of PACE or the Codes, accepting that a breach has occurred but that the evidence is insignificant or immaterial and should therefore not be excluded, or arguing that the breach was not deliberate and therefore evidence is still admissible (and thus, as Sharpe argues, inverting the disciplinary or the protective principle).<sup>617</sup> The courts' interpretations may therefore do little to promote compliance with the vulnerability provisions.<sup>618</sup>

Within this chapter I have also illustrated how the terms used within additional guidance may be confusing and unclear. Clarification or explication of these terms may improve implementation of the AA safeguard.<sup>619</sup> This chapter has suggested ways of doing so. Another, and perhaps more radical suggestion, is to reconceptualise vulnerability. I will reserve such

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<sup>614</sup> A similar theme is found with custody officers – see section 7.2.1.

<sup>615</sup> Indeed, in the context of Belgium, Vanderhallen and van Oosterhout found that police officers viewed lawyers as a means through which to back-cover – Miet Vanderhallen and Marc van Oosterhout, 'Belgium: Empirical Findings' in Miet Vanderhallen, Marc van Oosterhout, Michele Panzavolta and Dorris de Vocht (eds), *Interrogating Young Suspects II: Procedural Safeguards from an Empirical Perspective* (Intersentia 2016) 80.

<sup>616</sup> Sharpe (n 171) 133. See also discussion in sections 1.3 and 4.2 on the safeguards within PACE.

<sup>617</sup> *ibid* 154.

<sup>618</sup> See sections 8.4-8.8.

<sup>619</sup> Although as I will explain in the remainder of this thesis, the problem is more complex than merely changing the law or guidance.

discussion for Chapter 9. Within the following chapter I will explore how custody officers conceptualise vulnerability.

## CHAPTER 5: CONSTRUCTING VULNERABILITY – THE CUSTODY OFFICER APPROACH

*I hear people come in and say they've got anxiety and depression and I think, 'No you haven't, you're just struggling with life like most people do' ...*<sup>620</sup>

### 5.1 Introduction: constructing vulnerability in custody

Before vulnerability is identified, it must be defined i.e. we need to know what custody officers are looking for before we ascertain how they look for it, and custody officers themselves have to construct vulnerability before they try to identify it. The definition of vulnerability is important to understanding why the AA safeguard often remains unimplemented, and whilst this is something that researchers have engaged with in previous studies,<sup>621</sup> it has not been explored to the extent to which I have explored within this thesis. The project commenced on the assumption that custody officers defined the Code C vulnerability provisions in the same way that I interpreted them. This was incredibly naïve but also meant that I was free from any preconceived ideas before commencing the research. As outlined in Chapter 3, there is not one interpretation of vulnerability but many. In terms of vulnerability in custody this is also, to some extent, true. Yet, as I will address in this chapter, there were significant commonalities between custody officers with regard to how vulnerability for the AA safeguard was defined. Quotes similar to that expressed above were not uncommon – the significance of some of these will be highlighted in Chapter 8.<sup>622</sup>

The starting point for this chapter is to address how custody officers define 'vulnerability' without reference to the AA safeguard. By doing so, I can highlight that whilst custody officers can conceptualise vulnerability in a broad manner, they cast aside such notions when discussing the AA safeguard. Such a contrast illustrates how different conceptualisations of vulnerability can be deployed for different purposes. As I will argue in Chapter 9, vulnerability can and should be conceptualised more broadly within police custody. It is also interesting to see how

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<sup>620</sup> CO16-1 Interview.

<sup>621</sup> For example, see sections 1.2 and 6.2.

<sup>622</sup> In particular, characteristics such as cynicism and scepticism, which are part of police culture – see Reiner, *The Politics of the Police* (n 18) 119-122.



far the various threads of vulnerability, discussed in Chapter 3, are weaved through the custody officers' understandings of vulnerability. After addressing how vulnerability is defined, I will turn to how custody officers responded when asked to explain the terms 'mentally vulnerable' and 'mentally disordered' – the terms which form the basis of adult suspect vulnerability, as outlined in Chapter 4. Thereafter, I will address how they define vulnerability for the AA safeguard, or what I have termed 'AA vulnerability'.<sup>623</sup> As will be illustrated in this chapter, what starts off as a broad concept is distilled down by the law, and then whittled down by the custody officer operationalisation of the law.<sup>624</sup> The framing of the AA safeguard also provides insight into the framing of 'AA vulnerability', therefore, I will also address how custody officers understand the nature and purpose of the AA safeguard. Of course, their decision-making processes are layered and there are other factors which they take into account when implementing the safeguard – these will be explored in Chapters 6 and 7. As can be seen throughout this chapter, vulnerability has some connections with the notion of the 'ideal victim'.<sup>625</sup> Moreover, the theory, as explored in Chapters 8 and 9, will help to explain why vulnerability is framed in a particular manner.<sup>626</sup>

## 5.2 Vulnerability: a 'catch-all concept'<sup>627</sup>?

As outlined in Chapter 3, the term 'vulnerability' lacks a unifying, single definition and can mean different things to different people. This too was true when custody officers were asked to explain what was meant by the term – some custody officers interpreted this term specifically in the context of custody whilst others thought about it more broadly. Moreover, whilst custody officers used 'vulnerability' frequently in interactions both amongst themselves and between themselves and I, it was apparent, particularly during interview, that they had not necessarily thought deeply about what 'vulnerability' meant or how it could manifest. The variation

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<sup>623</sup> Or 'AA vulnerability'. This differs from Code C vulnerability – something which is, at least on paper, broader than 'AA vulnerability'. This should become apparent through this chapter.

<sup>624</sup> I use the term 'operationalization' as whilst the custody officer may say he is, for example, focusing on the suspect's understanding, what one means by 'understanding' can differ when compared with someone else's interpretation.

<sup>625</sup> Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed) *From Crime Policy to Victim Policy: reorienting the justice system* (Macmillan 1986) 17–30.

<sup>626</sup> See also Chapter 8.

<sup>627</sup> Misztal (n 182) 5.

between custody officers' answers, when asked about vulnerability more broadly, lends support to the notion that, whilst vulnerability can be something universal, it also something which is subjective – vulnerability means different things to different people, even those who perform the same role within the same organisation. There were, however, sufficient commonalities, as will be addressed below.

Vulnerability was '*difficult to put it into words*'<sup>628</sup> owing, at least in part, to the fact that it had a plurality of meaning i.e. it '*could mean literally lots and lots and lots of things*'.<sup>629</sup> Vulnerability thus could be broad and/or ill-defined and, as such, there was '*no straight answer*'.<sup>630</sup> It could also be used to refer to risk (its 'conceptual [cousin]'<sup>631</sup>). For example, suspects or other detainees with physical or mental health problems were viewed as 'vulnerable'. In this sense, their vulnerability did not mean that they would necessarily require an AA,<sup>632</sup> but rather that they were at potential risk of self-harm, suicide, injury or death as a result of their health issues. Custody officers had '*to act in that person's best interests, if we feel they're vulnerable in any way, be it mental health, self-harm, whichever way, medically*'.<sup>633</sup> For the duration of the detainee or suspect's time in custody, officers had to ascertain '*whether or not there are any vulnerability issues, whether from a medical point of view, mental health point of view or just vulnerable in general*'.<sup>634</sup> Similarly, risk factors or 'vulnerabilities' could also include '*drug dependency or mental health issue or learning difficulty, or whatever it might be*'<sup>635</sup> – the aim was to '*flag up vulnerabilities [when] looking at risk*'.<sup>636</sup>

References were explicitly made to victims and victimisation<sup>637</sup> – for example, one custody officer when asked what 'vulnerable' meant to him stated:

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<sup>628</sup> CO9-1 Interview.

<sup>629</sup> CO22-2 Interview.

<sup>630</sup> CO29-2 Interview.

<sup>631</sup> Brown (n 183) 15. See section 3.4.

<sup>632</sup> See later in this chapter.

<sup>633</sup> CO24-2 Interview.

<sup>634</sup> CO30-2 Interview.

<sup>635</sup> CO18-1 Interview.

<sup>636</sup> *ibid.*

<sup>637</sup> Here there are some parallels with the dictionary definition and the characteristics identified succinctly by Misztal (n 182). As highlighted, however briefly in Chapter 4, the categories for vulnerability are much broader in relation to victims and witnesses than for suspects or defendants. It could be argued that it is much easier to conceptualise vulnerability in terms of

*I tend to think that that's in the 'too difficult' box to deal with because of the complexities of the thought process and their understanding and in terms of how they are as a victim and these things going onto court, if they're making a complaint... you're almost in the situation where you're dealing with the ten year olds.*<sup>638</sup>

Another custody officer cited the example of a rape victim:

*Let's say for example a rape victim, I would suggest is vulnerable... So, for an example of vulnerable, I would say that that person would probably be vulnerable and say you'd avoid any issue that sort of might upset them... So, certain sensitive, sensitivity, needs, they're the vulnerable types.*<sup>639</sup>

Vulnerability was also linked with helplessness and, interestingly, addiction. As the quote below illustrates, the vulnerable person is not viewed as being 'at fault' for his or her vulnerability. Rather, he or she is vulnerable to others who may exploit the vulnerability.<sup>640</sup> The transgression of the person who is addicted to alcohol or drugs does not, in this case, challenge his or her vulnerability because *'their addictions can make them vulnerable when they need money or drugs or drink or whatever, their addiction makes them vulnerable to people who can prey on them'*.<sup>641</sup>

Vulnerability was also viewed in terms of exposure or liability, thus bearing some similarity with the idea of helplessness. Those whose exposure was greater were viewed as having a greater sense of vulnerability. Having experience could reduce one's exposure or helplessness

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a victim, particularly because the victim is not to 'blame' for the difficulties he or she is facing whereas a suspect or defendant could be viewed as blameworthy thus challenging his or her vulnerability. See section 3.4.

<sup>638</sup> CO10-1 Interview. There are a number of threads to vulnerability within this quote. For example, vulnerability is compared to childhood. The custody officer also suggests that vulnerability has a parallel with thought-processes and understanding. Further, vulnerability is perceived to create a difficulty for those interacting with the vulnerable person. These aspects will be explored in greater detail later in this chapter.

<sup>639</sup> CO21-2 Interview.

<sup>640</sup> See Goodin, *Protecting the Vulnerable* (n 403).

<sup>641</sup> CO29-2 Interview. I will return to this in the context of the AA safeguard later.

and could therefore challenge one's vulnerability.<sup>642</sup> The following quote illustrates that one's knowledge of the criminal justice system could render one invulnerable. By contrast, a 'first-timer' could be more vulnerable.<sup>643</sup> Moreover, the offence for which one is under investigation could also create or exacerbate one's exposure to harm and, therefore, one's vulnerability.<sup>644</sup>

*Someone who lives in a criminal fraternity family, used to criminality going on around them and everything else, not working, not going to have a social impact being arrested, anything else and they come into custody the first time and [they] can just glide through the process as if nothing's wrong. But ... somebody else who comes into custody for child sex offences, first time in custody as well, going to have a massive social impact with them and family personal impact with them and, yeah, they're going to be vulnerable at some point through that process, aren't they?*<sup>645</sup>

The following quote serves to reiterate this point but also provides perhaps more information on why the alleged sex offender may have an increased sense of vulnerability.

*Some people can be vulnerable, particularly coming into the custody area, simply by the crime that they've been accused of. A perfectly respectable middle-class, middle-aged gentleman with a good job; if he's accused of a sexual offence involving young boys for instance, the very nature could make him vulnerable to what he perceives the outside world to think.*<sup>646</sup>

As the custody officer firstly highlights, the crime one commits can render one vulnerable. This speaks to the quote from CO27-2 above. Yet, CO29-2's quote also indicates other reasons as to this heightened perception of vulnerability. He mentions some key characteristics such as

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<sup>642</sup> Kemp and Hodgson had similar findings in relation to young suspects – see Kemp and Hodgson (n 121) 127-181.

<sup>643</sup> *ibid.* It should be noted that the 'first-timer/recidivist' dichotomy also applied to vulnerability for the AA safeguard – see later in this chapter.

<sup>644</sup> Perhaps in spite of the current moral panic in relation to paedophiles and 'predators'.

<sup>645</sup> CO27-2 Interview. Here one can see the inversion of the protective principle, i.e. that those with prior criminal records are 'resilient, aware of their right and unaffected by the absence of [protection]' – Sharpe (n 171) 154-5.

<sup>646</sup> CO29-2 Interview.

the individual's class ('perfectly respectable middle-class'), age ('middle-aged') and employment status ('good job'). It could therefore be suggested that this individual faces greater exposure, not only in terms of his alleged conduct, but also because of his social standing. If one were to reflect back upon Misztal's thesis,<sup>647</sup> one could say that, for custody officers, vulnerability arises as a result of the predicament of unpredictability (i.e. not knowing what to expect from the criminal process) or the predicament of irreversibility (i.e. criminalisation that results in stigma which, even if found not guilty, cannot be retracted). This latter predicament came across in CO1-1's interview:

*Somebody could be charged for a relatively minor offence, to you or me or somebody who's not been in much trouble it might not mean anything [but] to somebody who's previously been to prison that could make them vulnerable because all of sudden they could think, 'What's going on in the future?' ...They could be going to prison; they therefore could risk harming themselves and things like that.*

Again, not only does this quote illustrate the conceptual congruence of vulnerability and risk, it also speaks to Misztal's thesis, specifically the irrevocability of the past. As can also be seen by the foregoing quotes, particularly those from CO27-2 and CO1-1, there is some variation between how custody officers interpret vulnerability, or at least how they verbalise their interpretations, thus lending support to the subjectivity of vulnerability. Further, vulnerability was not necessarily something innate, it could equally be something situational – '*[v]ulnerability isn't necessarily somebody suffering from a condition but of something that's happening to them either then or has happened to them previously, which is causing them stress, anxiety, depression*'.<sup>648</sup>

Vulnerability was also seen as something that could be affected by '*all [sorts] of external triggers...obviously one of them being in custody*'.<sup>649</sup> Again, this suggests that vulnerability, as something situational, can be created or exacerbated by detention in police custody – custody

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<sup>647</sup> See section 3.4.

<sup>648</sup> CO4-1 Interview. This speaks to one of Gudjonsson's four areas of vulnerability – see section 3.3.

<sup>649</sup> CO30-2 Interview.

was a ‘*stress factor*’.<sup>650</sup> This argument has been raised in Chapter 3 and will be returned to in Chapter 9. Perhaps unsurprisingly, custody officers, when assessing vulnerability, did not mention the power dynamic between themselves (the detainer) and the suspect (the detainee) as a factor.

Vulnerability could also be seen as something which was variable. As mentioned in Chapter 3, and to which I will return in Chapter 9, isolation or uncertainty (i.e. the predicament of unpredictability)<sup>651</sup> – ‘*[p]eople arrive fine but because you’re not interacting enough with them, you’re not answering their questions, things escalate or deteriorate or whatever. And that’s when these issues arise and they become more and more vulnerable*’.<sup>652</sup> Yet, just as vulnerability can be increased, so too can it be lessened. For example, CO17-1 stated at interview, ‘*[a]nd once they’ve been here for a while, that sort of vulnerability has gone because they’ve come off whatever they’ve had and they’re just normal, sane people sometimes*’.<sup>653</sup> This quote also suggests that vulnerability is the antithesis of ‘normality’ and therefore perhaps a negative characteristic.

As mentioned above, and in Chapter 3, vulnerability was used interchangeably with risk<sup>654</sup> – there were numerous occasions where the suspect was recognised as ‘vulnerable’ but not for the purposes of the AA safeguard.<sup>655</sup> The two interactions below illustrate this point:

*Suspect seems distressed and anxious – she has been using inhaler, is swaying from side to side and is visibly upset. She is being charged with domestic assault. She has dyslexia but the decision was taken to interview her without an AA. She was booked-in last night (CO3-1 had not made this decision). The decision is not criticised (suggesting that he would have made the same decision or indicating an unwillingness to criticise*

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<sup>650</sup> CO18-1 Interview.

<sup>651</sup> Misztal (n 182).

<sup>652</sup> CO16-1 Interview. It should be noted here that, again, this ‘vulnerability’ is most likely referring to risk.

<sup>653</sup> In the latter part of this quote vulnerability is characteristic of ‘abnormal’ people. In this sense, vulnerability has negative connotations – see Levine (n 208) in Chapter 3.

<sup>654</sup> See Brown (n 183) in Chapter 3.

<sup>655</sup> For more discussion on the interplay between vulnerability and risk see sections 7.4 and 8.7.

his colleagues). A police officer is asked to escort suspect home as she lives far away and is 'slightly vulnerable in a general sense but not for interview purposes'.<sup>656</sup>

Suspect arrives handcuffed and is placed in a holding cell (handcuffs are later removed). Suspect is angry, agitated and her speech is slurred. She has been arrested under suspicion of criminal damage and for threatening behaviour. She reports no difficulty reading or writing but she suffers from fits and anxiety. She is also alcohol dependent and suffers from withdrawal symptoms.

CO12-1 discusses timing of interview with the investigating officer. He raises his concerns in relation to intoxication on the one hand and alcohol withdrawal on the other. He advises that the interview will have to be conducted when the suspect is sober but before alcohol withdrawal sets in. A fitness for interview assessment, on account of her 'vulnerability', is requested. AA is deemed unnecessary as suspect "does not have mental health problems". Suspect asks to make a phone call, CO12-1 agreed. She lifts her own phone from the 'Prisoner Belongings' bag and calls her parents. CO12-1 tries to explain that she should be calling from the custody phone but she does not seem to understand this and replies, 'I'm using my own credit, not yours'. CO12-1 makes a comment that 'At least this saves the taxpayer some money'. She is asked if she knows her rights and she replies 'Yes'. She reads the screen and thinks 'misc.' is 'music'. This makes me question her ability to read, although this may be as a result of alcohol consumption/intoxication. CO12-1 does not query this, neither does he make any connection between this and the suspect's ability to read.<sup>657</sup>

Finally, whilst vulnerability was viewed as inherent, i.e. 'there's a certain vulnerability for everybody'<sup>658</sup> or 'anyone could be vulnerable at any given time',<sup>659</sup> this did not mean that all individuals were provided with an AA. Moreover, as I will illustrate in the following section, even a situational vulnerability is insufficient.

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<sup>656</sup> Interaction 73, Site 1.

<sup>657</sup> Interaction 116, Site 1.

<sup>658</sup> CO9-1 Interview.

<sup>659</sup> CO17-1 Interview.

### 5.3 Custody officers: constructing the Code C definitions

As set out in Chapter 4, a vulnerable suspect is one who is considered ‘mentally vulnerable’ or ‘mentally disordered’. The former relates to someone who ‘may not understand the significance of what is said, of questions and their replies’<sup>660</sup> due to their mental state or capacity, whereas the latter refers to any suspect who has a ‘disorder or disability of the mind’.<sup>661</sup> Custody officers were asked at interview to give their interpretation of both of these terms. They neither gave either the Code C definition of mentally vulnerable, the Code C definition of mentally disordered, nor were the terms paraphrased.<sup>662</sup>

#### 5.3.1 ‘Mentally vulnerable’

Custody officers gave their own interpretation of what ‘mentally vulnerable’ meant to them. For CO10-1, as the quote above indicates, ‘mentally vulnerable’ was tied to victimisation. The most common characteristic of ‘mental vulnerability’ incorporated either learning disabilities or difficulties,<sup>663</sup> low intelligence, or both.<sup>664</sup> The category ‘mentally vulnerable’ *‘could include people suffering from mental illness or it could include people with learning difficulties’*<sup>665</sup> or it could be *‘somebody possibly with learning disabilities’*.<sup>666</sup> This did not mean that all individuals with mental illness, learning difficulties or learning disabilities *were* mentally vulnerable; rather that they *could be* mentally vulnerable. Ostensibly, ‘mental vulnerability’ could also be distinguished from mental illness and it could also be separated from learning difficulties,<sup>667</sup> as the quote below illustrates:

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<sup>660</sup> Code C, para 1G.

<sup>661</sup> *ibid.*

<sup>662</sup> CO12-1 was not asked to define ‘mental vulnerability’ or ‘mental disorder’ (or similar) but the term ‘mental vulnerability’ was used in the interview questions and CO12-1 talked around it. In the interviews of CO12-1 and CO10-1 the term ‘mental disorder’ was not mentioned or discussed. As mentioned in Chapter 2, I returned to ask questions to cover gaps in the interview transcripts. CO12-1 and CO10-1 were the only officers with such gaps in their interviews.

<sup>663</sup> These terms were used interchangeably even though they mean different things – see section 4.3.

<sup>664</sup> I will elaborate on the significance of this later.

<sup>665</sup> CO20-1 Interview.

<sup>666</sup> CO30-2 Interview.

<sup>667</sup> Sentiments were expressed that a learning difficulty might not always be enough for the AA safeguard – see later in this chapter.



*It's difficult to put it into words. If somebody's got a mental illness... like schizophrenia or paranoia or something, then that comes under the umbrella of mental illness. But mentally vulnerable, I suppose, if somebody's really not understanding what's happening, they've got learning difficulties, maybe they struggle to read and write. Whether you class that as mental vulnerability or just vulnerability, I don't know.*<sup>668</sup>

One custody officer explicitly stated that *'we don't have guidance as to what mentally vulnerable means'*.<sup>669</sup> This may suggest, as I have previously argued,<sup>670</sup> that the custody officer is aware of the guidance under Code C but such guidance is insufficient in order for custody officers to operationalise vulnerability. Alternatively, as also previously argued, it could mean that this custody officer (and potentially the other custody officers, inferred from their responses) are not aware of the Code C guidance on mental vulnerability.<sup>671</sup> It also suggests that the definitions are not explored within their custody officer training or that the definitions have long been forgotten.<sup>672</sup> The general consensus was that Code C was inaccessible and thus deterred custody officers from reading it. Moreover, the impression was such that Code C was not necessarily written with the custody officer in mind and did not deal with the 'nuts and bolts' of the day-to-day work. That said, whilst clear and concise definitions of 'mentally vulnerable' were absent, the custody officers had some idea of what it meant.<sup>673</sup>

### 5.3.2 'Mentally disordered'

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<sup>668</sup> CO9-1 Interview. It is unclear whether the custody officer is making a point that learning difficulty is a mere vulnerability but not a mental vulnerability or whether he is unsure. His addition of *'I don't know'* would suggest the latter.

<sup>669</sup> CO18-1 Interview. This was also implicit in many interview transcripts.

<sup>670</sup> Dehaghani, 'Custody officers, Code C and Constructing Vulnerability' (n 484).

<sup>671</sup> *ibid.*

<sup>672</sup> A small number (N = 4) of participating custody officers had recently started working in custody – two at each site. One such custody officer (CO27-2) seemed to be aware of the Code C guidance and another custody officer (CO31-2) was not interviewed for practical reasons.

<sup>673</sup> See section 4.9 – 'mentally vulnerable' can also be a situational state rather than simply something innate. See also Dehaghani, 'Custody officers, Code C and Constructing Vulnerability' (n 484).

Whilst custody officers had a vague notion of what ‘mentally vulnerable’ denoted, the definition of ‘mental disorder’ contained within Code C seemed even more problematic.<sup>674</sup> As highlighted in Chapter 4, ‘mental disorder’ is something which is purely innate. Whilst this is implicit in the definition contained within Code C, the Code does not explicate what ‘any disorder or disability of the mind’ means and, as argued elsewhere, custody officers would be required to consult the MHA 1983 Code of Practice in order to know how ‘mental disorder’ links-up with recognised conditions.<sup>675</sup> Custody officers neither mentioned the phrase ‘any disorder or disability of the mind’ when asked to explain mental disorder nor at any other point during the interview. The term ‘mental disorder’ seemed to cause confusion and hesitancy for many, almost as if it was unheard-of.

There was a general awareness that that mental health problems and/or learning disabilities could constitute a mental disorder, however, there was some hesitancy in the responses. The typical response referred to mental health or learning difficulty but not necessarily disability. CO22-2 was adamant that learning disability was not included under the definition of mental disorder when he stated at interview, *‘define mentally disordered, there’s such a variety of what it could be, such a misunderstanding of what it means... people equate learning disabilities into mental disorder and it’s **not**’*.<sup>676</sup> In fact, he himself was confused as to how the two terms were related. Whilst it is true that learning *difficulties* are neither mental health problems nor fall under ‘mental disorder’, as the list from the MHA Code of Practice in Chapter 4 illustrates, learning *disabilities* are in fact included within the definition of mental disorder. Custody officer responses also included references to medication and diagnosis as well as

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<sup>674</sup> One explanation is that, because custody officers tend to ignore mental disorder as a distinct category, they do not have an idea of what it means. See later in this chapter. Alternatively, because mental disorder is a term which encompasses many illness and conditions (see section 4.3) it may be difficult to articulate. Nevertheless, the phrase, ‘any disorder or disability of the mind’, i.e. the quote contained within Code C, was not mentioned.

<sup>675</sup> Section 4.3. See also Dehaghani, ‘Custody officers, Code C and Constructing Vulnerability’ (n 484).

<sup>676</sup> CO22-2 Interview.

behavioural problems and cognitive impairments.<sup>677</sup> Moreover, mental vulnerability also seemed to be conflated with mental disorder.<sup>678</sup> The following quote illustrates this nicely:

*Mentally disordered and mentally vulnerable, if a person has mental health issues generally I would see them as being mentally vulnerable. I don't really know. I'm not a doctor. But I would suggest that they're very, very similar. Mentally vulnerable, I would suggest that just means that they have very, very high learning issues...*<sup>679</sup>

Whilst the foregoing discussion gives insight into how custody officers understand (or rather do not understand) the terms under Code C, it does not give any insight into what the custody officers are looking for when deciding whether the AA safeguard should be implemented. This will be explored in the following section.

#### 5.4 The 'AA vulnerable'<sup>680</sup> suspect

It could certainly be argued from the above discussion that the terms are what custody officers find problematic and that they can, and do, implement the AA safeguard for all adult suspects who fall under the Code C guidance. However, as the following discussion will illustrate, they have their own perception of vulnerability for the AA safeguard. In this sense, it does not quite matter that custody officers do not understand the terms within Code C – they have their own idea of what is required and they rely on this.<sup>681</sup>

As addressed above, custody officers have interpretations of what it means to be vulnerable. Being vulnerable did not, however, mean that the suspect requires an AA, even where that vulnerability derives from, for example, a mental illness. The following quote illustrates this:

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<sup>677</sup> This will be elaborated upon in later sections.

<sup>678</sup> It is true that an individual with mental disorder can also be mentally vulnerable i.e. the mental disorder can make the suspect mentally vulnerable, yet the two can also be mutually exclusive.

<sup>679</sup> CO22-2 Interview.

<sup>680</sup> I coined this term; the custody officers observed and interviewed did not refer to it in this manner.

<sup>681</sup> Although it could be argued, and I would argue, that their definition of vulnerability rests, in part, with 'faulty' guidance. The explanation is multi-faceted, however – see sections 8.4-8.8 and 9.2. See also Dehaghani, 'He's just not that vulnerable' (n 165).

*I think when you're dealing with what people recognise as bi-polar and schizophrenia and paranoia, they are areas of vulnerability. Because they have a vulnerability due to mental illness, does that mean that they need an [AA]? I'm sure that people that I've dealt with have those issues, [those] who say 'I'm bi-polar' or 'I'm schizophrenic'. I don't just automatically tick 'Need an [AA]' if that's where you're running to.<sup>682</sup>*

Code C vulnerability includes those deemed 'mentally disordered' and those who would be considered 'mentally vulnerable', as discussed above and in Chapters 1 and 4. Whilst these 'states' could constitute an 'area of vulnerability' (as above), a suspect in possession of this vulnerability may not necessarily avail of the AA safeguard. For example, the vulnerability referred to by custody officers could be for the purposes of care in, or release from, custody.<sup>683</sup> Moreover, 'vulnerability' is something which can vary – it could be distinguishable on the basis of temporariness or permanency (as suggested by CO22-2) (temporary vulnerability could dissipate or disappear altogether through time and may, as such, be rejected). Although custody officers lack knowledge of the terms contained within Code C or, at the very least, exhibit difficulties when articulating these terms, this does not necessarily constitute an obstacle to implementing the AA safeguard<sup>684</sup> – whilst unable to articulate what the terms 'mentally vulnerable' and 'mentally disordered' mean, they nevertheless have a sufficient grip on some of the terminology (enough to ascertain that a suspect's condition or illness may be caught by the Code C guidance). However, through observation and interview I was able to establish that custody officers have set their own benchmark or standard.<sup>685</sup> This will be explored below.

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<sup>682</sup> CO3-1 Interview. Whether this was intentional or not, CO3-1 commenced with 'what people recognise', which could suggest that he is sceptical about these diagnoses.

<sup>683</sup> Some of them were viewed as 'vulnerable in terms of health but not AA', particularly within the context of risk – see section 7.4.

<sup>684</sup> In fact, these 'obstacles' allow them to perform their role more effectively. It all depends upon perspective and purpose. See Chapters 7, 8 and 9.

<sup>685</sup> Custody officers readily divulged at interview that they have their own ideas of who is vulnerable for the purposes of the AA safeguard and also felt that this criterion was 'subjective'. Whilst there may be some level of subjectivity in how the vulnerability of each suspect is interpreted, given the overwhelming commonality between custody officers in their response to who requires an AA, it could be said that the standard is actually *objective*. There are some overlaps here with how vulnerability is identified – see Chapter 6, particularly section 6.4.5.

#### 5.4.1 ‘Symptoms’ not condition: presenting as vulnerable

As was indicated earlier in this chapter, a suspect can be identified as having a specific vulnerability, be that a learning difficulty, a mental health problem, an addiction or a personality disorder, or a combination of some or all of these. Vulnerability in this sense is innate. A suspect can also be deemed vulnerable due to their circumstances. This could be termed ‘situational’ or ‘circumstantial’ vulnerability.<sup>686</sup> The risk assessment tools<sup>687</sup> can facilitate, at least to some extent, identification of the condition.<sup>688</sup> Yet, it is neither the condition nor the circumstance that automatically lead to the implementation of the AA safeguard.<sup>689</sup> According to custody officers, ‘AA vulnerability’ is a result, not of the condition, but of the symptoms of that condition, or the impact of circumstance on that condition resulting in particular symptoms. The suspect must therefore display the symptoms of his or her condition<sup>690</sup> – even when someone has a *‘mental health diagnosis [which means that] you’re dealing with a diagnosed mental condition [this] doesn’t necessarily mean that they need an [AA] [because it comes down to] how they are when they’re actually presented in front of you’*.<sup>691</sup> As CO4-1 went on to explain, such presentation can occur *‘particularly if somebody isn’t taking their medication [which means that] they’re much more likely to display symptoms, behaviours that are different that would cause concern than somebody who is’*.<sup>692</sup>

Such themes appeared frequently. For example, for a suspect who had schizophrenia (a mental disorder) who has recently had a *‘depo-injection that they take two weekly [and] said that “well, I had my injection yesterday” and they present well and I would never had known that they*

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<sup>686</sup> See section 3.4.

<sup>687</sup> See section 6.3.

<sup>688</sup> See Chapter 6.

<sup>689</sup> It is important to note at this point that, as will be discussed in Chapter 6 (see, in particular, sections 6.4.5 and 6.5.2), custody officers are not necessarily using the answers given to the risk assessment questions as an indicator of ‘AA vulnerability’ but instead rely on observational skills. I will assess whether this is an appropriate approach in Chapter 6.

<sup>690</sup> This also links with the notion of ‘performing’ vulnerability, something which may be difficult for those who are alleged to have committed a criminal offence. Brown (n 183) discusses the notion of ‘performing’ vulnerability.

<sup>691</sup> CO4-1 Interview.

<sup>692</sup> CO4-1 Interview.

*had schizophrenia hadn't they told me, I'd probably go ahead with an interview rather than [get an [AA]].*<sup>693</sup> Thus, the use of medication can negate one's 'AA vulnerability'.<sup>694</sup> Moreover, the custody officer is not relying on what the suspect is saying (that he or she has schizophrenia) but is instead relying on how the suspect presents and the fact that medication has recently been taken. Conversely, *'if someone came in with schizophrenia and they hadn't taken their medication, they probably would be displaying something and that to me would be a stone bonker [sic] that they need someone to sit and make sure that they know what's going on.*<sup>695</sup>

How one presents can impact upon whether one is provided with an AA. Moreover, one's presentation is more likely to come across as 'AA vulnerable' should one have failed to take one's medication. As will be illustrated in Chapter 6, the fact that the suspect is not taking his or her medication can, of itself, act as an indicator that the AA should be present. It is therefore unclear whether the suspect presents with particular symptoms, is then found not to have taken his or her medication, and is therefore 'AA vulnerable'; or whether the suspect is found not to have taken his or her medication and this then influences the custody officers' *perception* of whether the suspect is 'AA vulnerable'. Both explanations could, of course, be valid.

#### 5.4.2 Normality/abnormality: a vulnerability dichotomy

As indicated earlier, vulnerability was viewed as, in some senses, the antithesis of normality. This was evident when considering 'AA vulnerability'. The words 'normal' and 'abnormal' appeared frequently to describe or articulate what vulnerability meant, particularly in reference to the AA safeguard. For example, CO11-1 stated that *'if they present normally to me, even if they have mental health issues, I wouldn't get an [AA]'*.<sup>696</sup> Conversely, CO12-1, when asked what he would consider when obtaining an AA, stated *'odd's not the right word...'* and then went on to say that, *'if they don't, sounds awful, [act] how you would expect a normal person [to act when] booked in. Normal's [sic] not quite the right word but I can't think of another*

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<sup>693</sup> CO13-1 Interview.

<sup>694</sup> See section 5.5. See also Chapter 6.

<sup>695</sup> CO22-2 Interview. The suggestion that someone needs to make sure that the suspect 'knows what's going on' will be explained in greater detail later.

<sup>696</sup> CO11-1 Interview.

one.<sup>697</sup> Abnormality could be indicated by the offence that the suspect has been arrested for, such as being found naked in a public place and was going through bins and picking up soiled nappies.<sup>698</sup> Going to a *‘normal school or ... a school for people with issues’*<sup>699</sup> could also act as an indicator for the AA safeguard.

As indicated above, one’s presentation and, bound-up with that, whether one is taking medication can impact upon whether one is perceived as ‘AA vulnerable’. In terms of this normality/abnormality dichotomy, those with mental illness could be considered ‘normal’ if their condition was ‘under control’.<sup>700</sup> Acting ‘unusually’ did not, however, always lead to implementation of the AA safeguard.<sup>701</sup> For example, a suspect, who was not provided with an AA, , *‘had two knives in his hands and he was stabbing himself and he turned on us [referring to the arresting officers] with the knives. Straight away you’re starting to think “That’s not normal behaviour, there’s obviously some issues there”’*.<sup>702</sup> During observations, a recognition of abnormality did not lead to the implementation of the AA safeguard even where:

*Suspect had been running down a railway line with a traffic cone on his head. The suspect also believed he was working for MI5, was talking into his hand, and was convinced that he was being spied on through the overhead vents and strip-lights. He was assessed by an FME and was deemed fit for interview without an AA. The FME recognised that the suspect ‘exhibited strange behaviour’ and ‘unusual ideas’ but was sufficiently lucid so as not to require an AA. He was thus interviewed without an AA.*<sup>703</sup>

One’s ‘normality’ need not simply be in question, rather one must be presenting with severe symptoms or appear ‘abnormal’ in order to be provided with an AA.<sup>704</sup> For example, having

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<sup>697</sup> CO12-1 Interview.

<sup>698</sup> Interaction 93, Site 1.

<sup>699</sup> CO2-1 Interview.

<sup>700</sup> CO33-2 Interview.

<sup>701</sup> For the rationale, see Chapter 7, and in particular section 7.2.

<sup>702</sup> CO28-2 Interview. This particular suspect was not provided with an AA despite exhibiting ‘odd’ behaviour. See also at n 754 and n 756.

<sup>703</sup> Interaction 100, Site 1. Here one can also see the role of the FME (see section 7.2.3 below). Perhaps what was also notable here, was that the PACE clock was running out and that calling an AA may have required the suspect to be detained beyond the 24-hour time limit.

<sup>704</sup> See section 5.4.2.

recently been sectioned was an indicator that someone was vulnerable and required an AA – *‘we had a chap in yesterday who was mentally vulnerable, he had been sectioned previously and when I visited him when I came on duty, was literally paced up and down in his cell, almost skippy [sic], hopping around, screaming and shouting and swearing’*.<sup>705</sup>

#### 5.4.3 The ‘AA vulnerable’ suspect: a child

Abnormality was also likened to childlike characteristics – where the impairment was severe, the suspect was not deemed to be fully ‘adult’. This is an interesting comparison to draw since this would suggest that ‘AA vulnerable’ adult suspects are viewed akin to young suspects, particularly those who are just above the age of criminal responsibility.<sup>706</sup> Comparisons were made between innocence and acquiescence:

*It’s childlike, in so much as the kids can happily be sat at school now but if you walk into the classroom in the school round the corner and then they’ll say, ‘Me, me, me’ because you’ve suggested that [they go for ice-cream] and they’ll sort of acquiesce and go along with whatever you’re saying and that is that understanding issue. People here will say ‘Yes boss!’ and they’ll nod their heads a lot.*<sup>707</sup>

This analogy appears to be based upon one’s capacity. For example, someone with *‘learning difficulties ... they might have a mental capacity that isn’t of an adult, it might be more in the juvenile range’*.<sup>708</sup> Similarly, where an adult has the mental age of a child or teenager, he or she is viewed as ‘AA vulnerable’. This connection was explicitly made by CO24-2 who stated, *‘if you’ve got a 25 year old man stood in front of you, “I’ve got the mental age of a 12 year old”*

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<sup>705</sup> CO11-1 Interview. Here, mental vulnerability was synonymous with ‘AA vulnerability’, however, this suspect had previously been sectioned, thus indicating severity and a previously diagnosed and/or treated condition. It is also possible that the custody officer had simply adopted the terminology that I used earlier in the interview.

<sup>706</sup> This is set at ten – see Crime and Disorder Act (CDA) 1998. This view of the vulnerable ‘childlike’ adult suspect is interesting, particularly when contrasted with custody officers’ views of youth vulnerability.

<sup>707</sup> CO16-1 Interview. This has interesting parallels with the custody officer conception of the AA safeguard – see later discussion.

<sup>708</sup> CO3-1 Interview.



– 12 year old, juvenile, [AA], vulnerable.<sup>709</sup> Conversely, being unable to read and write was not necessarily an ‘AA vulnerable’ indicator, *‘because they can be mentally sharp enough to be an adult in the normal sense of the word, without an [AA]’*.<sup>710</sup> There was therefore an unusual fiction that a ‘vulnerable’ adult had to be imbued with childlike characteristics.

Those behaving in childlike manner fell within the category of suspects in need of protection,<sup>711</sup> however, those who were able to ‘perform’ adulthood were not. The juxtaposition between ‘adult’ and ‘child’ was interesting, particularly as custody officers took the view that adults who were capable of raising a family were also capable of withstanding a police interview without an AA present. For example, CO16-1 stated *‘because a person has reading problems, doesn’t mean they need an [AA]. [It] could be their upbringing and they’ve survived perfectly fine and they’ve a family, perfectly good job and everything else’*.<sup>712</sup> A similar sentiment was echoed by CO21-2 who stated that he would not *‘get somebody an [AA] if, say it’s somebody for example living on their own. Or it could be a family man, who has one or two problems with reading and writing but he holds down a full time job and he’s raising a family. Why should that person need an [AA]? ... The kids are always going to need an adult... And he’s acting in that role already, in his current position as a family man’*.<sup>713</sup> This also suggests that the AA is viewed as something that is required to protect the childlike suspect, in a similar manner to which a parent would protect their child.<sup>714</sup>

Those who are genuinely vulnerable are unable to fend for themselves; they are helpless and may be vulnerable to exploitation. If one is able to ‘survive’ in the outside world, this suggests that he or she is not vulnerable. As with normality, capability and adulthood were seen as the antithesis of vulnerability. Yet, my own perception of childlike qualities did not marry with the custody officer’s perception, as the following observation illustrates:

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<sup>709</sup> CO24-2 Interview.

<sup>710</sup> CO12-1 Interview.

<sup>711</sup> This may also have a connection with one’s ability to ‘perform’ vulnerability.

<sup>712</sup> CO16-1 Interview.

<sup>713</sup> CO21-2 Interview.

<sup>714</sup> Palmer and Hart made a similar observation – see Palmer and Hart (n 76). The perception of the AA safeguard will be explored later in this chapter.

*Suspect has been arrested on suspicion of assault. She is alleged to have bitten her boyfriend's neck during a fight. She is visibly upset and is crying incessantly. She keeps screaming that she does not want to be 'locked away'. She makes no attempts to wipe away the tears and nasal mucus running down her face, her hair is matted and she is upset that she has to take her hair-tie out of her hair (she is screaming and sobbing while she is repeatedly asked to remove the hair-tie). She has sustained a head injury during the fight with her boyfriend and she discloses physical injuries, manic depression and self-harm. She states that she last self-harmed by cutting herself and had to be admitted to hospital as a result. I ask CO31-2 about his decisions in relation to the suspect; he states that she will be placed on 30 minute visits due to her head injury but does not require CCTV as her method of self-harm would not be possible in custody. There is no mention of obtaining an [AA] for the suspect.<sup>715</sup>*

As indicated from this excerpt, a mental disorder (manic depression) has been disclosed. This seemed an insufficient basis upon which to implement the AA safeguard. It also did not matter that the suspect was visibly upset and was agitated. Of course, this behaviour may have been as a result of the head injury, because she was deeply upset having had a fight with her boyfriend, or because she was upset or frightened at having been brought into custody.<sup>716</sup> Nevertheless, she, in my view, met the custody officer's 'childlike' criteria, at least when she was being booked-in.

#### 5.4.4 Understanding: 'knowing what's what'<sup>717</sup>

As discussed above, custody officers were assessing capacity in order to ascertain whether the suspect was 'AA vulnerable'. Within this section I will illustrate that a capacity or capability approach was taken towards 'AA vulnerability'. The term 'knowing what's what' was mentioned frequently during observations and was ostensibly the rationale for both custody officers and HCPs. Specifically, custody officers relied on whether the suspect 'understood' particular aspects of the custody process and the criminal process in order to ascertain whether

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<sup>715</sup> Interaction 76, Site 2. The focus here is firmly placed on risk – see sections 7.4 and 8.6.

<sup>716</sup> Each element, even taken separately, should be enough to make her vulnerable.

<sup>717</sup> What is important here is that custody officers are not always considering whether the individual understands the *significance* of what is said (as Code C requires – see section 4.2).

he or she was ‘AA vulnerable’.<sup>718</sup> For example, ‘*vulnerable is anyone who for any reason has a lack of understanding as to their circumstances, why they’re being investigated, why they’re under arrest and the processes that we go through during investigation whilst they’re in custody*’.<sup>719</sup> As I will discuss in Chapter 6, the suspect’s understanding, and thus ‘AA vulnerability’, can be identified or ascertained in a number of ways (usually through interaction). The first interaction for the custody officer with the suspect is usually at the booking-in desk, during the risk assessment; answers given and the way these answers are given can indicate to the custody officer that the suspect is ‘AA vulnerable’.

One must have no understanding or, at best, a limited understanding of what is going on to be considered ‘AA vulnerable’. Custody officers can assess this in a number of ways. For example, they can address the suspect’s understanding of the reason for arrest,<sup>720</sup> the fact he or she is being detained and the fact that he or she will be questioned. If a suspect’s ‘*understanding of consequence is a little retarded*’<sup>721</sup> then he or she may be provided with an AA. This quote, and other elements of ‘AA vulnerability’, speaks to the ‘mentally vulnerable’ aspect of Code C i.e. that the suspect ‘because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies’.<sup>722</sup> Of course, if the suspect fails to understand these particular aspects then it could certainly be argued that he or she has been unable to fully invoke his or her due process rights.<sup>723</sup> By contrast, if the suspect is to invoke his or her due process rights, he or she will not be viewed as ‘AA vulnerable’ as he or she is deemed to understand the process sufficiently,<sup>724</sup> as the following three quotes illustrate:

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<sup>718</sup> Palmer and Hart (n 76) had similar findings.

<sup>719</sup> CO33-2 Interview.

<sup>720</sup> This does not mean that the suspect agrees with the arrest and/or detention (or the reasons for arrest or detention). It simply means that he or she understands the meaning of arrest and detention.

<sup>721</sup> CO27-2 Interview.

<sup>722</sup> Code C, Note for Guidance 1G.

<sup>723</sup> See section 1.3. Although, as I would argue, someone may fail to understand these rights or may feel unable to exercise them even where he or she does not have any obvious issues with comprehension, or such issues at all. See also sections 3.6 and 9.3.4. For a discussion of due process see section 8.2.2.

<sup>724</sup> Although, as will be illustrated later, the presence of a solicitor can also negate the requirement for an AA. See also section 7.2.1.

*When you go through their rights they say, 'Yes, I'd like a solicitor' or they appear to be fully engaging with you, I would say they don't need an [AA] because they fully understand what's happening... They know why they're here, they understand the booking-in process, and they'll be able to understand questions in interview.<sup>725</sup>*

*The main thing that I'm looking out for is to be able to protect them... what we're going through from a police point of view... And I think you make sure that they fully understand what they're saying, what they're not saying, and the impact that will have on the investigation, and what happens from a criminal point of view, whether they are charged, cautioned, no further action, whatever it may be.<sup>726</sup>*

*All those questions in themselves are giving you feedback as to what their level of understanding is like. It doesn't have to be a specific question about that area, it can be anything. You get an idea of this person's level of understanding... To me vulnerable is someone who doesn't understand what's going on, they have very limited awareness or understanding of why they've been brought to a police station... I mean the most obvious way of answering it is when you say to someone, 'You can be detained at this police station'. It starts off 'Do you know why you've been arrested?' and they'll tell you. And then you say 'You're going to be detained here,' and they'll say 'Why am I going to be detained here?' and straight away the alarm bells are ringing.<sup>727</sup>*

The suspect's understanding of the criminal process can also be gleaned by his or her previous contact with, or experience of, the criminal process. For example, as Kemp and Hodgson have highlighted, 'recidivists' are deemed to possess greater knowledge than 'first timers'; the police generally respond better to suspects who are 'first-timers' compared with those who are 'recidivists'.<sup>728</sup> Therefore, capacity or understanding can be conceptualised as something

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<sup>725</sup> CO9-1 Interview.

<sup>726</sup> CO14-1 Interview. Although, as I will argue in Chapter 8, the AA safeguard is more likely to be implemented where the case is likely to reach the courts.

<sup>727</sup> CO28-2 Interview.

<sup>728</sup> Kemp and Hodgson (n 121) 169. This is in relation to young suspects. There is some variation with regard to the 'usual suspects' – for example, there are occasions where the use of an AA on a previous occasion will result in the use of the AA on present and future occasions. Thus, someone who is alleged to (or may) have previously offended may be given

general or something specific to the criminal process. In the following quote, a suspect who lacked capacity, in a general sense, and had schizophrenia (a mental disorder), was deemed not to require an AA as it was believed that he had sufficient understanding of the criminal process:

*This person had had an awful lot of contact with the police and had been through the process of being arrested and dealt with quite a number of times and had quite a number of convictions. So I was quite comfortable with that decision. But if someone had very few dealings with the police then I would probably have an [AA]. But that would be purely because I would be concerned about their level of understanding of what was going on.*<sup>729</sup>

Even where a suspect has a recognised condition and even where this condition is classed as a mental disorder, such as Autism Spectrum Disorder, this does not necessarily result in the implementation of the AA safeguard, as the following example illustrates:

*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, hmm, is 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*

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an AA – see section 7.3.2. The 'first-timer/recidivist' dichotomy was also found in the Italian context but not in the Dutch or Polish equivalents – see Claudia Cesari, Deborah de Felice and Vania Patanè, 'Italy: Empirical Findings' in Miet Vanderhallen, Marc van Oosterhout, Michele Panzavolta and Dorris de Vocht (eds), *Interrogating Young Suspects II: Procedural Safeguards from an Empirical Perspective* (Intersentia 2016) 209; Marc van Oosterhout, 'The Netherlands: Empirical Findings' in Miet Vanderhallen, Marc van Oosterhout, Michele Panzavolta and Dorris de Vocht (eds), *Interrogating Young Suspects II: Procedural Safeguards from an Empirical Perspective* (Intersentia 2016) 255; Barbara Stańdo-Kawecka and Justyna Kusztal, 'Poland: Empirical Findings' in Miet Vanderhallen, Marc van Oosterhout, Michele Panzavolta and Dorris de Vocht (eds), *Interrogating Young Suspects II: Procedural Safeguards from an Empirical Perspective* (Intersentia 2016) 293.

<sup>729</sup> CO2-1 Interview.

*with individually. You can't just sort of say, blanket, across the board, that everybody needs an [AA].*<sup>730</sup>

When asked to explain this approach CO4-1 stated, *'because they know the difference between right and wrong, they know why they're here'*.<sup>731</sup>

CO4-1's rationale is that someone of a high intellect such as a consultant anaesthetist or someone who attends Oxford University is not in need of an AA because they are sufficiently intelligent to understand why they have been brought into custody. This is arguably a similar approach to that taken by the courts in *Law-Thompson*.<sup>732</sup> Thus, custody officers endeavour to cognise the suspect's mental capacity and his or her ability to communicate effectively, in addition to his or her understanding of the world and of the criminal process.<sup>733</sup> They seemingly do not appreciate how a suspect who presents no issues with capacity or comprehension may nevertheless fail to appreciate the long-term consequences of his or her actions, or when placed under pressure may be prone to falsely confessing.<sup>734</sup> The following quote is tied to 'presentation', an aspect already discussed above, but illustrates that because someone does not 'perform' their autism, or where the autistic traits are not visible, then they do not require an AA:

*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'.*<sup>735</sup>

Not all custody officers took this approach, however. Both CO9-1 and CO10-1 commented that 'anything on the autistic spectrum' would warrant the AA safeguard. CO9-1 explicitly

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<sup>730</sup> CO4-1 Interview.

<sup>731</sup> CO4-1 Interview.

<sup>732</sup> *Law-Thompson* (n 522). See section 4.4.2.

<sup>733</sup> The ability to communicate is essential, as without effective communication between the police and the suspect, the interview may be fruitless – see section 8.6 (and 8.6.2 in particular).

<sup>734</sup> See section 3.3.

<sup>735</sup> CO13-1 Interview.

provided his reasons, stating that ‘*anyone that is anywhere on the autistic spectrum, our rule book says “They will have an [AA]”*’.<sup>736</sup> This ‘rule book’<sup>737</sup> is the Safer Detention Guidance,<sup>738</sup> now superseded by the College of Policing APP on Detention and Custody.<sup>739</sup>

The approach to ‘knowing what’s what’ was not always consistent, however. For example, a suspect who was brought in on suspicion of committing arson with intent to endanger life was viewed as ‘knowing what’s what’ and therefore not in need of an AA.<sup>740</sup> However, a suspect who was deemed to ‘know what’s what’ was provided with an AA. This particular instance concerned the same offence and the suspect was booked-in on the same day:

*Suspect brought in under suspicion of committing arson with intent to endanger life (he had set fire to his bed in shared accommodation). He said that he wanted to burn his things before he committed suicide at his mother’s grave. It transpired that he had been given notice to leave his accommodation. When advised of his rights, he asked whether the duty solicitor was ‘attached to the police’. CO21-2 explained the duty solicitor’s role. The suspect then asked if he had to pay and found it difficult to understand that legal advice was ‘free and independent’. He also wanted to read the Codes of Practice. On PNC it stated that he had persistent delusional disorder, obsessive compulsive disorder, a personality disorder and a low IQ (of around 70). The suspect only informed CO21-2 that he had depression and stress. CO21-2 discussed the use of AA with the HCP and AO. They all felt that he ‘knows what’s what’ and had ‘malice aforethought as he had taken some belongings with him before setting fire to his bed’. The HCP initially felt that an AA would not be needed but, because of all the suspect’s mental health problems, that it was best to ‘err on the side of caution’. It was agreed that the AMHP would assess the suspect and decide upon the use of the AA in the morning.*<sup>741</sup>

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<sup>736</sup> CO9-1 Interview.

<sup>737</sup> The influence of ‘rules’ will be discussed in Chapter 8.

<sup>738</sup> ACPO (n 152). Custody officers still refer to this guidance when discussing risk and ‘rules’ on vulnerability and risk. At Site 1, they were ostensibly unaware of the new College of Policing guidance.

<sup>739</sup> College of Policing, APP: Detention and Custody (n 153) See also Chapter 4.

<sup>740</sup> See Interaction 95, Site 2 below.

<sup>741</sup> Interaction 45, Site 2. There are a number of aspects here such as the information provided by the suspect (see section 6.4.1 and 6.5.2), the use of PNC (see section 6.4.2), the role of the

On a separate occasion, when the suspect was booked-back for bail, an AA was present and I was told that the AA was also present during his interview.<sup>742</sup>

#### 5.4.5 The negative case: two vulnerable females

Although I have provided a nuanced account of how ‘AA vulnerability’ is framed by custody officers, there is one element which has yet to be discussed – the negative case. Two exceptions to the ‘AA vulnerable’ suspect arose in interviews with CO16-1.<sup>743</sup> The first of these cases concerned a *‘nineteen year old, female, teaching assistant’* who, when she arrived in police custody *‘was sound as a pound, could converse with you here’* yet *‘by eleven o’clock it was, “You’ve got to get the officers here. I don’t want a solicitor. I just want to admit it; I’ll admit it all”’*. CO16-1 recognised that her desire to *‘admit something she’s potentially not done’* had been brought about by *‘the stresses and strains of being here’* even though *‘she can happily deal with thirty little kids running round’*. The suspect was *‘somebody who’s never been in trouble before’* but who, after being *‘in for twelve hours’* was ready to (potentially falsely) confess. In the 12 hours that she was in custody *‘she [couldn’t] see that [confessing was] going to affect her for the next eighty years of her life’*. The decision was therefore taken to obtain an AA for her. CO16-1 went on to note, *‘the officers weren’t happy with it because they wanted to go to interview at that point. So we ended up getting an [AA], which happened to be her partner, which she was happy with, she’s nineteen, the partner was twenty-something’*. The presence of the AA was seen to radically change the outcome for this nineteen-year-old – *‘she’s had a solicitor and she ended up being bailed as opposed to, yesterday, when she would’ve been cautioned or charged straight off...’*. CO16-1’s rationale was that:

*Clearly she did need an [AA] and it was from a communication point of view because she had to communicate what was going through her mind. It’s not for her to admit it*

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HCP (see section 6.4.3), the seriousness of the offence and the likelihood that it would get to court (section 7.3.3) and the ass- or back-covering approach (see sections 8.3.4, 8.6.2 and 9.2).

<sup>742</sup> Interaction 97, Site 2.

<sup>743</sup> Because these were discussed at interview I cannot provide any greater detail than that given by CO16-1. For example, I cannot ascertain whether the suspects had mental health problems or otherwise. Within this section I will explore CO16-1’s interview only.



*to me, she needs to communicate what's going through her mind and if she says, "No I haven't done this but I need to get out of here" then that's what she needs to communicate to the [AA], who in turn can then say, "Look, let's get a solicitor and we'll go from there".*<sup>744</sup>

The suspect, whilst not 'mentally disordered' and not initially considered 'mentally vulnerable' (nor actually considered 'AA vulnerable'), was nevertheless provided with an AA. The custody officer's rationale was that, at the point at which the suspect had been in custody for 12 hours,<sup>745</sup> she wanted to admit something she potentially had not done. She was, therefore, placing short-term gains (i.e. being allowed to go home) over long-term implications (the outcome of the case and, potentially, her liberty and livelihood) and was unable, at that point, to think in manner which was pursuant to her own best interests.<sup>746</sup> It is also worth noting that it was the suspect's first time in custody – perhaps she would not have received such treatment if she was considered a 'recidivist'.<sup>747</sup> Further, she was also female and this may have had some bearing on her 'performance' of vulnerability.<sup>748</sup> As I will explore in Chapter 7, other factors, such as the nature of the offence and the likelihood that confession evidence would be challenged at court, may also have had a bearing on the AA provision. Of course, in this instance, as I did not ask more about this particular case, I can only speculate.

The second case also concerned a suspect who, according to the custody officer, would not have been considered vulnerable under Code C. In this particular instance, I had been present when she was being brought back from interview to be placed in the cell, but I had not been present whilst she was being booked-in or when decisions were being made on the AA safeguard. In this case CO16-1 was highlighting the flaws with what he perceived as the Code C vulnerability definitions.

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<sup>744</sup> CO16-1 Interview.

<sup>745</sup> From the context it seems that she had been in for either 4 or 15 hours.

<sup>746</sup> See Chapter 3 and, in particular, section 3.3.

<sup>747</sup> See section 5.2.

<sup>748</sup> As Brown notes, vulnerability also has a gendered dimension – see Brown (n 183) 92. Women can also be considered 'disarmers' – see Simon Holdaway, *Inside the British Police: A Force at Work* (Basil Blackwell 1983) 77-79.

*CO16-1: .... there was a person just at the desk there who I was sorting out just before speaking to you and there is nothing in Code C that would identify her as a vulnerable person but to speak to her and to listen to the way that she lives and functions she clearly is. So I think that that safeguarding is false. I think people go through, they tick all the boxes, don't need an [AA] and it doesn't cover them...*

*R: So what were her issues and how does Code C not deal with that?*

*CO16-1: It sounds a bit stereotypical, when you talk to her and she lives independently, she doesn't get any help or support to manage on a day-to-day basis but when she starts telling you all about her cats, she clearly is very vulnerable. The way she will tell you about police officers, she's got a very high appreciation of the police to the point where whatever a police officer says is right and she's there just to please the police officer and she might not give an honest answer – she will give you an answer that will make you happy which in turn could land her in all sorts of trouble. So I think her views and her upbringing, even though they aren't identified as having any learning difficulties or things like that. Her lifestyle just makes her easily manipulated and the accounts and the things that she will say to you won't always be true but they'll be what she thinks you want her to say.*

Again, as before, the suspect was female. Moreover, it may have been her first time in custody and she may have been arrested under suspicion of a serious offence.<sup>749</sup> She was deemed suggestible and compliant by CO16-1 from the outset, something which, as discussed in Chapter 3, can render the suspect susceptible to falsely confessing. The definition of mental vulnerability can, as I have argued in Chapter 4, include those who are suggestible and/or compliant. It is instead the custody officer interpretation, and the questions intended to identify vulnerability for the AA safeguard (to be discussed in Chapter 6), which suggest that such a suspect is not 'AA vulnerable'. Therefore, even though CO16-1 thought that this suspect was not included within the Code C definition, his perception was potentially more accurate than he realised.

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<sup>749</sup> I will explore the significance of this latter element in Chapter 7.

CO16-1's approach was ostensibly the exception rather than the rule<sup>750</sup> and the majority of the data, as discussed above, suggests that custody officers are focussing largely, if not solely, on 'AA vulnerability'. These two cases were also beyond CO16-1's definition of 'AA vulnerable' – a definition which was consistent amongst all custody officers. They were, however, within my interpretation of Code C: by virtue of not appreciation the *significance* of what was said or what they were saying they could have been considered 'mentally vulnerable'.

## 5.5 Disproving vulnerability: not actually vulnerable

As discussed in Chapter 4, custody officers must implement the AA safeguard where there is doubt as to the mental state or capacity of the suspect.<sup>751</sup> Moreover, where mental disorder or mental vulnerability has been established, an AA must also be called. Of course, as also discussed in Chapter 4, custody officers are invited to provide evidence to dispel the notion of vulnerability. Additional questions are, therefore, asked and lines of inquiry are pursued.<sup>752</sup> However, the approach is more inclined towards using additional questions to disprove vulnerability than to discover vulnerability.<sup>753</sup> This quote from CO22-2 exemplifies this approach:

*And if I ask someone if they can read and write and they tell me that they can, it's extremely rare that I ask them to read, extremely rare. But if people say to me that they can't read or write then I'll give them the piece of paper like the white piece of paper that gives the rights and entitlements, I'll ask them to read the top line for me and that then gives me a measure of whether or not this person can in fact read or write. Quite a lot of people will say, 'I really struggle' and you'll say, 'Can you read that for me?'*

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<sup>750</sup> Whilst other custody officers did not articulate that they implemented the safeguard in instances where the suspect did not meet their interpretation of 'AA vulnerable', it is possible that they indeed implement the safeguard in such instances.

<sup>751</sup> One could say that this doubt will always exist – one can never be 100% sure that the suspect is not vulnerable.

<sup>752</sup> See also Chapter 6.

<sup>753</sup> This section could equally be contained within Chapter 6 or, albeit to a lesser extent, in Chapter 7. There is some overlap with how vulnerability is identified (Chapter 6) or why decisions are made (Chapter 7), yet exploring this data in this chapter contributes to understanding how vulnerability is defined.

*'You're entitled to a solicitor free of charge', 'Well, you've not really got a big issue with reading or writing. Perhaps someone down the line told you that you're not very good at it but it's more than adequate for what you need in custody'.*<sup>754</sup>

### 5.5.1 Diagnoses and medication

Attempts to disprove vulnerability do not only arise in relation to a suspect's ability to read or write, custody officers also seek to disprove vulnerability in relation to mental disorder such as depression, bi-polar, anxiety, or schizophrenia.<sup>755</sup> This is done through various means such as asking whether the condition is self-diagnosed or medically diagnosed – as a marker of vulnerability, the latter is significantly more convincing than the former.<sup>756</sup> Where the condition is self-diagnosed this is usually enough to disprove vulnerability entirely. For example, CO30-2 explains why he would not get an AA for someone who has *'self-diagnosed that they've got depression'*<sup>757</sup> – CO30-2 would ask, *'"Have you seen anybody about it?"'*<sup>758</sup> to which the suspect would respond *"No"*. Upon this basis, CO30-2 *'wouldn't necessarily bother with an [AA] because ... there's no definitive diagnosis'*<sup>759</sup>. It does not matter that the suspect has got depression, or at the very least feels depressed. The definitive diagnosis is key – it is enough to dispel the notion of vulnerability. This is illustrated in the following observation:

*The suspect has been arrested on suspicion of affray (he had been waving a knife around in a public place). He has a history of self-harm and was on recall to prison for breaching his conditions of release. According to PNC, he suffers from alcoholism and*

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<sup>754</sup> CO22-2 Interview. This quote also indicates that custody officers are focusing on the suspect's capacity – the level required need only be basic (enough to read simple sentence, to dispel) the requirement for an AA. It, moreover, does not seem to matter that the suspect may not be able to exercise this right fully nor may be feel able to exercise the right.

<sup>755</sup> These were the most commonly reported mental disorders during observation and the most frequently mentioned at interview.

<sup>756</sup> Custody officers fail to appreciate that some suspects or detainees may be reluctant to seek a medical diagnosis or may be so paralysed by their mental ill health that they do not feel capable of seeking medical advice or assistance.

<sup>757</sup> CO30-2 Interview.

<sup>758</sup> *ibid.*

<sup>759</sup> *ibid.*

*is being medicated for withdrawal symptoms. He discloses that he has depression, at which point CO22-2 asks him if this is 'self-diagnosed' or 'medically diagnosed'. The suspect replies that it has been medically diagnosed. CO22-2 then asks if this is severe or minor depression, to which the suspect replies 'severe'. He discloses previous instances of self-harm (by cutting his wrists). He does not seem to understand a number of the questions that he is being asked and when he disclosed that he cannot read or write, CO22-2 asks if this is 'out of choice' or due to an underlying condition. The suspect confirms the latter. When asked about his dietary needs, he replies that he has 'special needs' and still fails to understand when CO22-2 proceeds to explain what dietary means. He discloses that he went to a 'special school' and gives the name of that school. He declines legal advice. On this basis, coupled with his 'problems with reading and writing', CO22-2 decides to call an AA. He also refers the suspect to the HCP in relation to his alcohol withdrawal, stating that this is his main priority.<sup>760</sup>*

As discussed above, if a suspect has been prescribed medication and has failed to take his or her medication, this may be indicative of 'AA vulnerability'. This is not always the case, though:

*Suspect had been arrested on suspicion of arson with attempt to endanger life. He was initially too angry to be booked-in and was screaming and banging on the holding cell door. He attempted to dispute the charges and appeared to have knowledge of the custody process. He disclosed his mental health problems and stated that he recently been diagnosed as schizophrenic. He had not, however, taken his medication for a week. According to the PNC, he had been violent and had previously attacked staff when in custody. CO10-1 contacted a family member to pacify the suspect. An FME was requested to provide a mental health assessment. He was also to be assessed for fitness for detention and fitness for interview. There was no mention of an AA being*

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<sup>760</sup> Interaction 15, Site 2. There are a number of matters here such as the element of 'choice' (see section 5.5.3 below); issues with understanding (see section 5.4.4 above); refusal of legal advice (see section 7.2.1 below); and a focus on risk (see section 7.4 below)

*called until the FME later suggested it, although it was ultimately felt that no AA was needed.*<sup>761</sup>

Yet, if the suspect has not been prescribed medication it might suggest that the suspect is not sufficiently vulnerable. Moreover, if the suspect is on a low dosage of medication then this may suggest that the condition is of sufficient severity to warrant the use of the AA. Yet, greater scepticism was evident, further still, when discussing the use of medication for those with depression:

*You're just struggling with life like most people do and because you haven't got much else to do, you go to your doctors, and your doctor's a very busy person and they think, 'if I put you on these low level little anti-psychotic tablets, these little low level anti-depression tablets, at least it gets rid of you for a few months and it might even have that mellowing effect of you deciding that your depression's all dealt with'... You can probably pre-empt most of the answers that they'll give you on the risk assessment in relation to which GP they're under, which medication they're taking...*<sup>762</sup>

This quote is interesting for a number of reasons. Firstly, it indicates extreme scepticism about depression as a worthy mental illness.<sup>763</sup> Secondly, taking 'low-level' medication is enough to suggest that the vulnerability is merely a fabrication. Moreover, it also suggests that certain GPs within certain areas will indiscriminately prescribe medication, suggesting that anyone within that catchment area probably does not have a 'recognised medical condition' and thereby casting further doubt on their vulnerability. It may also suggest that custody officers hold a very negative view of both alleged offenders coming into custody and the General Practitioners or other HCPs prescribing this medication. Such suspicion and disbelief is, of course, a common cultural theme within the police.<sup>764</sup>

As discussed above, once it is established that the suspect has a medical diagnosis and has been prescribed medication, the custody officer will then seek to ascertain whether the suspect is

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<sup>761</sup> Interaction 14, Site 1. This interaction also shows the importance of the FME's involvement. It is possible that an AA would not have been considered if it were not for the FME.

<sup>762</sup> CO16-1 Interview.

<sup>763</sup> See section 5.5.3 below.

<sup>764</sup> See Reiner, *The Politics of the Police* (n 18) 121-122. See also Chapter 8.

taking his or her prescribed medication or complying with his or her regime.<sup>765</sup> The reason for this is simple – if a suspect has been diagnosed and is taking prescribed medication then he or she is effectively ‘cured’ of the condition; it has no ill-effect on the suspect, he or she is not in the middle of an episode and is thus, by the custody officer’s logic, not vulnerable. In addition to quotes given earlier in this chapter, CO30-2 also discussed this approach:

*I don’t know what kind of condition, say schizophrenia, for example or depression. If somebody has been diagnosed with that and they’re being treated for it medically and they’re up to date with all their medication and they can function normally in society then I wouldn’t necessarily say that they were vulnerable.*<sup>766</sup>

### 5.5.2 Appearances can be deceiving

Yet, custody officers did not only discuss the use of substances in relation to medication but also in relation to alcohol or illicit drugs. A suspect who has been consuming drugs or alcohol may be viewed as ‘not vulnerable’ because this substance misuse results simply in the *appearance* of vulnerability and the process of sobering-up removes this vulnerability. For custody officers, it is important to ascertain whether the vulnerability is ‘*genuine mental health issue or [whether] they’re under the influence of drink and drugs*’.<sup>767</sup> The question is one of great difficulty but custody officers must consider whether the drink and drugs are ‘*impacting on their behaviour*’.<sup>768</sup> Another question, moreover, is whether the mental health issue is ‘*drug-induced, or alcohol-induced... where it came from and whether the person is managing it*’.<sup>769</sup> Of course, drug or alcohol abuse can result in a severe, permanent condition such as brain damage. Where the suspect has suffered permanent cognitive damage as a result of sustained substance misuse then he or she may also be deemed ‘AA vulnerable’. Two custody officers gave an example of this at interview – the suspect, through years of cannabis abuse, was so impaired that custody officers doubted whether he would be able to communicate, even with

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<sup>765</sup> See section 5.4.1 above.

<sup>766</sup> CO30-2 Interview. See also section 5.4.2 above.

<sup>767</sup> CO13-1 Interview.

<sup>768</sup> *ibid.*

<sup>769</sup> CO14-1 Interview. See section 5.4.1 above.

the assistance of an AA.<sup>770</sup>

As discussed above, suspects may also appear, or actually be, vulnerable through circumstance. Yet, this situational vulnerability,<sup>771</sup> as aforementioned, did not, of itself, mean that the suspect would be provided with an AA. Rather, because custody could exacerbate a suspect's condition, custody officers attempted to ascertain whether the suspect would exhibit this vulnerability when outside of custody.<sup>772</sup> Because custody is *'quite a stressful environment... if somebody's got mental health issues we're probably seeing the bad side of it...and how the stress side of it makes them angry or anything else'*.<sup>773</sup> CO1-1 went on to say:

*Perhaps seeing them in their own environment whether that is in hospital or somewhere like a day centre or something, perhaps you'll be able to recognise the signs of people who are vulnerable because of mental health rather than just when they're coming in kicking and shouting and screaming.*<sup>774</sup>

As CO28-2 highlighted, in addition to the various issues that person may be dealing with, *'you've got all the other factors to consider, you know, the stress of being at the police station, the medication that they're on that's not to do with mental health issues because they may have other health issues, alcohol, drugs'*.<sup>775</sup> Ascertaining vulnerability is therefore a complex process whereby the custody officer must strip away the layers of façade. The ultimate conclusion is that if the suspect were not in custody this vulnerability would not manifest and

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<sup>770</sup> Custody officers seemingly fail to recognise that addiction could be considered a mental disorder, particularly if it has caused a mental or behavioural disorder (see section 4.3). Not all intoxicated detainees will be drug or alcohol addicted but there are certainly many who were or potentially were. The failure to recognise drug or alcohol addiction as part of 'Code C vulnerability' was ascertained during observation and confirmed at interview.

<sup>771</sup> Brown (n 183) 31-33.

<sup>772</sup> This is something with which I disagree – custody *can* cause a mental vulnerability and the fact that custody can exacerbate or create vulnerability should not be used as a factor in disproving vulnerability. The cause of the vulnerability is insignificant; what is imperative in these circumstances is the suspect's mental state (or potential mental state) during his or her time in custody. I will return to my recommendations in Chapter 9.

<sup>773</sup> CO1-1 Interview.

<sup>774</sup> CO1-1 Interview. Again, this quote is interesting as it suggests that those who are genuinely 'vulnerable' are those who are sufficiently ill to be kept in hospital or attend a day centre.

<sup>775</sup> CO28-2 Interview.



the suspect would not be vulnerable – this situational vulnerability is used to dispel ‘AA vulnerability’.

### 5.5.3 Reliability and choice

The suspect’s reliability could also have a bearing upon whether he or she was accepted as vulnerable. Custody officers were of the opinion that suspects could exaggerate or fabricate their condition.<sup>776</sup> There was a general consensus amongst custody officers that suspects, by virtue of being suspected criminals,<sup>777</sup> were not to be trusted.<sup>778</sup> Suspects were viewed as ‘*playing on*’<sup>779</sup> their condition rather than it being ‘*a genuine sort of thing*’.<sup>780</sup> It was thought that ‘*a lot of [suspects] use it as a control strategy by saying “Well I have this condition and I’m in control in so much as you don’t know what it is and you’re not an [HCP]”. And again I have to take their word for it until I have it verified*’.<sup>781</sup> Answers could also be ‘*purely ... given off the back of being an alcoholic or, sorry, being drunk or being under the influence of drugs*’.<sup>782</sup> Similarly, it could be ‘*somebody who is just being goddamn bloody minded who says, “I’ve got everything”*’.<sup>783</sup> There was therefore an awareness that the ‘*people in front of you aren’t always telling the truth*’.<sup>784</sup> Although the approach could be to ‘*go risk averse and if anybody’s got any level of mental illness, have an [AA]*’<sup>785</sup>, CO3-1 did not think this was the right approach to take.

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<sup>776</sup> See section 6.5.2. Discussion in Chapter 8 may help explain this.

<sup>777</sup> Rather than the idea of ‘suspicion’, custody officers either expressly or inadvertently stated that suspects were guilty and untrustworthy, even where I highlighted the fact that not everyone who is arrested is factually guilty. Arrest was not an indication of potential untrustworthiness – it was a clear signal of deceitfulness and dishonesty.

<sup>778</sup> This is arguably why custody officers rely more on their own feelings and observations than on the information provided by suspects. That said, Code C clearly states that there must be sufficient evidence to dispel the notion of vulnerability – a distrust of the suspect is surely not enough.

<sup>779</sup> CO1-1 Interview.

<sup>780</sup> *ibid.*

<sup>781</sup> CO28-2 Interview. This also applied to ‘risk management’ in police custody.

<sup>782</sup> CO3-1 Interview.

<sup>783</sup> *ibid.*

<sup>784</sup> *ibid.*

<sup>785</sup> *ibid.*

Vulnerability could also be refuted as something which was the suspect's choice. For example, travellers would not be provided with an AA because they had made a '*lifestyle choice*'<sup>786</sup> not to read or write (and were also typically viewed as '*astute*'<sup>787</sup>). Such an approach was also apparent in relation to suspects who had depression. It was also deemed to be part of a lifestyle choice or was something merely circumstantial and therefore of insufficient severity, in other words it did not impact upon the suspect's daily life.<sup>788</sup> This suggests that there is an element of human agency: that those who make such 'choices' are to blame for their misfortune. The poor, for example, are constructed as 'undeserving' as they have made a choice to be poor and not to follow the behavioural rules of respectable white middle-class society.<sup>789</sup> Responsibilisation<sup>790</sup> extends too to victims who, by virtue of being poor and disadvantaged, also fall outside the category of those worthy of protection.<sup>791</sup> Further, as Brown highlights, ex-offenders are often not treated as worthy of social housing assistance because of their status as ex-offenders. This is 'despite their official categorisation as a vulnerable group'.<sup>792</sup>

Many custody officers felt that suspects claimed that they were depressed due to an inability to cope with life events or felt depressed out of boredom<sup>793</sup> – for example, '*the lifestyle of the individual will be a big clue as to why they're depressed*';<sup>794</sup> or the suspect will '[say] that [they]'ve got depression because [they]'re not taking great steps to cope with life and [they]'re saying "Woe is me" and that's why [they] keep going out and shop-lifting instead of getting a job'.<sup>795</sup> Depression was also viewed as synonymous with being '*just pissed off, fed up, whatever you want to call it*'.<sup>796</sup> Custody officers tended to view depression as something which

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<sup>786</sup> CO22-2 Interview.

<sup>787</sup> *ibid.*

<sup>788</sup> See section 5.4.2.

<sup>789</sup> Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009). See also Michael B Katz, *The Undeserving Poor: America's Enduring Confrontation with Poverty* (OUP 2013).

<sup>790</sup> See David Garland, *The Culture of Control: Crime and social order in contemporary society* (University of Chicago Press 2001).

<sup>791</sup> See Christie, 'The Ideal Victim' (n 625).

<sup>792</sup> Brown (n 183) 51.

<sup>793</sup> See n 451.

<sup>794</sup> CO18-1 Interview.

<sup>795</sup> CO16-1 Interview. On this point see Loftus (n 204) 95.

<sup>796</sup> CO1-1 Interview.

was overused,<sup>797</sup> a condition that ‘everyone has these days’, or something that someone fabricates to avail of social welfare, as the following quote illustrates:

*Speaking as a police officer, not just a custody sergeant, I’ve been doing this job for a long time now and one of the reasons people get themselves classed as being depressed is so they can go on medication and get their benefits. I have been round at people’s houses to get their medication on occasion and they have boxes and boxes and boxes of unopened medication. They collect their prescription every week and don’t use it.*<sup>798</sup>

Depression was also viewed by custody officers as a way for suspects to express their frustration with having been caught. For example, CO22-2 stated that *‘the vast majority of people that come in will say that they’re depressed.... It isn’t because they’re suffering from a medical or mental condition of depression, it’s because they’ve been caught and are in custody...’*.<sup>799</sup> He went on to add, *‘if we had an [AA] for every time some said they were depressed, we would have an [AA] for virtually every person that comes through the door’*.<sup>800</sup> As such, the ill-effects of the condition could be discounted and, as a result, those with depression are almost automatically excluded from the category of ‘AA vulnerability’ and, potentially, ‘vulnerability’.

Custody officers seemed to be most critical of suspects who reported depression and anxiety, however, they also ignored other mental disorders as prompts for the AA safeguard to be implemented.<sup>801</sup> As noted above, the ‘AA vulnerable’ suspect was someone who exhibited issues with comprehension and/or capacity. It seemed therefore that custody officers largely

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<sup>797</sup> This scepticism can be seen in society more generally, prompting contemplation of Sir Robert Mark’s comment that ‘the police force is the best reflection of a society. If society is violent, so are the police; if society is corrupt, so are the police; but if society is tolerant, literate and humane, the police will act accordingly’ – Sir Robert Mark, *Policing a Perplexed Society* (Allen and Unwin, 1977) as quoted in Ben Whitaker, *The Police* (Penguin 1964) 8. Whitaker argues that the police are a mirror of society. As a cautionary note, it has been established that whilst the police officers embody some views and characteristics of society, the police can also be viewed as a subset of the population.

<sup>798</sup> CO29-2 Interview.

<sup>799</sup> CO22-2 Interview.

<sup>800</sup> *ibid.*

<sup>801</sup> Although they were certainly less critical of suspects with conditions other than depression and/or anxiety.

ignored mental disorder as a distinct category. For example, CO33-2 explained, *'I've one in custody at the moment [that has] got bi-polar. That in itself wouldn't necessarily mean that an [AA] is needed'*.<sup>802</sup> Even if a suspect came *'in with schizophrenia [or] psychosis... they know the difference between right and wrong, they know why they're here'* and therefore were deemed not to require an AA.<sup>803</sup>

Having a condition is not enough to be considered 'AA vulnerable', one must also have issues with comprehension. This does not, of course, have to be exclusively as a result of a recognised condition,<sup>804</sup> however, such issues with comprehension or capacity *are* usually bound-up with something innate.<sup>805</sup> The approach taken towards adult suspects contrasts quite significantly with that taken towards young suspects who, whether perceived as 'AA vulnerable' or not, are provided with an AA:

*We will have people at 15 years come in who are very bright and clearly don't need [AA]s, they understand exactly what is going on, they've been through the system so many times, it's incredible. They've probably spent as much time in a police station as I do, a lot of our recidivists.*<sup>806</sup>

As briefly mentioned in Chapter 4, suspects below the age of 18 are considered vulnerable under Code C definition. A comparison, considering this approach, will be drawn in Chapter 7 and explained in Chapter 8. However, since this thesis is not concerned with young suspects I will not labour this point much further. Suffice it to say, as I will explain in Chapter 8, the

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<sup>802</sup> CO33-2 Interview.

<sup>803</sup> CO4-1 Interview.

<sup>804</sup> See section 5.4 generally.

<sup>805</sup> Such decisions were often left to HCPs. At Site 1, a suspect with schizophrenia was deemed not to require an AA even where the custody officer (CO15-1) thought one should be called. At Site 2, a suspect with bi-polar disorder, who was clearly displaying manic and anxious behaviour, was interviewed and charged without an AA present. See Chapters 6 and 7, and in particular sections 6. and 7. for discussion.

<sup>806</sup> CO22-2 Interview. This custody officer also went on to say that many young suspects were 'absolute villains'.

approach taken towards young suspects was such that the law dictates that the AA safeguard be implemented, whereas with adult suspects the rules are viewed as discretionary.<sup>807</sup>

## 5.6 Defining the role of the AA

Within the foregoing section I provided the reader with a multi-faceted and nuanced account of the custody officers' views of vulnerability, both broadly and in relation to Code C and the AA safeguard. That said, explorations of vulnerability and 'AA vulnerability' illustrate only part of the picture. Within this section I will address how custody officers perceive the AA safeguard,<sup>808</sup> as 'AA vulnerability' is tied to this, and without it an exploration of vulnerability would appear somewhat anaemic. The following section also serves to cast light on the separation between 'vulnerability' and 'AA vulnerability', in addition to explaining, in part, why suspects who fall under the Code C definition of vulnerability are not necessarily provided with an AA.

As discussed in Chapter 4, the AA safeguard must be implemented for any suspect who falls under one of the three categories of vulnerability. The AA's role encompasses a number of elements – facilitating communication between the suspect and the police, providing support, advice and assistance, and ensuring that the police act fairly.<sup>809</sup> Although the AA's role is not purely communicative, much of Code C lends itself to that purpose. Moreover, Code C does not, of itself, mention support – this is instead found in the Guide for Appropriate Adults.<sup>810</sup>

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<sup>807</sup> For example, CO9-1 stated, *'Well anybody under eighteen obviously has got to have one, so that's non-negotiable, they've always got to have an [AA]'*.

<sup>808</sup> As should become apparent through this and later chapters, the AA safeguard is seen more as a resource rather than a rule.

<sup>809</sup> See section 4.2.

<sup>810</sup> Home Office and NAAN (n 48).

### 5.6.1 Support, assist and advise: an ally or a friend

Custody officers recognised that the purpose of the AA was to ‘advise and assist’.<sup>811</sup> For example, they were ‘*there to help and guide the person that they’re there to assist*’.<sup>812</sup> They were also viewed as being there to provide ‘*the support of having someone there that they know, from their side*’.<sup>813</sup> The AA was also viewed as an ally:

*I think they’re there as an ally for a suspect in custody. It’s a harsh environment, particularly if you’ve never been in custody before, and it can be forbidding. The [AA] is someone that’s, I suppose, going to be on their side and as much as they can, look out for their welfare. They’re going to talk to them first before they’re interviewed, to an extent going to gain their confidence, and someone who the [suspect] is going to be comfortable with in custody.*<sup>814</sup>

They were also viewed as ‘*somebody there to act in [the suspect’s] interests*’<sup>815</sup> or someone that ‘*will give you an honest answer of what is going on, what will happen, a friend*’.<sup>816</sup> Their role was contrasted with that of a solicitor who was viewed as a single-minded individual who sought to serve his or her own goals.<sup>817</sup> Instead, the AA was seen as someone who was kind, caring and without motive (other than their goal to ‘look after’ the suspect). This is also in

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<sup>811</sup> Whilst this exact phrase (or similar) only appeared in the interview transcripts at Site 1, it was implicit within the interview transcripts at Site 2.

<sup>812</sup> CO11-1 Interview.

<sup>813</sup> CO28-2 Interview.

<sup>814</sup> CO13-1 Interview. This quotation is interesting in that it suggests that the AA’s presence can put the suspect at ease (lowering his or her guard) and thereby facilitates the police interview – see section 4.7.4 below. The custody officer also mentions ‘welfare’ in this quote – see section 5.6.2 below.

<sup>815</sup> CO24-2 Interview.

<sup>816</sup> CO29-2 Interview.

<sup>817</sup> This was an interesting contradictory perception as solicitors were also viewed as AA replacements – see section 7.2. This view is also taken by the court – see section 4.5.

marked contrast with the police officer whose role may be perceived as one of discipline or punishment.<sup>818</sup>

Whilst the supportive function of the AA was recognised, the support was more so for the purpose of ensuring that the suspect understood the various processes – *‘they’re there to support the person in making sure that they understand the process, what’s going on, what’s being asked of them, that they understand their rights and entitlements, that they know what they are, what they can do’*.<sup>819</sup>

#### 5.6.2 Welfare and protection: as a parent to a child

The AA, in addition to assisting, advising and supporting the suspect or facilitating communication, may also perform a protective or welfare function. The AA’s role was viewed as somewhat synonymous with that of a carer or parent – i.e. *‘to be what a parent is to a child... as a crutch really’*,<sup>820</sup> or *‘to act as a parent would with a teenager, as much as they may not [understand] some of the technicalities of the law, some of the processes’*.<sup>821</sup> When considering the comparisons made between ‘AA vulnerable’ and a child, this parent/carer comparison is unsurprising. The AA’s function extended beyond assistance with the processes, it also provided a means to ensure other rights and entitlements:

*That that person is being cared for, that they understand that they can have food, drink, they can go outside. So basically they can understand what they are allowed to do through PACE, what we should be giving them, how they should be looked after, they should be reviewed, all that sort of stuff, that they have been reviewed. It’s there to make sure the rules, the regulations, and how we look after them are being abided by and that person understands.*<sup>822</sup>

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<sup>818</sup> As Kemp and Hodgson have noted, suspects may view the police not as ‘there to look after you’ but instead ‘there to scare you’ – Kemp and Hodgson (n 121) 164. See also Jessiman and Cameron (n 124).

<sup>819</sup> CO24-2 Interview.

<sup>820</sup> CO4-1 Interview.

<sup>821</sup> CO18-1 Interview.

<sup>822</sup> CO24-2 Interview.

*The [AA] is there to ensure that their rights other than their legal rights... and any concerns that they have are being met by the police when they're in custody. That they are eating and drinking, have they ever had access to food and water [and] medical attention.*<sup>823</sup>

### 5.6.3 Facilitating communication

The main purpose of the AA, according to custody officers, is largely to facilitate communication between the suspect and the police and to ensure that the suspect understands what is being asked of him or her.<sup>824</sup> For example, it was important to ascertain from the suspect 'whether or not you think they can form an opinion and give you their side of the story adequately enough'<sup>825</sup> – the '[AA] will explain things in layman's terms. And just be there to assist the reading and writing, almost'.<sup>826</sup> However, even where suspects had difficulties reading and writing, an AA was not necessarily provided, as evidenced by Interaction 82, Site 1.<sup>827</sup>

The AA could 'ensure that they have an understanding of the processes that they're going through, the interview questioning side of things so that they're not being, arguably, oppressed and starting to just say something'.<sup>828</sup> However, the '[AA] is not, or should not, answer questions on behalf of the client but they should make sure that that client understands the question fully before they answer it'.<sup>829</sup> The AA can, however:

*[M]ake sure the person being interviewed understands what's going and sometimes clarify what they say... make sure that the person understands what's going on and*

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<sup>823</sup> CO28-2 Interview.

<sup>824</sup> This particular element of the role is contained within law under Code C, para 11.17. This theme was explicit in eight out of 15 responses from Site 1 and seven out of nine responses from Site 2.

<sup>825</sup> CO17-1 Interview.

<sup>826</sup> *ibid.*

<sup>827</sup> See section 6.5.1.

<sup>828</sup> CO3-1 Interview.

<sup>829</sup> CO21-2 Interview.



*they're able to put across what they want to put across in the most effective way possible. That's what I think that the [AA] is there for.*<sup>830</sup>

#### 5.6.4 Obtaining information and ensuring compliance

The communicative function of the AA was useful not only in ensuring that the suspect can impart his or her account most effectively, but also in ensuring that the police can obtain the information they require and conduct their interviews effectively and efficiently.<sup>831</sup> The '[AA] ... might be the sort of person to say, "Well, this is the opportunity to talk to the police about why you've been arrested and this might, this might help you, with what issues are there in the first place"'.<sup>832</sup> The AA could also enable custody officers to obtain information required to conduct the risk assessment:<sup>833</sup>

*The [AA] also needs to get relevant information for me so whilst they're not telling which doctor they're seeing, which psychiatrist they're seeing, which medication they're on – they don't want to tell me that but whilst they're not telling me that, it's going to mean that they're here for longer, we can't get them interviewed, we can't get them dealt with and it's just delaying their release from here. And that [AA] has got to find out what's made them land in here.*<sup>834</sup>

The above quote also suggests that either the AA's role is to assist the police with their inquiries or that the 'relevant information' may explain the offending behaviour. Further, the AA could also be used to ensure compliance with the various procedures such as '*the samples side of things, because fingerprints, photographs and DNA can be taken by force if necessary. Again they're there to sort of facilitate communication between us and the detained person so they understand that "We will be taking your fingerprints, please comply"*'.<sup>835</sup> For example, family

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<sup>830</sup> CO14-1 Interview.

<sup>831</sup> One custody officer (CO16-1) was, however, critical of the ability of this safeguard to ensure effective communication – see section 9.3.5.

<sup>832</sup> CO1-1 Interview.

<sup>833</sup> This was only explicit in four interviews. In section 6.3, I explore the risk assessment in greater detail.

<sup>834</sup> CO16-1 Interview.

<sup>835</sup> CO30-2 Interview.

members were called in as a means through which to placate the suspect. During observation, I saw this approach used explicitly on one occasion for the purpose of calming a purportedly volatile suspect who had schizophrenia.<sup>836</sup>

#### 5.6.5 Independent of the police

Code C stipulates that the AA must be independent of the police. Moreover, the AA's presence is intended as a check on the police. This element appeared sparsely within the interview transcripts. For example, the AA was viewed as *'someone who isn't wearing a uniform; [they] haven't got that "them and us"'*.<sup>837</sup> The AA was there *'to ensure that procedures are conducted fairly and undue pressure isn't placed on the person who is potentially vulnerable that is going to blurt out something that they ought not to be saying, that's going to incriminate them wrongly somehow'*.<sup>838</sup> The AA was also there to *'make sure that the vulnerable person's comfortable, and isn't pressurised or anything like that'*,<sup>839</sup> rather than ensuring that *'the police officer [who] is interviewing ...[gets] the answers that they want'*.<sup>840</sup> Thus, the AA is present to protect against false confessions or misleading information, as the purpose of Code C alludes to.<sup>841</sup>

Yet, CO16-1 was particularly critical of this element within the guidance:

*It's old fashioned in the sense of pre-PACE and trying to make sure cops did things right, then you would, for your ... vulnerable people, you would have someone coming in to make sure the cops didn't make the person write the statement and then sign it. And it was more correct in those days, making sure the cops were doing things properly, lawfully, correctly, and they were looking after the vulnerable but also checking up on*

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<sup>836</sup> Interaction 14, Site 1. Bean and Nemitz had similar findings – see Bean and Nemitz (n 77) 47. See also n 761 and 969.

<sup>837</sup> CO28-2 Interview.

<sup>838</sup> CO8-1 Interview. This quote is interesting as it states 'potentially vulnerable'. One interpretation of this is that there is always doubt as to whether the suspect is actually 'AA vulnerable'. The suspect must, however, typically meet this standard (although see Chapter 7 generally).

<sup>839</sup> CO4-1 Interview.

<sup>840</sup> *ibid.*

<sup>841</sup> See section 4.2.

*the police... They're here to ensure that the police are treating them right and they'll do that bit. And to be honest nowadays, the cops are so scared of losing their jobs, there's that much audio, there's that much CCTV around, the cops would be doing it anyway.*<sup>842</sup>

## 5.7 Conclusion – Code C or Custody Officer criteria?

When analysing the interview transcripts, it was apparent that the AA was viewed as a due process safeguard<sup>843</sup> – the law was viewed as a tool through which to protect the vulnerable or weak and to ensure that they are placed on an equal footing with the rest of society. Whilst custody officers appreciated that the role was multi-faceted, i.e. that it could have a supportive function, an oversight function, an advisory function, and a communicative function, they ostensibly focused on the latter. Moreover, when assessing vulnerability, the focus for custody officers was firmly placed on communication, capacity, and comprehension. Custody officers in all instances, aside from CO16-1's two examples, seemed not to fully appreciate how these other functions may serve a purpose for some suspects. Clearly, a suspect who is 'mentally disordered', but who nevertheless understands what is going on around him or her, may not be able to withstand pressure or adequately give his or her account pursuant to his or her best interests. The suspect may feel under attack within the adversarial interview setting after having been detained in a six-foot by eight-foot cell for between one and, potentially, 24 hours (or longer). The suspect may be unable or may feel reluctant to exercise his or her rights or ask for food, water, or fresh air. The suspect may, as a result of a low mood, anxious state, or addiction be willing to say anything to be released from custody.<sup>844</sup> However, provided the suspect is able to comprehend questions and formulate answers without the assistance of an independent third party, the custody officer will, in most circumstances, be satisfied. The suspect's 'vulnerability' will not necessarily render it difficult to conduct an interview nor will it lead to questions at trial.<sup>845</sup>

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<sup>842</sup> CO16-1 Interview.

<sup>843</sup> See section 8.2.2 for a discussion of due process.

<sup>844</sup> See section 5.4.5 for an example.

<sup>845</sup> On this latter point see section 1.3 and, in particular, section 4.4. I will return to this contention in Chapter 8 and in particular 8.6.3.

As the foregoing discussion has indicated, custody officers have their own interpretations of Code C vulnerability ('AA vulnerability') and of the AA safeguard. This 'AA vulnerability' does not necessarily correspond with their views of 'vulnerability' (broadly defined) nor the strict Code C definition.<sup>846</sup> The question of whether their interpretation breaches the letter, if not also the spirit, of Code C will be addressed in Chapter 8. This purported 'disparity' rests, at least partly, on a lack of understanding of the terms 'mental disorder' and 'mental vulnerability' – custody officers have developed 'AA vulnerability' in order to operationalise vulnerability, influenced by their own understandings and conceptions. Whether this is due to a 'flaw' in the guidance or whether this is because custody officers do not pay much, if any, attention to the guidance is not exactly clear.<sup>847</sup> It became abundantly clear, however, through my observations and interviews that custody officers typically, although not always, required that the suspect be mentally vulnerable as a result of a mental disorder or other innate mental condition. But the requirements perhaps go further beyond the Code C definitions, particularly with regard to mental vulnerability – 'AA vulnerability' meant childlike characteristics, 'abnormal' behaviour, and reduced capacity. Perhaps unsurprisingly, the suspect had to 'perform' vulnerability.<sup>848</sup> Further, as the discussion on the custody officer conception of AA safeguard illustrates, custody officers focus on the function(s) which serve a police purpose i.e. to facilitate communication, to obtain accurate or reliable information, and to ensure compliance with procedures. Even where assistance and support were discussed, this was predominantly geared towards the communicative function of the AA. These issues will be elaborated upon within Chapters 7, and in greater detail in Chapters 8 and 9. Such conceptions of the AA safeguard are ostensibly bound-up with their interpretation of the archetypal vulnerable suspect.

As also illustrated in this chapter, custody officers find ways of 'disproving' vulnerability and there are markers which signify non-vulnerability. This process could be active, i.e. custody officers are attempting to disprove vulnerability when they are asking questions, but could

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<sup>846</sup> Interestingly, gender was only implicitly present in any discussion of vulnerability and race and sexuality were entirely absent altogether.

<sup>847</sup> See section 8.6.

<sup>848</sup> As I will explore in section 6.4.5, custody officers rely on their observations to detect vulnerability. It is unclear, however, whether the suspect is required to 'perform' vulnerability because the custody officers use observational methods or whether, because vulnerability is best understood through 'performance', the custody officers use observations to detect it.

instead be subconscious, i.e. something operating on their minds but not explicit during the identification procedure. Alternatively, these methods of refuting vulnerability may be post-fact justifications, i.e. after the decision not to obtain an AA is made, or when asked why an AA would not be obtained, custody officers search for, and find, 'suitable' reasons. It is, undoubtedly, difficult to sift the apparently vulnerable out from the actually vulnerable or vice-versa. This will be addressed in the following chapter, where I will build upon some of the material discussed in this chapter.

## CHAPTER 6: IDENTIFYING VULNERABILITY IN POLICE CUSTODY

*It's only by doing some sort of scoping... not only by asking questions of the detainee or questions of the officers that brought them in, looking at whatever else is available, for example previous times they've been in custody, previous medical history to [try] and gain a picture of potential risk. And I suppose for me that is part of where the experience and my life experience, my experience in policing and my experience working here, albeit short, has lead me to trust my own instincts.<sup>849</sup>*

### 6.1 Introduction

As discussed in Chapter 5, vulnerability must be defined before it is identified. Yet, identification of vulnerability is also essential to implementation of the AA safeguard. This chapter will illustrate how custody officers, based on their definition of vulnerability, identify whether an AA is required, in respect of adult suspects.<sup>850</sup> It starts with a review of the previous studies before moving onto provide an overview of how to identify vulnerability according to the current law and guidance. Thereafter, I will explore how vulnerability was identified by custody officers in this study, also detailing the challenges they face when identifying (adult) vulnerability. It is not my intention to suggest that identification is an easy task – custody officers may face numerous obstacles when identifying vulnerability. However, as I will argue both here and later in Chapter 7, how custody officers make sense of the information provided to them also explains why the AA safeguard is often left unimplemented.<sup>851</sup> Within this chapter I will also explore how vulnerability could be identified or, rather, how information provided by the suspect could be treated by custody officers. I will also address how they make sense of their identification role. The findings explored within this chapter share many similarities with previous research;<sup>852</sup> – I will build upon these studies in this chapter.

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<sup>849</sup> CO18-1 Interview. Here, CO18-1 mentions 'risk' but, as mentioned in Chapter 5, the terms 'risk' and 'vulnerability' were often used interchangeably.

<sup>850</sup> Although some of these methods apply equally to young suspects.

<sup>851</sup> Bean and Nemitz (n 68) 48.

<sup>852</sup> See in particular Palmer and Hart (n 76) and NAAN, 'There to Help' (n 39). The methods, inter alia, are different in this study – Palmer and Hart used interviews only; NAAN conducted a survey of 60 custody officers, a survey of main stakeholders and held a discussion with members of a Working for Justice group.

## 6.2 Problems with identification: Lessons from previous research

As discussed in Chapters 1 and 4, PACE has not been entirely problem-free in either law or action. Upon, and shortly after inception, a number of studies were conducted to assess the efficacy of PACE and, more importantly for this thesis, the implementation of the AA safeguard. Within the following section I will explore some of the findings of previous research.<sup>853</sup> It is worth noting that the following section will make reference to ‘mental handicap’ or ‘mentally handicapped’ – this terminology (as noted in Chapter 4), whilst no longer in used within Code C (having been replaced by ‘mentally vulnerable’), *was* the term used within Code when many of these studies (below) were conducted.<sup>854</sup>

Irving and McKenzie, in their review of the effects of PACE conducted in 1989, explored some of the problems with police interview.<sup>855</sup> Notably, 30% of the suspects interviewed were in an ‘abnormal state’;<sup>856</sup> and there were issues within how vulnerability was identified by custody officers. However, the researchers avoided criticism of the custody officers– they felt that the safeguard protecting vulnerable suspect was ‘working as the exigencies of the problem allow’,<sup>857</sup> suggesting that if the diagnostic ability of the police could not be improved then the role of medical and social staff should take greater priority.<sup>858</sup> These findings were largely supported by Gudjonsson and others in 1993 who found that ‘the police were very good at identifying the most disabled and vulnerable detainees, and ensured that an [AA] was called when they considered it necessary’.<sup>859</sup> Schizophrenia was the ‘most readily identified’<sup>860</sup> condition; depression was the most commonly unidentified condition.<sup>861</sup> Further, almost 9% of detainees had an IQ below 70,<sup>862</sup> another 42% had an IQ between 70 and 79,<sup>863</sup> and around one

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<sup>853</sup> Such research and other studies have been mentioned throughout the thesis.

<sup>854</sup> The term ‘mentally handicapped’ has been retained within PACE s 77 – see n 65.

<sup>855</sup> Their study seemed to suggest many improvements post-PACE – see Irving and McKenzie (n 57).

<sup>856</sup> *ibid* 71.

<sup>857</sup> *ibid* 203.

<sup>858</sup> *ibid*.

<sup>859</sup> Gudjonsson, Clare, Rutter and Pearse (n 76) 26.

<sup>860</sup> *ibid*.

<sup>861</sup> *ibid*.

<sup>862</sup> Those with an IQ below 70 are considered learning disabled.

<sup>863</sup> Those with an IQ in this range are considered borderline learning disabled.

third of the sample were intellectually disadvantaged.<sup>864</sup> The research found that a considerably higher number of individuals required an AA compared with those actually identified as such by the police,<sup>865</sup> however, it was noted that there were ‘no obvious signs that police officers can be trained to look for’.<sup>866</sup> As a further caution, the researchers highlighted that those with significant intellectual impairment may have limited intellectual functioning, but they often appear to have reasonable social functioning and, as such, vulnerability may be difficult to identify.<sup>867</sup> Further still, only 5% of the sample ‘showed clear evidence of mental handicap, highlighting the difficulties associated with the identification [of mental handicap] on superficial examination’.<sup>868</sup> Such findings are important to bear in mind when assessing the custody officers’ responses below.<sup>869</sup> These two studies ostensibly suggested that the police were not at fault for failing to identify vulnerability – they simply lacked knowledge, training and resources.<sup>870</sup> Moreover, identification seemed to be the main, if not sole, obstacle to implementation of the [AA] safeguard.<sup>871</sup>

Other studies, however, suggested that identification was not always a precursor for implementation of the AA safeguard – for example, Brown, Ellis and Larcombe who, in 1992, highlighted how ‘[AAs] were not summoned by the police in all cases in which the suspect was suspected to be mentally disordered or handicapped’.<sup>872</sup> The researchers noted that ‘custody officers may not always have considered the suspect’s mental condition serious enough to

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<sup>864</sup> Gudjonsson, Clare, Rutter and Pearse (n 76) 24. It is thought that ‘approximately 30 percent of people in police custody have a learning or communication disability’ – HMIC, *Welfare of Vulnerable* (n 81) 51.

<sup>865</sup> *ibid* 25.

<sup>866</sup> *ibid* 24.

<sup>867</sup> *ibid* 26.

<sup>868</sup> *ibid* 15.

<sup>869</sup> These findings also indicate deficiencies in the custody officers’ definitions of ‘AA vulnerability’ – whilst a suspect may appear, for example, to have reasonable social functioning (and, therefore, appear to ‘understand’ what is going on around him or her), he or she may in fact have a learning disability. It is, therefore, important that, if the suspect discloses information to the custody officer, the custody officer relies on that information, instead of his own observations of the suspect.

<sup>870</sup> I have no doubt that the findings were valid when these studies were conducted and, to a certain extent, still are. However, knowledge, training, and resources are not the only barriers to the implementation of the AA safeguard – see Chapters 5 and 7.

<sup>871</sup> Gudjonsson, Clare, Rutter and Pearse (n 76) 26; Irving and McKenzie (n 57) 203.

<sup>872</sup> Brown, Ellis, and Larcombe (n 13) 48.



warrant calling an [AA] or that initial concerns may subsequently have been felt to have been exaggerated'.<sup>873</sup> Indeed, in 1995 Bean and Nemitz indicated that vulnerability *can* often be identified, instead problems arise because of how custody officers make sense of this information.<sup>874</sup> Palmer and Hart, in their 1996 report, ascertained how vulnerability was identified by custody officers. They highlighted how custody officers relied on observational signs such as 'florid behaviour' and 'tangible clues' and their own 'perception',<sup>875</sup> drawing also upon information gained through previous contact and utilised previous records (where available).<sup>876</sup> Identification of vulnerability was also facilitated by 'informants' such as family, volunteer groups, social workers, arresting officers, solicitors and the suspect him or herself.<sup>877</sup> Custody officers in this study stated that when informed about vulnerability they usually 'regarded the information as reliable'.<sup>878</sup>

Further, in 1997, Bucke and Brown highlighted that there was a lower proportion of [AAs] in the case of mentally disordered suspects compared with young suspects.<sup>879</sup> In 1998, Phillips and Brown ascertained that [AAs] were called in 33 of the 67 cases concerning mentally disordered suspects, 20 of which where the suspect had seen a doctor<sup>880</sup> and that custody officers tended to await the doctor's verdict.<sup>881</sup> In 2003, a study indicated that 600 vulnerable adults brought into custody within a month were not provided with an [AA].<sup>882</sup> In relation to those with mental illness, an analysis of custody records in the East Midlands illustrated that an AA was only used in 0.016% (38) of the instances rather than the estimated 14%.<sup>883</sup> Further, as McKinnon and Grubin highlighted, 39% of the detainee population had any mental health

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<sup>873</sup> *ibid* 78.

<sup>874</sup> See Bean and Nemitz, *Out of Depth and Out of Sight* (n 77) 48.

<sup>875</sup> *ibid* 29.

<sup>876</sup> *ibid* 28.

<sup>877</sup> *ibid* 28-9.

<sup>878</sup> *ibid* 28. Palmer and Hart did not observe so could only take such statements at face value. My results conflict with this particular finding— see, in particular, section 6.5.2. In this sense, observations were seen as paramount to the research project, as they enabled me to *see* how things were done and not simply *hear* how things were done. Moreover, there have undoubtedly been some changes to the custody procedures in the last 20 years.

<sup>879</sup> Bucke and Brown (n 76) 8.

<sup>880</sup> Phillips and Brown (n 76) 55.

<sup>881</sup> *ibid* 55-56. See also Brown, Ellis and Larcombe (n 13) and Bean and Nemitz, *Out of Depth and Out of Sight* (n 82).

<sup>882</sup> Medford, Gudjonsson and Pearse (n 76) 253. See also Brown (n 16) 209.

<sup>883</sup> Bradley (n 113) 43. Although I would argue that this figure is higher still.

problem and 3% had a learning disability; police assessments were able to identify around 50% of those with mental health or learning disabilities.<sup>884</sup>

The CJI report found a ‘general lack of understanding among police officers of the difference between mental capacity and mental health needs leading to confusion over whether a detainee had a mental illness or learning disability’.<sup>885</sup> However, when a learning disability was identified, an AA was used in 63% of cases.<sup>886</sup> For those with mental health problems, the percentage was somewhat lower (at 53%).<sup>887</sup> A dual diagnosis of drug and/or alcohol addiction along with a mental health problem can pose a particular problem in terms of support and services provided;<sup>888</sup> drug and/or alcohol consumption can also mask mental health issues.<sup>889</sup> When custody officers are identifying vulnerability, they tend to draw upon their life experience.<sup>890</sup> This seems particularly the case as their training has been identified as inadequate.<sup>891</sup> The CJI report also found that the physical lay-out of the custody suite is often not conducive to carrying out a risk assessment.<sup>892</sup> Indeed, the HMIC report highlighted how ‘the design, management and staffing of police custody arrangements are primarily directed towards the control of suspected criminals, and not the identification of, and support for people who might be vulnerable’.<sup>893</sup> Further, HMIC also highlighted how suspects, in the midst of a mental health crisis, may find it difficult to communicate their needs<sup>894</sup> or may not be given enough time to properly answer the risk assessment questions.<sup>895</sup>

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<sup>884</sup> Ian McKinnon and Don 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, 402.

<sup>885</sup> CJI, *Offenders with Learning Disabilities* (n 70) 5.

<sup>886</sup> *ibid* 19.

<sup>887</sup> CJI, *A joint inspection on work prior to sentence* (n 135) 37.

<sup>888</sup> HMIC, *Welfare of Vulnerable* (n 81) 50.

<sup>889</sup> Bradley (n 113) 38.

<sup>890</sup> CJI, *Offenders with Learning Disabilities* (n 70) 4; HMIC, *Welfare of Vulnerable* (n 81) 55.

<sup>891</sup> Bradley (n 113) 38. See also CJI, *Offenders with Mental Health* (n 133) 36; Graham Durcan, Anna Saunders, Ben Gadsby and Aidan Hazard (n 113); HMIC, *Welfare of Vulnerable* (n 81) 119.

<sup>892</sup> CJI, *Offenders with Learning Disabilities* (n 70) 4; HMIC, *Welfare of Vulnerable* (n 81) 51.

<sup>893</sup> HMIC, *Welfare of Vulnerable* (n 81) 24.

<sup>894</sup> *ibid* 84.

<sup>895</sup> *ibid*.

The recent NAAN report found three inter-related problems when ensuring the AA provision – ‘[i]nadequate identification of suspects’ vulnerabilities and their need for AAs, ‘[insufficient] availability of AAs [and variable] quality of AA provision’.<sup>896</sup> Further, as the literature review of the NAAN report<sup>897</sup> indicated, identification rates are low due to:

[A] lack of effective and systematic screening, a lack of training for the police, ...no visual or behaviour clues..., the influence of alcohol or drugs complicating the assessment, a disregard of self-reporting, the failure to use historical information... to identify learning disabilities, [suspect reluctance to disclose], [the use of standardised questions].<sup>898</sup>

Similar findings will be explored within this chapter.<sup>899</sup>

### 6.3 Identifying vulnerability: the law and guidance

Neither PACE nor Code C establish how vulnerability should be identified, however, Code C does set out a ‘benefit of the doubt’ test – this requires that an AA be called in the event that the custody officer has ‘any doubt about the mental state or capacity of the detainee’.<sup>900</sup> Similarly, in Annex E paragraph 1 it states:

If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, or mentally incapable of

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<sup>896</sup> NAAN, *There to Help* (n 39) 10.

<sup>897</sup> The NAAN report largely neglected mention of the terms ‘mental disorder’ and ‘mentally disordered’ – see NAAN, *There to Help* (n 39).

<sup>898</sup> *ibid* 4. See also Hodgson, ‘Vulnerable Suspects’ (n 99); Ian McKinnon and Don Grubin, ‘Health screening in police custody’ (2010) 17 *Journal of Forensic and Legal Medicine* 209.

<sup>899</sup> NAAN also highlighted how decision-making and availability of AAs may impact upon the provision of the safeguard – NAAN, *There to Help* (n 39). Within Chapter 8, I will explore decision-making factors, yet go further in contextualising this within the broader criminal justice and decision-making framework. I also found additional factors – see Chapter 7 and, to a lesser extent, Chapter 5.

<sup>900</sup> Code C, Notes for Guidance 1G.

understanding the significance of questions or their replies that person shall be treated as mentally disordered or otherwise mentally vulnerable for the purposes of this Code.<sup>901</sup>

These provisions make clear that the custody officer need not establish with absolute certainty that the suspect is vulnerable. This is reiterated in para 1.4 with the addition that ‘in the absence of clear evidence to dispel that suspicion, the person shall be treated as [vulnerable] for the purposes of this Code’.<sup>902</sup> Such evidence must be ‘clear’ in order to dispel the suspicion, however, what constitutes ‘clear’ is unknown. Moreover, the question of how vulnerability should be identified is also unknown – as such, it may be left largely for the custody officer to decide.

Usually, prior to being taken to a cell, the suspect must be booked-in; a procedure that involves asking a number of questions, namely as part of the ‘risk assessment’. The purpose of the risk assessment is to alert custody officers to any potential issues such as, inter alia, physical or mental ill health, learning needs or self-harm or suicide risk. The current risk assessment finds its origins in the Safer Detention guidance,<sup>903</sup> which, since 2013, has been superseded by the College of Policing APP on Detention and Custody.<sup>904</sup> Upon booking-in, the suspect or detainee is the responsibility of the custody officer<sup>905</sup> who must ‘[document] and [record] the risk assessment for every detainee in the custody record in accordance with paragraphs 3.6 to 3.10 of PACE Code C’.<sup>906</sup> ‘The arresting or escorting officer should make checks with any immediately available sources of information relevant to the welfare of the arrested person’<sup>907</sup> – this may include the suspect (or detainee) him or herself, friends or relatives, the Police

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<sup>901</sup> Code C, Annex E para 1.

<sup>902</sup> Code C, para 1.4.

<sup>903</sup> ACPO (n 152).

<sup>904</sup> College of Policing, *APP: Detention and Custody* (n 153).

<sup>905</sup> Prior to such times, he or she is the responsibility of the arresting or escorting officer - College of Policing, *APP: Detention and Custody: Risk Assessment* (College of Policing 2013/15) <<https://www.app.college.police.uk/app-content/detention-and-custody-2/risk-assessment/>> accessed 7 November 2015. (Hereafter *APP: Risk Assessment*).

<sup>906</sup> *ibid.*

<sup>907</sup> *ibid.*

National Computer (PNC), the Police National Database (PND), legal representatives, HCPs, other relevant bodies, and AAs.<sup>908</sup>

The risk assessment includes a range questions – these questions may provide information through which to identify vulnerability, particularly certain types of mental disorder.<sup>909</sup> The risk assessments observed at both sites are somewhat lengthier than the College of Policing APP but broadly follow the same format. The APP questions<sup>910</sup> are as follows:

1. *How are you feeling in yourself now?*
2. *Do you have any illness or injury?*
3. *Are you experiencing any mental ill health or depression?*
4. *Would you like to speak to the doctor/nurse/paramedic (as appropriate)?*
5. *Have you seen a doctor or been to a hospital for this illness or injury?*
6. *Are you taking or supposed to be taking any tablets or medication? If yes, what are they and what are they for?*
7. *Are you in contact with any medical or support service? If yes, what is the name of your contact or support worker there?*
8. *Do you have a card that tells you who to contact in a crisis?*
9. *Have you ever tried to harm yourself? If yes, how often, how long ago, how did you harm yourself, have you sought help?*

These questions may help flag-up mental disorder or mental vulnerability. For example, Q1, amongst others, may help identify a situational vulnerability; Q2 and Q3, in particular, can highlight a number of mental disorders; and Q7 may alert custody officers to learning disabilities or difficulties. Questions additional to the APP guidance such as special schooling, ability to read or write, and ability to tell the time may enable identification of learning disability or difficulty. However, these questions did not form part of the main risk assessment; instead these were supplementary questions – they required that custody officers first flagged-

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<sup>908</sup> *ibid.*

<sup>909</sup> As McKinnon and Grubin have noted, the risk assessment questions are more likely to flag-up mental illness, drug/alcohol misuse or self-harm rather than intellectual disability – see McKinnon and Grubin, ‘Health screening in police custody’ (n 898).

<sup>910</sup> College of Policing, *APP: Detention and Custody* (n 153). Numbers added.

up a potential issue, and only then was the suspected asked these additional questions.

#### 6.4 Identifying vulnerability: the findings

As aforementioned, some commonalities exist between this research and the findings of, for example, Palmer and Hart,<sup>911</sup> and NAAN.<sup>912</sup> However, the use of observations and semi-structured interviews within this study has allowed for a more multi-dimensional, textured, and nuanced account of how vulnerability is identified, thus building upon previous studies.

##### 6.4.1 The risk assessment

The risk assessment, as aforementioned, can enable the identification of vulnerability. At interview, custody officers were asked about the efficacy of the risk assessment in identifying vulnerability<sup>913</sup> – the general consensus was that it worked well.<sup>914</sup> For example, CO22-2 said he was *'quite happy with the risk assessment that we do',*<sup>915</sup> adding that *'it's built up over the years'*<sup>916</sup> as:

*[W]hen I first started in custody, the risk assessment was probably like four or five questions, in all truth, 'Have you ever harmed yourself? Do you feel like harming yourself?' and that would really be about it and then looking at very, very basic mental health. It has evolved tremendously. There [are] a lot of questions in there now.'*<sup>917</sup>

The risk assessments are, therefore, *'far more intensive than what they used to be'*.<sup>918</sup> A number of the changes to risk assessment appeared to be more recent; *'[the] risk assessment [has] changed in such a short period of time'*.<sup>919</sup>

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<sup>911</sup> Palmer and Hart (n 76).

<sup>912</sup> NAAN, *There to Help* (n 39).

<sup>913</sup> See Appendices 1 and 2.

<sup>914</sup> Although see later.

<sup>915</sup> CO22-1 Interview.

<sup>916</sup> *ibid.*

<sup>917</sup> *ibid.*

<sup>918</sup> CO21-2 Interview.

<sup>919</sup> CO1-1 Interview.

The risk assessment was viewed as a *'good basis to work from'*<sup>920</sup> or *'good as in a base-line to give you a good starter for where they are'*.<sup>921</sup> The questions asked within the risk assessment, due in part to their specificity, provided a basis through which to identify vulnerability. For example, CO29-2 commented that *'[t]he questions written down are quite specific and will give a broad outline of a person's health as well as mental health, if answered correctly'*<sup>922</sup> and CO8-1 commented that *'[t]here are questions within the risk assessment that are designed to try and identify vulnerability... So, for example, yes, you can get a flavour from talking to someone for a few minutes as to whether or not they appear to have learning difficulties'*.<sup>923</sup> The answers given to the questions can indicate vulnerability and often questions can trigger further answers – *'there are certain questions that we ask to everybody, they're almost like trigger questions that, when you ask them, they will bring, if someone's willing to tell you, what's up with them'*.<sup>924</sup> It was also abundantly clear, both from the above quotes and others, that the risk assessment was only as good as the answers provided – for example, as CO30-2 commented, *'I think the questions on the risk assessment as they stand, it gives the person the opportunity to disclose any medical or mental health issues; whether they choose to or not is entirely up to them, I can't force them'*.<sup>925</sup>

During observation, the efficacy of the risk assessment to identify vulnerability was apparent – it gives custody officers an opportunity to engage with suspects, an interaction typically lasting between 15 and 45 minutes,<sup>926</sup> which allowed them to observe and attempt to detect 'unusual' behaviour or other 'signs' of vulnerability.<sup>927</sup> By providing time for interaction it allowed them to assess vulnerability pursuant to their own definition, as discussed in Chapter 5.

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<sup>920</sup> CO14-1 Interview.

<sup>921</sup> CO27-2 Interview.

<sup>922</sup> CO29-2 Interview. 'If answered correctly' is relevant – see section 6.5.

<sup>923</sup> CO8-1 Interview. Again, this quote also alludes to another method through which to identify vulnerability – see section 6.4.5.

<sup>924</sup> CO24-2 Interview. See section 6.5.

<sup>925</sup> CO30-2 Interview.

<sup>926</sup> It could also be much shorter (around 5 minutes) or longer (around one hour).

<sup>927</sup> The observational method will be discussed later in this chapter.

#### 6.4.2 History: AA previously provided

Custody officers, in addition to using the risk assessment questions, also used resources such as previous custody records<sup>928</sup> and records contained on the PNC. The PNC, according to the APP, ‘should be considered the primary reference for recording and accessing risk information’.<sup>929</sup> All information was recorded electronically in both sites, with paper records used only as a last resort e.g. in the event of a systems-failure.<sup>930</sup> At Site 1, PNC records were typically checked by custody officers when the suspect (or detainee) was at the desk and was used as a first point of reference; previous custody records were only used if custody officers had grave concern for the suspect’s (or detainee’s) welfare.<sup>931</sup> At Site 2, the PNC check was usually conducted by the arresting officer(s) prior to the suspect’s (or detainee’s) arrival at the booking-in desk.<sup>932</sup> Previous records seemed to be frequently, although not always, checked.

Whilst previous records ostensibly guided decisions on risk more so than vulnerability,<sup>933</sup> during observations both CO31-2 and CO20-1 based most, if not all, of their decisions on whether the suspect had previously been provided with an AA.<sup>934</sup> As CO18-1 commented at interview, *‘[l]et’s explore what was previously, if you’ve got the luxury of that; what was done previously in interview when this person’s been in custody, have they had an [AA] before?’*<sup>935</sup> At both sites the use of an AA on previous occasions was often, but not always, a sign that an AA should be called in present circumstances – it was an indicator but was not pre-emptive. A suspect who had been provided with an AA would be *‘more likely to have one again’*,<sup>936</sup> with

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<sup>928</sup> As noted in Palmer and Hart (n 76) 28.

<sup>929</sup> College of Policing, *APP: Risk Assessment* (n 905).

<sup>930</sup> The information from the paper record would later be entered onto the computer system.

<sup>931</sup> It was claimed that the custody suite was too busy for such checks to be routinely made. Indeed, there were often a ready stream of suspects or detainees waiting to be booked-in.

<sup>932</sup> Arresting officers were encouraged conduct PNC checks whilst they were waiting to book their ‘prisoner’ in and were often reprimanded if this was not done. Overall, the procedure for PNC checks seemed to be better organised at Site 2, facilitated by policy and by the layout of the custody suite.

<sup>933</sup> Again, it is important to note that the predominant focus within custody is on risk. See Chapters 7.4 and 8.6 and 8.7.

<sup>934</sup> CO31-2 and CO20-1 were relatively new to the role.

<sup>935</sup> CO18-1 Interview.

<sup>936</sup> CO33-2 Interview.



some suspects having *'been in custody that many times you just know... they will always have an [AA]'*.<sup>937</sup> Typically in such cases it was *'quite obvious from their medical history that [the suspect] is a vulnerable person'*<sup>938</sup> and, in such cases, it was viewed as much more efficient to call an AA than to deliberate or seek advice.<sup>939</sup> The previous AA approach was seen as a *'fall-back'*<sup>940</sup>, particularly where the custody officer was *'not too sure about it'*.<sup>941</sup> However, this was *'only an avenue if they've been in custody before'*.<sup>942</sup> Thus, the 'previous AA' approach was limited – in part because it could only be used if the suspect had previously been in custody, but also, as was recognised, because the suspect's condition could improve or worsen between spells in custody.<sup>943</sup>

Conversely, this approach was also taken to justify *not* obtaining an AA, as the following quote illustrates:

*You should, I think, base your decision on what you see in front of you, at the time...Even if they say 'No' [that they haven't had an AA before] that doesn't change the fact that you're looking at them now thinking, 'This person is the kind of person that would benefit from an [AA]'*.<sup>944</sup>

Yet, this approach was admittedly used by CO8-1, notwithstanding his criticisms. Therefore, what one purports to do or purports *should be* the norm is not a clear indication of what one actually does.

#### 6.4.3 Medical advice

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<sup>937</sup> CO9-1 Interview.

<sup>938</sup> CO28-2 Interview.

<sup>939</sup> See section 6.4.3.

<sup>940</sup> CO30-2 Interview.

<sup>941</sup> *ibid.*

<sup>942</sup> *ibid.*

<sup>943</sup> This matter is not straightforward – a number of mentally vulnerable or mentally disordered suspects are 'usual suspects' with sufficient knowledge and understanding of the criminal justice system – see section 5.2, 5.4.4, 5.6.3 and 7.3.4.

<sup>944</sup> CO8-1 Interview.

Custody officers often relied on HCPs<sup>945</sup> (but also FMEs and AMHPs where available) for assistance when identifying vulnerability.<sup>946</sup> Although HCPs can provide advice to a custody officer, the ultimate decision rests with the custody officer himself.<sup>947</sup> HCPs were available on-site 24 hours a day seven days a week at both Sites 1 and 2. During observations, Site 2 also had AMHPs on site during the day<sup>948</sup> (this resource was only introduced in Site 1 a few months after observations had ended).<sup>949</sup> Custody officers made referrals to HCPs for, inter alia, physical health issues, medication needs, and mental health issues. As noted in Chapter 1, the custody officer can decide, in consultation with the HCP as required,<sup>950</sup> if a suspect is fit for interview. HCPs would also assess suspects (or detainees) to decide if they are fit to detain, require an AA, or present any risk prior to release.<sup>951</sup> The HCP (and/or the AMHP, if available) could also assist with identifying vulnerability, although this often occurred when *an* issue, although not necessarily *the* issue, had first been identified by the custody officer. For example, as CO21-2 stated:

*As a custody sergeant, you'll make that initial assessment and you think, 'This person could do with a little bit further than this, I think I'm going to refer them to the mental health practitioners that we have in custody'. And those people can go and have a word with them. And then they'll come and report to us what their findings are.'*<sup>952</sup>

HCPs (and FMEs and AMHPs, where available) were viewed as invaluable resource due to

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<sup>945</sup> I cannot make any assessment to how HCPs, FMEs or AMHPs define or identify vulnerability as I neither interviewed nor directly observed these individuals whilst in custody. Informal conversations suggested, however, that they interpret vulnerability in the same, if not a more restrictive, manner.

<sup>946</sup> Although HCPs and others were also used in decision-making – see section 7.2.3.

<sup>947</sup> College of Policing, *APP: Risk Assessment* (n 910). See also Code C, paras 3.5-3.11; Code C, Annex G, paras 5, 7 and 8.

<sup>948</sup> This resource was rarely available at night.

<sup>949</sup> When I returned to Site 1 (see Chapter 2) the mental health team had been in operation for some months. The consensus amongst custody officers was that the mental health team had not made their jobs any easier, particularly because the mental health team were not willing to make affirmative decisions on the AA safeguard or on risk – they left the decision up to the custody officer.

<sup>950</sup> Code C, para 12.3.

<sup>951</sup> See College of Policing, *APP: Risk Assessment* (n 910).

<sup>952</sup> CO21-2 Interview.

their expertise<sup>953</sup> – ‘[s]ometimes, you know, you get a feeling that, “I’m going to refer them to the medical staff to assess them” and they usually, because they have skills and experience and knowledge, can often push in that direction as well’.<sup>954</sup> By contrast, custody officers felt lacking in knowledge<sup>955</sup> – as CO12-1 indicated: ‘[a]ny doubts really, it’s the nurse to see them. They’re the medically qualified persons, I’m not. I can’t even give a paracetamol’.<sup>956</sup> The recommendations of the HCPs, FMEs, and AMHPs were, more often than not, accepted<sup>957</sup> – they could aid identification of vulnerability or, where the custody officer believed that the suspect was (potentially) vulnerable, could make a decision on whether an AA was needed, as the following (quite common) observation illustrates:

*Suspect is suffering from paranoia, personality disorder and depression and is referred to the HCP for an assessment. The HCP deems the suspect fit for interview but without an AA.*<sup>958</sup>

The FME may also be involved in an assessment, albeit usually for more serious matters such as an informal mental health assessment or serious physical health issues.

#### 6.4.4 Informants: family, friends, solicitors, and other officers

In addition to the suspect (who can be considered a source of information through the risk assessment), identification of vulnerability can be facilitated by family, friends, and/or

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<sup>953</sup> Arguably this expertise only extends to a decision on whether someone presents with certain symptoms – HCPs, FMEs and AMHPs in the custody suite may not necessarily have an in-depth knowledge of the Code C requirements for the AA safeguard – see Graham A Norfolk, ‘Fitness to be interviewed and the appropriate adult scheme: a survey of police surgeons’ attitudes’ (1996) 3 *Journal of Clinical Forensic Medicine* 9. Moreover, HCPs may lack knowledge of mental health problems – see Ian McKinnon and Don Grubin, *Evidence-Based Risk Assessment Screening in Police Custody: The HELPPC Study in London, UK* (2014) Policing 8 (2) 174. They may also lack knowledge of learning difficulties – see CJJI, *Offenders with Learning Disabilities* (n 70) 5. My findings were similar on this latter point in particular – see section 6.5.

<sup>954</sup> CO14-1 Interview.

<sup>955</sup> See section 6.5.4 below.

<sup>956</sup> CO12-1 Interview.

<sup>957</sup> See section 7.2.3 for further discussion.

<sup>958</sup> Interaction 18, Site 2.

arresting officers – '[t]he officers, the officer they've spoken to, relatives'<sup>959</sup> or 'any issues at the time of arrest'<sup>960</sup> can facilitate identification of vulnerability. 'A lot of the time ... it's down to the officers who are making the arrests who are aware because they've arrested the person at home so the family have told them',<sup>961</sup> or it could be 'the person themselves telling us'.<sup>962</sup> Custody officers might have a lot of information prior to the suspect arriving at the custody suite:

*Very rarely does somebody come up to the desk where we're not pre-loaded. We know a lot of information about them. Even if it's the officer who's coming, 'What are the circumstances of arrest?', 'Well, yeah, he had two knives in his hands and he was stabbing himself and he turned on us [the arresting officers] with the knives'. Straight away you're starting to think 'That's not normal behaviour, there's obviously some issues there'. Call it mental health issues.'*<sup>963</sup>

The use of informants was more common when taking decisions on risk as this example illustrates:<sup>964</sup>

*Suspect has been brought in for affray. Police arrived at his home and he was self-harming (using knives). When officers tried to help him, he allegedly ran at them, waving the knives. Arresting officer advised that suspect has no pain threshold (due to mental block) and has a tendency to bite. He has previously stabbed himself through the arm and leg. Suspect has visible self-harm marks and had been hospitalised for this prior to being brought into custody. He appears quite distant but gives very clear and detailed answers. CO28-2 explains that he will make him an appointment with nurse. Suspect claims no difficulty with reading and writing but has mental health issues. CO28-2 states 'So you understand everything? Yeah', but did not give suspect a chance to respond. Suspect is allowed to keep earrings and rings but advised that if he starts*

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<sup>959</sup> CO4-1 Interview.

<sup>960</sup> *ibid.*

<sup>961</sup> *ibid.*

<sup>962</sup> *ibid.*

<sup>963</sup> CO28-2 Interview.

<sup>964</sup> See CO28-2 in section 5.4.2.

*to self-harm these will be removed. CO28-2 requests that HCP assess suspect for fitness to detain and fitness for interview. Suspect is placed on constant observations (camera). No AA provided as he 'understood everything'. He has also been in contact with the police previously (perhaps suggesting that he 'knows' the system).<sup>965</sup>*

As the example above illustrates, information provided by 'informants' may be relied on for decisions on risk but not necessarily for the AA safeguard. Because the suspect did not fit the custody officer's definition of vulnerable, as discussed in Chapter 5, he was not provided with an AA, even though he could be considered to have a mental disorder.

Information provided by informants can be vital – the following interaction illustrates this. Whilst it relates to risk only (no AA was required as this was a non-PACE matter), it does serve to indicate some of the challenges faced by custody officers when identifying vulnerability (or risk).

*Detainee has been brought in for a failing to appear at a Magistrates Court (elsewhere in England). CO4-1 carries out the risk assessment, to which the detainee reports no issues. The detainee's answers are accepted by CO4-1 and he is placed on Level 1 observations (60-minute visits only). In my own estimation, the detainee appears dishevelled, disoriented and withdrawn. He is avoiding eye contact during the booking-in procedure. I inquire from CO4-1 how he came to this decision and he explains that previous records show that the detainee suffered from depression but, as this was 18 months ago, he does not wish to rely on this. Later the detainee's family come into custody to advise that he has serious mental health issues and should not be left alone in a cell. As a result the observation level is changed from Level 1 to Level 3 (CCTV and 30-minute visits).<sup>966</sup>*

This interaction indicates the utility of previous records and/or observation of the suspect (or detainee). In this case, however, CO4-1 either ignored or failed to recognise the risk. This illustrates the challenge of relying on a suspect's (or detainee's) self-report. Such challenges

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<sup>965</sup> Interaction 107, Site 2.

<sup>966</sup> Interactions 142 and 145, Site 1.

will be discussed later in this chapter. Although Palmer and Hart's study seems to suggest that informants played a considerable role in assisting with the identification of vulnerability,<sup>967</sup> during interview in this study only four custody officers mentioned relying on information from officers or friends and family. Furthermore, during observation where the AA safeguard could have been implemented (i.e. that the suspect had been detained for a PACE matter), there was only one occasion out of 96 potential interactions at Site 1 and two occasions out of 103 potential interactions at Site 2 where family members, friends or the arresting officer alerted the custody officer to something which could have been considered a vulnerability under Code C and thus where such information could have prompted the use of the AA safeguard. On one such occasion the sister of a suspect, who had schizophrenia but was not taking his medication, was brought to the custody suite to 'placate' her brother, who at the time of the arrest and for some time thereafter was in the midst of a schizophrenic episode. His sister further informed custody officers of her brother's condition. The suspect was assessed for fitness for interview and fitness for detention, yet there was no discussion of the need for an AA. The need for an AA was, however, raised by the FME when he later arrived to assess the suspect, although the suspect was deemed not to require an AA. It was felt that this was a missed opportunity, particularly as his sister was already in the custody suite and could have acted as an AA.<sup>968</sup>

At Site 2, the sister of a suspect, who had been arrested on suspicion of possessing indecent images, called to advise the police that her brother posed a suicide risk and had mental health problems. This information, coupled with an assessment from the FME that the suspect was very easily led and an admission from the suspect that he had a very bad memory, seemed insufficient grounds upon which to call an AA.<sup>969</sup> An arresting officer, also at Site 2, advised the custody officer that a suspect, who had been arrested for affray (he had been stabbing himself when the police were called and when they arrived he waved the knives at them), that the suspect had no pain threshold due to a 'mental block' and had a tendency to bite. In my estimation, this should have led to some discussion around mental health but it did not. After

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<sup>967</sup> See Palmer and Hart (n 76) 28-29.

<sup>968</sup> Interaction 14, Site 1. See also n 766. This observation is also relevant to sections 4.7, 5.5.1, 6.4.3 and 7.2.3.

<sup>969</sup> Interaction 81, Site 2. This observation is also relevant to sections 6.4.3 and 7.2.3. The fact that the suspect was acquiescent was seemingly not enough to meet the requirements for the AA safeguard – see section 3.3.

seeing the HCP, he was deemed fit for interview without an AA.<sup>970</sup> With the increase in risk assessment questions and a greater presence of HCPs, FMEs and AMHPs, in the custody suite, informants are not perhaps as vital in aiding identification of vulnerability.<sup>971</sup> It is also worth noting that solicitors can also help identify vulnerability, undoubtedly through their interaction(s) with the suspect during consultation. I will explore the role of the solicitor in greater detail in Chapter 7.

#### 6.4.5 Observation

Custody officers may rely on all of the above sources, i.e. through ‘...*doing some sort of scoping... not only by asking questions of the [suspect] or questions of the officers that brought them in [but also] looking at whatever else is available...*’<sup>972</sup> Yet, they may also consider their own interpretation of the suspect. As discussed in Chapter 5, custody officers rely quite heavily, if not often entirely, on the ‘presentation’ of the suspect, and in particular how the suspect ‘understands’ certain aspects of the process, when deciding if he or she is ‘AA vulnerable’. It is therefore unsurprising that they rely on their own observations<sup>973</sup> to ascertain whether the suspect requires an AA. As the main concern is how the suspect is ‘presenting’ at the time or how his or her condition develops or deteriorates when in custody, the greatest indicator for ‘AA vulnerability’ is not simply what the suspect states, what others say, or what is recorded on PNC, but also how the suspect appears when in-front of the custody officer.<sup>974</sup> With regard to the risk assessment, the focus is not simply (or perhaps not at all) on what the answers are but rather how the answers are given. For example, ‘*risk assessments aren’t just about asking questions, it’s what you see as much as what you ask*’<sup>975</sup> and ‘*sometimes it’s the way that [the*

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<sup>970</sup> Interaction 107, Site 2. See also above at n 966. This is also relevant to sections 4.7, 5.4.2 and 7.2.3.

<sup>971</sup> As compared with 20 years ago during Palmer and Hart’s study (n 76).

<sup>972</sup> CO18-1 Interview.

<sup>973</sup> See also Palmer and Hart (n 76) 29.

<sup>974</sup> Having had informal conversations with former custody officers (who are now legal representatives) it transpired that, prior to the introduction of a formal risk assessment, custody officers were largely reliant on observational methods when identifying vulnerability. It seems that, even though custody officers have more information at their disposal and the risk assessment has become lengthier, they nevertheless rely on ‘old’ methods.

<sup>975</sup> CO22-2 Interview.

*risk assessment is] answered, gives you clues as to their state of mind’.*<sup>976</sup> A great deal of assessing vulnerability for the AA safeguard comes down to *‘the sort of personal interaction with the person that you’re talking to. And sometimes just pick up on the sort of comments that they’ve made or some phrasing of some answers or the time it’s taking them to answer some questions’.*<sup>977</sup> Similarly, although there are questions asked, *‘there are obviously those people who come in who overtly display behavioural issues, mental health issues, learning difficulties’.*<sup>978</sup> The word ‘demeanour’ was also used frequently – for example, *‘you’ve got to look at how that person’s demeanour is’;*<sup>979</sup> *‘[i]t’s all about their behaviour, their demeanour, and some clear mental health illnesses’;*<sup>980</sup> and *‘[i]t’s not just the words; you’ve got to look at people whilst you’re doing this risk assessment. You’re assessing people’s demeanour at the same time, it’s not just the answers they give you’.*<sup>981</sup> ‘AA vulnerability’ was therefore something physical – *‘[i]t becomes apparent when you see them’.*<sup>982</sup>

#### 6.4.6 Picking up on clues: ‘sniffing out’ vulnerability

Linked with observations, custody officers also eluded to, or expressly mentioned, that they can look for, and find, clues<sup>983</sup> or rely on ‘gut feeling’.<sup>984</sup> These ‘clues’ were, inter alia, unusual behaviour, the interaction of the suspect, and/or the reason for arrest.<sup>985</sup> For example, *‘[t]o go to the extreme, if they’re running around with no clothes on through traffic or been shoplifting but they’re not very good at it, you know, forever getting caught and you think, “What you’ve done just seems strange”’.*<sup>986</sup> ‘Abnormality’, in addition to being a characteristic of AA vulnerability (as discussed in Chapter 5), could unsurprisingly alert the custody officer to the fact that an AA was needed. Other clues such as physical appearance, signs of paranoia, and

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<sup>976</sup> CO29-2 Interview.

<sup>977</sup> CO1-1 Interview.

<sup>978</sup> CO4-1 Interview.

<sup>979</sup> CO21-2 Interview.

<sup>980</sup> CO3-1 Interview.

<sup>981</sup> CO21-2 Interview. This also links with what is stated above – it’s not simply the answers but also the way the answers are given.

<sup>982</sup> CO28-2 Interview.

<sup>983</sup> See section 6.6.

<sup>984</sup> CO14-1 Interview.

<sup>985</sup> The nature and circumstances of arrest, as well as the environment in custody, can also put someone at risk of harm – see Cummins, ‘Boats against the current’ (n 472) 19.

<sup>986</sup> CO18-1 Interview.



how the suspect signed his or her name could also indicate ‘AA vulnerability’. As CO27-2 stated *‘[i]t’s physically [how] they are, how their behaviour is physically, how they’re standing, whether they’re looking around them all of the time, very paranoid sort of behaviour... could be how they sign their name, how quick is that action, how slow is that action’*.<sup>987</sup> Other factors such as being able to tell the time, living independently or having a support worker could also be taken into account,<sup>988</sup> as could the nature of the illness, whether the illness was being treated, and the type and dosage of medication.<sup>989</sup>

Because custody officers seem to rely predominantly on observation of the suspect, whilst also typically using other factors such as medication and diagnosis, it could be suggested that they are requiring that the suspect be ‘mentally disordered’ *and* ‘mentally vulnerable’. That said, it is possible that they pay little, if any, regard to the definitions contained within Code C and have simply developed their own definition.

## 6.5 Barriers to Identification

In their 1996 research, Palmer and Hart explored the challenges faced by custody officers when identifying vulnerability – these included ‘practical difficulties’, ‘differences among custody officers’ and ‘differentiating symptoms displayed between suspects’.<sup>990</sup> Similarly, in 2007, Cummins reported challenges such as the public nature of the environment, the masking effect of alcohol or drugs, and the custody officer’s lack of training.<sup>991</sup> Within this section I will explore the difficulties perceived by custody officers and, in addition, barriers that I have identified through observation.

### 6.5.1 Limits to the risk assessment

Despite its utility, the risk assessment brings with it some practical difficulties. The risk assessment questions, as outlined earlier in this chapter, can aid the identification of mental

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<sup>987</sup> CO27-2 Interview.

<sup>988</sup> These questions are supplementary to the risk assessment – see section 6.3 above.

<sup>989</sup> See section 5.5.1.

<sup>990</sup> Palmer and Hart (n 77) 29.

<sup>991</sup> Cummins, ‘Boats against the current’ (n 472) 20-21.

health issues yet, and as McKinnon and Grubin have indicated,<sup>992</sup> the basic risk assessment may be limited when identifying learning disabilities or difficulties. Questions aiding the identification of issues such as learning difficulty, special educational needs, and cognitive impairment are largely absent from the risk assessment.<sup>993</sup> Therefore, unless the suspect considers his or her learning difficulty, special educational need, or cognitive impairment to be a ‘mental health problem’,<sup>994</sup> he or she may be unlikely, on the basis of the questions asked, to report this issue to the custody officer. As Clare and Gudjonsson found, only 35% of detainees with intellectual difficulties believed they should tell the police.<sup>995</sup>

Even when specific questions are asked, the suspect may either be unaware of why such information should be disclosed, may be distrusting of the police and, relatedly or not, may be unwilling to disclose sensitive information. The suspect’s willingness to provide information was viewed as a major barrier to identifying ‘AA vulnerability’<sup>996</sup> – custody officers were not ‘sure that the questions [asked] are answered frankly by all the detainees’.<sup>997</sup> Reluctance is undoubtedly increased by the layout of the custody suite, which does not typically lend itself to privacy and confidentiality. Some individuals may be reluctant to disclose ‘personal information’ as the observation below illustrates:

*Suspect has been brought in for assault, affray, racially aggravated offences and disorderly conduct. The alleged offence(s) had been captured on CCTV but AOs were unable to ‘get hold of the injured party’. CO13-1 explained the exact offences to the suspect and explained why he was being detained. It was agreed that if injured party could not be tracked down, then CCTV would be relied upon. When asked the risk assessment questions, the suspect answered that he suffered from depression and had problems reading and writing. He also claimed that he had consumed two pints of beer*

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<sup>992</sup> McKinnon and Grubin, ‘Health screening in police custody’ (n 898) 211.

<sup>993</sup> See section 6.3 above.

<sup>994</sup> A learning disability is classed as a mental disorder (but not a mental health problem) – see section 4.3. Some suspects or detainees *did* disclose learning difficulty or disability when asked about mental health issues.

<sup>995</sup> Isabel Clare and Gisli Gudjonsson, *Devising and Piloting an Experimental Version of the Notice to Detained Persons (Report on the Royal Commission on Criminal Procedure)* (Research Study No. 7) (HMSO 1993) 6.

<sup>996</sup> It is also a barrier to identifying risk – see Interactions 142 and 145 (n 969) above.

<sup>997</sup> CO13-1 Interview.

*and had previously been an alcoholic. CO13-1 made attempts to ascertain whether DP would suffer from withdrawal, explaining that he wanted to know this information so that he could care for the suspect whilst he was in custody. The suspect refused to provide ‘personal information’. The suspect requested a solicitor. AO found a bus pass belonging to someone other than the suspect within the suspect’s property and decided to investigate him for suspicion of fraud (in addition to the offences above). This was not challenged by CO13-1. The suspect was then searched after the risk assessment was carried out. Upon reflection, the suspect appeared drunk and it was felt by myself and CO13-1 that he had likely more than two pints. The suspect also demanded that he got a drink immediately, stating “I’ve got rights”.<sup>998</sup>*

This is further compounded by the background noise in the custody suite and the length of time the custody officer spends with the suspect.<sup>999</sup> For example, Site 1 was typically busy during periods of observation, with queues building along the wall opposite the booking-in desk. With approximately 15 staff or more on each shift (including detention officers and custody officers), the custody suite was rarely quiet. The holding cells were placed in front of the booking-in desk and, as such, custody officers felt under pressure to book suspects (and other detainees) in promptly.<sup>1000</sup> Site 2 appeared less busy and the holding cells were located away from the desk thereby lessening the noise and affording greater privacy to those being booked-in. That said, the presence of individuals other than the custody officer (such as arresting officers and detention officers) may nevertheless impact upon an individual’s willingness to come forward with personal information.<sup>1001</sup> Furthermore, whilst custody officers explain, for example, *‘I’m going to ask you a few questions about your health and well-being. I’m doing this so that you can be looked-after properly whilst you’re here with us’*,<sup>1002</sup> they do not provide an explanation of what the outcome may be should such information be provided. Moreover, even if informed, suspects may fail to appreciate the significance of the AA safeguard or may be offended that

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<sup>998</sup> Interaction 82, Site 1. As discussed in Chapter 7, not being able to read and/or write does not always lead to the AA being called – see section 7.2.4. See also section 5.5.

<sup>999</sup> See above (n 716). See also Palmer and Hart (n 76) 32.

<sup>1000</sup> This was to avoid delay to arresting or investigative officers. Custody officers also felt that a busy environment discouraged honest answers.

<sup>1001</sup> Custody officers frequently distrusted the suspect or detainee’s responses and seemed to use this as evidence to disprove vulnerability – see section 6.5.2.

<sup>1002</sup> This was usually said before the custody officer asked the risk assessment questions.

such ‘safeguarding’ is required. They may be unwilling to disclose this information out of embarrassment, shame or stigma. For example, as CO16-1 stated:

*The first question you ask them is going to make some people lie because people won't want to admit to the fact that they can't read or write, people won't want to admit to the fact that they've got dyslexia, certain problems with their reading and writing. So I think they go straight onto their back foot and they start to lie to you straight away.*<sup>1003</sup>

The suspect may not hide simply one condition – he or she may disguise them all. In such circumstances, unless the suspect is observationally vulnerable, custody officers may not necessarily establish that he or she should be provided with an AA (and such observations may be flawed). The questions asked may also be limited when identifying mental vulnerability, where such vulnerability is not innate but situational<sup>1004</sup> i.e. where one's mental state or capacity has been adversely effected by being brought into custody. Moreover, alcohol or drug consumption may complicate the assessment of whether an AA is needed, or perhaps more accurately, a suspect can be deemed as needing an AA if assessed when drunk but not when sober, as the following observation indicates:

*Suspect was brought in for suspicion of committing arson with intent to endanger life and was being booked-out for interview. She had fallen asleep with lit cigarette in hand. She has depression and is on constant observations as she was deemed 'high risk' (due to alcohol consumption and depression). When she had been brought into custody she was drunk and was assessed by the HCP as needing an AA. She had just been assessed again and this time was sober. At this point she was assessed as not needing an AA as she could answer basic question and 'knows what's what'.*<sup>1005</sup>

#### 6.5.2 Distrusting the suspect: ‘Funnily enough, people lie to the police’<sup>1006</sup>

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<sup>1003</sup> CO16-1 Interview.

<sup>1004</sup> See sections 3.4 and 4.9.

<sup>1005</sup> Interaction 95, Site 2.

<sup>1006</sup> CO14-1 Interview.

Unsurprisingly perhaps, custody officers felt that one drawback in identifying vulnerability was that suspects may not give truthful answers. Whilst suspects may fail to provide information (as above), they may also be prone to fabrication or exaggeration. Such distrust, which was more apparent in relation to the ‘usual suspects’ than the first timers, may act as a barrier to identifying that an AA is required if the custody officer chooses to discount the information. Further, custody officers may take steps to disprove vulnerability but will rarely take steps to ascertain vulnerability (where such vulnerability is not already apparent).<sup>1007</sup> The quote from CO22-2 at section 5.5 exemplifies this.<sup>1008</sup>

As discussed earlier in this chapter, Code C requires that custody officers call an AA where there is ‘any doubt about the mental state or capacity of the [suspect]’.<sup>1009</sup> Furthermore, where the officer suspects or ‘is told in good faith [that the suspect] may be mentally disordered or otherwise mentally vulnerable, or mentally incapable of understanding the significance of questions or their replies’ then an AA should be called.<sup>1010</sup> Such an approach *should be* adopted whether the suspect self-reports a mental disorder or mental vulnerability, or whether there is other information or evidence to suggest this. Unless there is clear evidence to dispel the suspicion, the individual must be treated as vulnerable and an AA called.<sup>1011</sup> Code C, by inference, permits the custody officer to find clear evidence to dispel the notion that the suspect is vulnerable.<sup>1012</sup> It is therefore entirely possible that custody officers attempt to disprove vulnerability – they seek ‘clear evidence’ through the various investigative methods.<sup>1013</sup>

### 6.5.3 HCPs, FMEs and AMHPs: always the experts?

Attention should perhaps first be drawn to the fact that not every custody suite has ‘in-house’ HCPs and, as such, advice may not be readily sought or decisions readily made. Yet, the

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<sup>1007</sup> Although they may be more likely to try to ascertain this information in relation to risk – see section 7.4.

<sup>1008</sup> CO22-2 Interview. However, on this point see Rock (n 173).

<sup>1009</sup> Code C, Notes for Guidance 1G.

<sup>1010</sup> Code C, Annex E para 1.

<sup>1011</sup> Code C, para 1.4.

<sup>1012</sup> *ibid.*

<sup>1013</sup> Of course, custody officers may not necessarily be *actively* trying to disprove or prove vulnerability. I will return to distrust and ‘suspicion’ in Chapter 8.

presence of ‘in-house’ HCPs (as at Sites 1 and 2) or on-call FMEs or HCPs is not without its problems – they may not always be experts in mental health, mental disorder, learning disabilities or difficulties and so on.<sup>1014</sup> This was recognised by custody officers: whilst *‘[s]ome come from mental health background; others don’t, ... they may come from, say, a paramedic background. But those from mental health background are able to give you a better steer on how to treat and how to deal with the detainee’*.<sup>1015</sup> As such, it was recognised that *‘[s]ome of the FMEs and some of the nurses are [savvier] with mental health issues. I think the training that they had will be in the mental health field or won’t be. So in that respect it’s a bit hit and miss in respect of what service the detainees get when they’re here’*.<sup>1016</sup> Accordingly, some may struggle when identifying innate vulnerabilities.<sup>1017</sup> However, such shortcomings did not seem to discourage custody officers from using this resource – whilst they desired something better, they seemed to adopt a pragmatic approach in that limited assistance was better than no assistance at all. Moreover, it seemed that this resource was not necessarily problematic in terms of identifying vulnerability and making decisions on whether to implement the AA safeguard – it served its purpose in this regard well-enough. Instead, the concern was ostensibly in relation to risk assessment and management.<sup>1018</sup>

When HCPs and FMEs in custody *are* trained in areas such as mental disorder or mental health, they are not necessarily aware nor are seemingly required to have knowledge of the guidance contained within Code C. Conversations with custody officers indicated that HCPs and FMEs would consider whether the suspect was lucid, was able to tell the time, or knew where he or she was i.e. they searched for severe impairment.<sup>1019</sup> Further, even where they have expertise, they may struggle to identify mental vulnerability where such vulnerability is not obvious, i.e. it is felt internally and does not manifest externally. Although the HCP or FME may be required to advise on whether an AA is needed, the AMHPs role encompasses MHA 1983

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<sup>1014</sup> Three custody officers at Site 1 explicitly recognised the shortcomings of relying on medical advice. This was not mentioned at Site 2 – at Site 2 AMHPs were seemingly happy to provide advice and make decisions on whether an AA was required. See also section 1.3.

<sup>1015</sup> CO18-1 Interview.

<sup>1016</sup> CO13-1 Interview.

<sup>1017</sup> See for example CJI, *Offenders with Learning Disabilities* (n 70) and Norfolk (n 954) for a discussion of the various problems with FMEs in custody.

<sup>1018</sup> This issue will be discussed further in Chapters 7 and 8.

<sup>1019</sup> This is the incorrect criteria. There seems to be much confusion between fitness for interview and the use of the AA. On this point see section 4.7.

responsibilities only (in any event, the decision ultimately rests with the custody officer). Assessing an individual for the purposes of the AA safeguard is not within the contractual remit of the AMHP.<sup>1020</sup> Moreover, although AMHPs should have knowledge of learning disabilities (as these are classed as mental disorders under the MHA Code of Practice)<sup>1021</sup>, they may not have knowledge of learning difficulties and may therefore be unable to advise on such matters. Even where AMHPs have such knowledge, this is not to say that they know much, if anything, about Code C and the AA safeguard.

#### 6.5.4 Training, knowledge and abilities: differences between officers

Just as HCPs, FMEs and AMHPs may vary with regard to their knowledge, so too may custody officers. They rely, in part, on any training provided but also on other professional or personal experiences. The custody officers in this study received training on risk management at least once a year, either through group face-to-face training or online modules. However, training can differ between forces – it is often a ‘postcode lottery’.<sup>1022</sup> Training on mental health, intellectual/learning disabilities and other innate vulnerabilities has been deemed inadequate.<sup>1023</sup> This is highlighted by the following statements:

*I’m not by any means an expert on mental health but you get bi-polar, schizophrenic, psychotic. There are other ones as well, which I can’t quite remember.*<sup>1024</sup>

*We can be bamboozled with all sorts of terms and phrases and medication that people are taking... you know, I’m not an expert in that field.*<sup>1025</sup>

*I sometimes think that some of the mental health stuff that we’re dealing with these days, I don’t feel qualified for it and I’m asking questions of people on a mental health assessment which I don’t think I should be asking.*<sup>1026</sup>

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<sup>1020</sup> This was something that custody officers struggled with – see section 2.4.

<sup>1021</sup> See section 4.3.

<sup>1022</sup> Coppen (n 70) 82.

<sup>1023</sup> See for example Cummins, ‘Boats against the current’ (n 472) 21.

<sup>1024</sup> CO12-1 Interview.

<sup>1025</sup> CO28-2 Interview.

<sup>1026</sup> CO21-2 Interview.

As with all individuals, custody officers may exhibit strengths and weaknesses in different areas of the job.<sup>1027</sup> As discussed in Chapter 5, custody officers experienced difficulty in expressing what the terms ‘mentally vulnerable’ and ‘mentally disordered’ meant<sup>1028</sup> and also had a tendency to discuss learning difficulty in the same vein as mental health.<sup>1029</sup> Custody officers did not believe that they were sufficiently qualified to ask questions about mental health, nor to ascertain whether someone is mentally disordered or has a mental health issue. They also felt that it was not their ‘*area of expertise*’<sup>1030</sup> as they were ‘*not mental health practitioner[s]*’.<sup>1031</sup> Such lack of expertise or knowledge may explain, in part, why many suspects who can be considered ‘mentally vulnerable’ or ‘mentally disordered’ are not provided with an AA.<sup>1032</sup>

Some custody officers valued personal experience and believed that it made them more attuned to the needs of some detainees and suspects. For example, three custody officers mentioned during informal chats or interview that they had children with learning disabilities or special educational needs. Two of these officers explicitly stated that this provided them with a better understanding and appreciation of vulnerability and felt that it enabled them to deal with individuals in a more appropriate manner. It was, however, abundantly clear that these ‘skills’ were more useful in terms of risk management than vulnerability for the AA safeguard. Moreover, a greater appreciation of certain conditions did not seem to correlate with a better understanding of, for example, mental disorder.<sup>1033</sup>

Interestingly, even though custody officers shared the same interpretation of vulnerability for the purpose of the AA safeguard,<sup>1034</sup> they did feel that differences in ‘personal opinion’ could

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<sup>1027</sup> I did not collect any data on job performance.

<sup>1028</sup> See section 5.3.

<sup>1029</sup> This is somewhat similar to the findings of previous studies.

<sup>1030</sup> CO13-1 Interview.

<sup>1031</sup> CO18-1 Interview.

<sup>1032</sup> Dehaghani, ‘Custody Officers, Code C and Constructing Vulnerability’ (n 484). See also Chapter 9.

<sup>1033</sup> Even if an officer identified, for example, a mental disorder, it did not necessarily always follow that the AA safeguard would be implemented (see section 7.2).

<sup>1034</sup> See section 5.4. Of course, there may be some subtle differences in how custody officers interpret this definition or how they interpret the suspect’s vulnerability.



result in differing interpretations of vulnerability – the identification of vulnerability was seen as ‘...quite a subjective thing’.<sup>1035</sup> They felt that it was ‘down to personal opinion and experience and you could present the same person to two sergeants and one would say, “This person needs [an AA]” and one would say, “No, they’re OK with that”’.<sup>1036</sup> As such, the outcome of the interaction (and potentially the outcome of arrest and detention) *could* vary from one custody officer to the next – ‘[i]t’s a bit hit and miss... I could do it at risk assessment from somebody who says they’ve got depression and another sergeant can do it and they might take a completely different tackle. You’re never going to get the same’.<sup>1037</sup>

#### 6.5.5 Relying on observation and seeking the extreme case

Whilst a lack of knowledge, as explored above, might constitute a barrier to identifying vulnerability (and implementing the AA safeguard), custody officers did not necessarily share this view.<sup>1038</sup> Because observations were heavily, if not solely, relied upon, knowledge of various conditions was not necessarily important. However, even if observations were the most accurate method of identification, a lack of knowledge nevertheless remains problematic – because custody officers are insufficiently trained in mental health issues or learning disability or difficulty, they do not know what is required when providing an accurate assessment.<sup>1039</sup> Moreover, appearances can be deceiving.<sup>1040</sup>

As indicated in Chapter 5, custody officers appear to be seeking the extreme case. Not every vulnerable suspect is, however, so severely impaired that he or she does not understand the world around him or her – mental disorder or mental vulnerability do not necessarily equate to

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<sup>1035</sup> CO3-1 Interview. As Kemp and Hodgson have highlighted, subjectivity extends beyond interpretation and identification; indeed, some officers are better at responding to vulnerability than others. For example, some may see a diagnosis of ADHD as ‘an excuse for misbehaving’ whereas another may be sensitive to the suspect’s needs – Kemp and Hodgson (n 121) 164.

<sup>1036</sup> CO18-1 Interview.

<sup>1037</sup> CO1-1 Interview.

<sup>1038</sup> This lack of knowledge was seen by custody officers as a barrier to identifying risk.

<sup>1039</sup> As I will argue in Chapter 9, if vulnerability *can be* broadly construed then such ‘barriers’ may no longer operate as such.

<sup>1040</sup> See Gudjonsson, Clare, Rutter and Pearse (n 76).

abnormality.<sup>1041</sup> Prior to the advancements in the risk assessment,<sup>1042</sup> this may have been the main, or sole, method by which a custody officer could identify the need for an AA, however, given the developments in the risk assessment tools, a very serious and obvious impairment is no longer the only means of identification – there is much more information available to the custody officer.

## 6.6 Identifying vulnerability – an investigation?

*Interview techniques, questioning, body language, signs that they give off, their eyes... There are signs that people will give off but you have to be able to pick up on, or should be able to pick up on... I think the main crux that you [i.e. the researcher] perhaps won't see when we ask the questions, is what's going on in the head of the custody sergeant and the copper's nose and that copper that sniff out a crime, can sniff out an issue. Just that penny drops or the light bulb moment. There's just something not quite right. I'm not happy that this person doesn't have an [AA] and should.*<sup>1043</sup>

The identification of vulnerability, an arguably mundane and unimportant task, can be elevated to the status of something which is exciting and requires intuition or skill, such as the police investigation. Custody officers believe that their experience gained through years 'on the job' enables them to correctly identify vulnerability through investigative and interrogative measures. At this point it is worth examining how we may understand the custody officer's view of the identification of vulnerability. I will do this through exploring the conceptualisation of investigations.

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<sup>1041</sup> The word 'disorder' means an abnormality or disturbance and this may be misleading for those with little knowledge of what mental disorder encompasses.

<sup>1042</sup> See section 6.3.

<sup>1043</sup> As stated by CO24-2 at interview when asked to explain how he identifies vulnerability for the AA safeguard. As Loftus has noted, police officers are unable to locate their suspicion – see Loftus (n 204) 123.

Investigations can be conceptualized as either ‘art’, craft’<sup>1044</sup>, or ‘science’.<sup>1045</sup> The first of these ‘competing perspectives’<sup>1046</sup>, the ‘craft’, views detective work as something which ‘emerg[es] from experience on the job, an understanding of the suspects, victims and police involved in the process of crime investigation and an ability to craft or organise the case in a manner considered suitable to the detective’.<sup>1047</sup> The craft is thus the ‘transfer of the reality of police work to the courtroom context in a manner that meets the crime-control objectives of the police’<sup>1048</sup> whereby manipulation and negotiation are key.<sup>1049</sup> Paperwork, in particular, is manipulated to “‘fit” the official presentation requirements’<sup>1050</sup> or ‘[cover] one’s ass’.<sup>1051</sup> By contrast, the “art” of detective work concerns intuition, and instinctive feelings and hunches regarding problem-solving in an investigative capacity’<sup>1052</sup> whereby the detective can successfully ‘separate the false from the genuine, but also ... [identify] the effective and creative lines of enquiry’.<sup>1053</sup> This can be done through ‘reading’ criminal behaviour or ‘reading’ the alleged perpetrator or witness.<sup>1054</sup> Those practising the ‘art’ of detective work can

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<sup>1044</sup> See Dick Hobbs, *Doing the business: Entrepreneurship, detectives and the working class in the East End of London* (OUP 1988). For a more detailed discussion of craft knowledge see James J Willis and Stephen D Mastrofski, ‘Improving policing by integrating craft and science: what can patrol officers teach us about good police work?’ (2016) *Policing and Society*, DOI: 10.1080/10439463.2015.1135921. For a discussion of art, craft and science see Stephen Tong and Ben Bowling, ‘Art, Craft and Science of Detective Work’ (2006) 76 *The Police Journal* 323.

<sup>1045</sup> Stephen Tong, ‘A Brief History of Crime Investigation’ in Stephen Tong, Robin P Bryant and Miranda AH Horvath (eds), *Understanding Criminal Investigation* (Wiley-Blackwell 2009) 7.

<sup>1046</sup> Tong, ‘A Brief History of Crime Investigation’ (n 1046) 7. However, Bayley and Bittner argue that whilst policing may be more like a craft than a science, the two conceptualisations are not incompatible – David H Bayley and Egon Bittner, ‘Learning the Skills of Policing’ (1984) 47 *Law and Contemporary Problems* 35.

<sup>1047</sup> Tong, ‘A Brief History of Crime Investigation’ (n 1046) 7-8.

<sup>1048</sup> *ibid* 8.

<sup>1049</sup> *ibid*.

<sup>1050</sup> Stephen Tong, Robin P Bryant and Miranda AH Horvath, ‘Crime Investigation in Context’ in Stephen Tong, Robin P Bryant and Miranda AH Horvath (eds), *Understanding Criminal Investigation* (Wiley-Blackwell 2009) 176.

<sup>1051</sup> Richard V Ericson, *Making crime: A study of detective work* (2<sup>nd</sup> edn. Toronto University Press 1993) as cited in Tong, Bryant and Horvath, ‘Crime Investigation in Context’ (n 1051) 176.

<sup>1052</sup> Tong, ‘A Brief History of Crime Investigation’ (n 1046) 8.

<sup>1053</sup> *ibid*.

<sup>1054</sup> *ibid*.

also ‘read’ the ‘considered motivation and strategies to avoid detection’.<sup>1055</sup> As Tong notes, the notion of ‘investigator as scientist’ is in ‘direct opposition’ to the notion of ‘detective as artist’<sup>1056</sup> – a scientist does not possess instinctive skills but instead relies on ‘scientific approaches’<sup>1057</sup> that have been learned through instruction and advancement in knowledge.<sup>1058</sup> The identification of vulnerability can be viewed as either an ‘art’ or a ‘craft’ – the custody officer ‘reads’ the behaviour of the suspect when determining whether he or she is vulnerable or has acquired the skills to do so ‘on the job’. It is, of course, doubtful that the identification of vulnerability (or risk) invokes the same feelings of excitement and suspense that is associated with investigating a serious crime, yet there are some similarities (at least in relation to how custody officers view this task). In addition to the clear conceptual links, as mentioned above, there may also be some practical similarities between the identification of vulnerability for the purposes of the AA safeguard<sup>1059</sup> and a typical police investigation.<sup>1060</sup> I will explore these similarities below.<sup>1061</sup>

As with a criminal investigation, custody officers may seek ‘evidence’ of vulnerability such as the use of medication or the presence of a recognised medical condition (as mentioned above and in Chapter 5).<sup>1062</sup> Custody officers may, similarly, look for clues such as, inter alia, unusual answers, failure to understand questions asked, or failure to understand the reason for arrest. Moreover, similar to a criminal investigation, informants may be used in the vulnerability investigation<sup>1063</sup> – some informants are, of course, more reliable and trustworthy than others

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<sup>1055</sup> *ibid.*

<sup>1056</sup> *ibid* 9.

<sup>1057</sup> *ibid* 9.

<sup>1058</sup> *ibid* 9.

<sup>1059</sup> Such parallels also apply here to the identification of risk.

<sup>1060</sup> See Peter Stelfox, *Criminal Investigation: An introduction to principles and practice* (Willan 2009) 107-146.

<sup>1061</sup> Some techniques of investigation are irrelevant and will not, therefore, be discussed.

<sup>1062</sup> The police are involved in the production of knowledge – see Mike Maguire, ‘Criminal Investigation and Crime Control’ in Tim Newburn (ed) *Handbook of Policing* (2<sup>nd</sup> edn, Willan 2008) 438. See also McConville, Sanders and Leng, *The Case for the Prosecution* (n 18).

<sup>1063</sup> Such as witnesses in a criminal investigation – see Stelfox (n 1061) 86-7. As Stelfox comments, information is knowledge – Stelfox (n 1066) 86-7. See also Nick Tilley, Amanda Robinson and John Burrows, ‘The investigation of high volume crime’ in Tim Newburn, Tom Williamson and Alan Wright (eds), *Handbook of Criminal Investigation* (Willan 2007) 243; Martin Innes, ‘Investigation order and major crime inquiries’ in Tim Newburn, Tom Williamson and Alan Wright (eds), *Handbook of Criminal Investigation* (Willan 2007) 260.

such as HCPs and fellow police officers. Furthermore, the seeking of advice from the HCP or FME may be likened to ‘forensic examination’ where HCPs or FMEs are viewed as experts.<sup>1064</sup> And just as investigators may prepare for the interview by reading through the case file so too do custody officers by checking the PNC or previous custody records to uncover more information about the suspect.<sup>1065</sup> Perhaps the most striking similarity between identifying vulnerability and the police investigation is the police officer’s assertion that he has the ability to detect lies.<sup>1066</sup> The reliance on a ‘hunch’ may be problematic – research has consistently shown that, whilst the police assume that they are ‘highly accurate judges of truth and deception’<sup>1067</sup>, ‘there is little if any evidence to support this claim’<sup>1068</sup> and, further, the police are no better than lay people when detecting truth and lies.<sup>1069</sup>

CO33-2 explicitly recognised the difficulties with what is perceived as the skill to ‘sniff out’ an issue:

*At the end of the day, the flipside to that is that these questions are, whilst we’re doing a risk assessment, untrained in terms of any sort of medical training, we’re asking questions and they’re sort of set questions and we don’t have the skills to recognise whether they’re being truthful or not, in that. I just think the risk assessment questions need reviewing really.*<sup>1070</sup>

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<sup>1064</sup> Although, as aforementioned, the HCP, FME or AMHP is typically used for making the decision on whether the AA is needed where vulnerability has already been identified or potentially identified – see section 7.2.3. Information can also be gleaned by experts – see Stelfox (n 1061) 88-89.

<sup>1065</sup> Information can be used as data. In a criminal investigation this may be ‘fingerprints, CCTV, documents, items left at or taken from the scene, and DNA’ – ibid 86.

<sup>1066</sup> The probative approach was more common when attempting to disprove vulnerability, rather than making a concerted effort to prove it. A probative approach was also more common in relation to risk than vulnerability. In fact, it could be said that vulnerability is often only ascertained because so much information is gathered for the purposes of ascertaining risk that it herewith comes to light.

<sup>1067</sup> Saul M Kassin, Christian A Meissner and Rebecca J Norwick, “‘I’d Know a False Confession if I Saw One’: A Comparative Study of College Students and Police Investigators” (2009) 29 (5) Law and Human Behavior 211, 211.

<sup>1068</sup> ibid.

<sup>1069</sup> ibid.

<sup>1070</sup> CO33-2 Interview.

That said, and as mentioned earlier in this chapter, custody officers do not trust suspects to tell the truth and, as a result, may attempt to disprove vulnerability.<sup>1071</sup>

## 6.7 Overcoming barriers: concluding remarks

Awareness of mental disorder and other mental health issues has undoubtedly improved and increased over the last 20-30 years. Diagnostic capabilities within, for example, the mental health and learning disability arenas are improving, thus increasing an individual's awareness of his or her own condition. Public knowledge seems to be improving, along with public discussion – mental health, for example, is being much more widely discussed. Further, the expanding risk assessment may enable a great deal of information to come to the fore allowing suspects an opportunity to self-report, with such information later being recorded on to PNC and custody records for future reference. However, custody officers are often distrusting of this information, particularly where it derived from the suspect, and instead place greater trust in their own assessment of the suspect. Furthermore, vulnerability may not always be easily identified, particularly where questions are not worded to prompt the 'right' answers, where the suspect is unwilling to come forward with the information or where the suspect does not realise what information should be divulged. Nevertheless, information *is* often provided to custody officers and it is instead what they choose to do with it that may affect whether the AA safeguard is implemented.

Custody officers, as evidenced in Chapter 5, may lack knowledge of the vulnerability definitions and how these correspond with recognised medical conditions or, further, how a mental state may render a suspect vulnerable. Despite (or perhaps because of) a lack of knowledge, custody officers rely on their own observations of the suspect in order to identify whether an AA is required. The answers to the risk assessment may also be limited in ascertaining situational vulnerability<sup>1072</sup> (i.e. mental state) and, although questions that attempt to ascertain how one is feeling may provide information on one's emotional or mental state, the risk assessment tends to focus predominantly on medical conditions. In this sense,

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<sup>1071</sup> As Stelfox notes, officers are trained to 'assume nothing, believe nothing, challenge everything' – Stelfox (n 1061) 167.

<sup>1072</sup> This situational state may refer, not only to mental state, but can be conceptualised more broadly – see section 9.3.4.

observations may be useful in identifying traits such as fear or anxiety (provided these are observable). However, as explored in Chapter 5, custody officers are looking for more than this – vulnerability must be, typically, both innate and manifest physically. Rather than the threshold for identification being lower than 20-30 years ago, it is now perhaps higher – previously custody officers had to rely on observations only, thus producing false-positives;<sup>1073</sup> now they can marry their observations with the answers to the risk assessment and use these answers to ‘disprove’ vulnerability. Of course, if situational vulnerability is to be accepted as something which occurs as a result of being detained then it is not difficult to ascertain at all – all suspects in custody are vulnerable. I will return to this in Chapter 9.

As required by the ‘benefit of the doubt’ test, custody officers should implement the AA safeguard where there is any doubt and can only continue without an AA where there is ‘clear evidence’ to dispel the notion of vulnerability. Therefore, where there is anything that suggests that the suspect *could be* vulnerable, the AA safeguard should be implemented. ‘Clear evidence’ can, of course, be sought, but mere distrust of the suspect should not be enough.<sup>1074</sup> It may be useful to have clarification of what is required here – it is likely that a disbelief of the suspect is unlikely to suffice. Whilst it may be impractical, an AA could be called where there is potential for the suspect being vulnerable.<sup>1075</sup> Nevertheless, there may be instances where even ‘potential’ vulnerability is not apparent but where the suspect is indeed vulnerable. As Bean and Nemitz noted, identification is not always the problem, instead, ‘it is more a question of what [the custody officer thinks] should happen to the [vulnerable] once detected’.<sup>1076</sup> Thus, the identification of vulnerability depends, at least in part, on its definition. This does not, however, explain the issue in its entirety. Within the following chapter I will explore further reasons why the AA safeguard may or may not be implemented.

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<sup>1073</sup> Where they thought that the suspect met their criteria (as discussed in Chapter 5) but the suspect only appeared to.

<sup>1074</sup> Although ‘clear evidence’ has not been defined.

<sup>1075</sup> See sections 9.3.4 and 9.3.5.

<sup>1076</sup> Bean and Nemitz, *Out of Depth and Out of Sight* (n 77) 48.

## CHAPTER 7: IMPLEMENTING THE AA SAFEGUARD

*It's just belt and braces, ain't it?*<sup>1077</sup>

### 7.1 Introduction

Just as definition and identification are essential in understanding the implementation of the AA safeguard, so too are the various factors which may persuade or dissuade custody officers from using the safeguard. Within this chapter I will explore how the custody officer makes his decision after he defines and identifies vulnerability. As noted previously in this thesis, this is probably not a linear process – definition, identification and decision-making may all occur together or may vacillate. Moreover, a lot of these factors may not be active considerations but instead be post-fact justifications or rationalisations. Regardless, they are important to understanding the purported ‘gap’ between the law in books and the law in action. Within this chapter I will explore the factors that custody officers take into account when deciding whether to implement the AA safeguard. Analysis of actual decision-making will not, however, be dealt with until the following chapter. This chapter will address the factors deemed to influence decision-making within other research studies on the AA safeguard and the factors cited by custody officers in this study. I do not purport to explore every factor – I am simply exploring those that emerged from the data. This chapter will also look briefly at how the AA safeguard is implemented for young suspects (i.e. those under 18), in addition to looking at how custody officers approach decisions on risk. Such decision-making approaches provide interesting contrasts (I will draw upon this in greater detail in Chapter 8).<sup>1078</sup> This chapter seeks to build-upon some of the literature and data discussed in the previous chapter – indeed there may be some overlaps in discussion.

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<sup>1077</sup> CO9-1 Interview. The ‘belt and braces’ approach means utilising double security. This is arguably in reference to implementing the safeguard in conjunction with recording everything on the custody record. It also suggests that measures may be taken purely in the interests of security.

<sup>1078</sup> I will also draw upon these elements in Chapter 8 to attempt to explain custody officer decision-making, before moving onto the ‘grounded theory’ in the concluding chapter.



## 7.2 Calling an AA: dissuasive factors

As discussed in Chapter 5, custody officers have their own interpretations of vulnerability and the AA safeguard. Yet, identification of ‘AA vulnerability’ does not necessarily lead to the implementation of the AA safeguard. Thus, there are instances where the suspect will meet the custody officer’s requirements, and such requirements have been identified by the custody officer, but the suspect will not be provided with an AA. Within this section I will explore the factors that dissuade custody officers from implementing the AA safeguard.

### 7.2.1 ‘Solicitor’ as substitute<sup>1079</sup>

Whilst Code C makes it clear that solicitors cannot act as AAs,<sup>1080</sup> custody officers take the approach that they can<sup>1081</sup> – the presence of a solicitor negates the need for an AA. Although custody officers were somewhat critical of solicitors,<sup>1082</sup> viewing them as ‘goal-oriented’ and self-interested, they also believed that solicitors or other legal representatives could act as AAs.<sup>1083</sup> This was evident from CO2-1’s interview when asked about the AA safeguard:

*The [AA’s] motives are purely from a welfare and health perspective, to make sure that that person’s OK and understanding everything and I would argue that solicitors’ motives and we, as the police, motives are not wholly that. We have other motives and we have other issues that we are trying to address as well...*<sup>1084</sup>

As Blackstock, Cape, Hodgson, Ogodrova and Spronken have highlighted, the role of the lawyer was viewed as ‘to get the client off’ or to obstruct justice. The AA by contrast is largely

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<sup>1079</sup> The term ‘solicitor’ was used generically. The more appropriate term is ‘legal representative’ as not every individual providing legal advice at the custody suite is a solicitor – see section 1.3.

<sup>1080</sup> Code C, Notes for Guidance 1F.

<sup>1081</sup> The Courts have also adopted this approach – see section 4.5. The significance of this will be discussed in Chapter 8.

<sup>1082</sup> Although notably less so about other legal representatives.

<sup>1083</sup> See section 1.3.

<sup>1084</sup> CO2-1 Interview.

viewed as independent.<sup>1085</sup> Yet, because a legal representative could act as an *'ally'*<sup>1086</sup>, he or she is a suitable replacement for an AA. The solicitor was also seen to provide *'back-up'*<sup>1087</sup> or a *'someone giving them another perspective and safety net from that, being led down the avenue that the police might lead them down should they be easily persuaded or other things'*.<sup>1088</sup> The solicitor is also able to facilitate communication and may be able to explain that *"Yes, it's OK to sign that. It's just... the label for the disk"*<sup>1089</sup> or otherwise assist with reading and writing. Thus, when a solicitor is not present, *'then perhaps I'll consider an [AA] purely to help them with their reading and writing'*.<sup>1090</sup> The AA, like the solicitor, can also ensure that the interview is being conducted properly and that *'the person doing the interview is behaving appropriately and not oppressively or anything'*.<sup>1091</sup> Whilst there was a recognition that both the AA and the solicitor could prevent oppressive behaviour,<sup>1092</sup> not all custody officers felt this way. CO22-2 expressed dissent with the notion that a solicitor can replace an AA because the AA was *'someone to reassure them, not necessarily to guide them but for that physical reassurance so it's not just you and the cops. I don't think, and perhaps I'm speaking a little bit out of turn, but I don't think that the solicitor gives that reassurance whereas the [AA] tends to'*.<sup>1093</sup> However, a solicitor's presence was likely to tip the balance where the custody officer was unsure:

*I would also argue that there are sometimes that once I know someone's having a solicitor, if I'm in a little bit of a grey area and I'm a little bit unsure and know that they're having a solicitor, sometimes that decision that they're fit for interview without an [AA] might be swayed by them having legal representation.*<sup>1094</sup>

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<sup>1085</sup> Blackstock, Cape, Hodgson, Ogodrodova and Spronken, *Inside Police Custody* (n 30) 345.

<sup>1086</sup> CO8-1 at interview. This was common throughout most transcripts.

<sup>1087</sup> CO11-1 Interview.

<sup>1088</sup> CO2-1 Interview.

<sup>1089</sup> CO9-1 Interview.

<sup>1090</sup> CO22-2 Interview.

<sup>1091</sup> CO28-2 Interview.

<sup>1092</sup> See section 5.6.5.

<sup>1093</sup> CO22-2 Interview.

<sup>1094</sup> CO2-1 Interview.

### 7.2.2 Cost: Time and Money<sup>1095</sup>

It is no great surprise that custody officers considered matters of efficiency when deciding whether to call an AA. Whilst many areas have AA schemes in operation, these schemes do not typically operate 24/7 and, even where these schemes are in operation, AAs may not always be readily available or arrive promptly at the custody suite.<sup>1096</sup> The NAAN report, citing other research studies, has already highlighted the deficiencies in the availability and commissioning of AA services. As they noted, availability of AAs ‘has a direct impact on operational decisions, causes delays in investigations and leads to mentally vulnerable people [sic] being detained for longer than is necessary, including overnight, and in an environment which is unhelpful to their mental state’.<sup>1097</sup> This arises from the absence of a statutory duty to provide AAs to vulnerable adults.<sup>1098</sup> Furthermore, Norfolk found a significant correlation between FMEs who claimed that they were pressurized into not providing an AA and areas where the AA provision was lacking.<sup>1099</sup>

Calling an AA requires that the custody officer make additional calls and record additional information, it requires that the suspect is re-read his or her rights (with the AA present), and it may delay the investigation and the suspect’s release from custody. It may also, inadvertently, re-direct police resources towards the custody suite and away from ‘the streets’ (where it is ‘needed’ most).<sup>1100</sup> Although a family member or friend does not receive remuneration for their presence at the custody suite, those requested from the scheme are often paid<sup>1101</sup> and custody officers may consider this when deciding to call an AA.

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<sup>1095</sup> This could be deemed ‘efficiency’ (and either crime control or due process, depending on perspective) – see section 8.2.

<sup>1096</sup> According to CO18-1 custody officers were not explicitly discouraged by their superiors from using the AA safeguard on the grounds of financial expense.

<sup>1097</sup> NAAN (n 31) 16. This should ideally read ‘mentally vulnerable or mentally disordered’.

<sup>1098</sup> Perks (n 111) 18. See section 8.6.

<sup>1099</sup> Norfolk (n 954) 12.

<sup>1100</sup> This could also be viewed as a crime control consideration. There were also analogies used to describe custody such as ‘fast moving consumer goods’ (CO13-1) and ‘task-orientated; it’s almost like a conveyor belt’ (CO22-2). These are indicative of crime control or efficiency – see section 8.2.1.

<sup>1101</sup> See section 2.4 for discussion of AA arrangements in Sites 1 and 2.

*When we bring in an [AA], the person is paid for by the public purse and there's quite a cost involved in relation to it. Does this person need an [AA] in my opinion? If the answer to that is 'no' because it's very, very, very minor depression, in fact it's not even depression, they're just fed up, then I won't get an [AA]... The practicalities are, if we adhere absolutely strictly to what my interpretation of PACE is, we'd basically be getting an [AA] for every single person that comes in and the practicality of that would be to slow the system down tremendously and to cost the public an absolute fortune.<sup>1102</sup>*

CO22-2 understands that he is not complying with PACE. Yet, instead of adhering strictly with how he understands the PACE – or more specifically Code C – requirements, he exercises his own discretion.<sup>1103</sup> CO22-2 also used some justifications – rather than the suspect being recognised as in need of an AA by virtue of having depression (a mental disorder), CO22-2 instead rationalises this as being ‘fed up’. It seemed that CO22-2 disagreed with the approach taken within PACE – or more specifically Code C. This approach, it seems, is costly both to the ‘public purse’ and requires a time investment on behalf of those working within the system (presumably here, the custody officer and others such as the interviewing officer(s)). Whilst the scheme is costlier, the voluntary provision is not without its drawbacks: although it may not cost money, it most certainly costs time.

As noted above, the time taken may impact, not simply upon the custody officer, but also upon other police officers. One should not forget that custody officers are police officers and, having gained experience through policing, appreciate the impact that their work may have on other police officers.<sup>1104</sup> This was highlighted in relation to risk but can equally apply to vulnerability:

*I tend to be acutely conscious of, if a custody sergeant follows the Safer Detention guidelines to the letter, you end up sending a lot of people to hospital that may well not*

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<sup>1102</sup> CO22-2 Interview. The significance of some of these statements will be explored in Chapter 8.

<sup>1103</sup> See section 8.3.1. and Chapter 8 more generally.

<sup>1104</sup> It was clear from observations and interviews that ‘Bobbies on the beat’ do not understand the demands of custody. As such, decisions were often taken to appease the Bobbies or their superiors. On this latter point see Vicky Kemp, ‘PACE, Performance Targets and Legal Protections’ (n 67).

*really need to go. As a police officer I'm acutely aware that police resources are finite and every time that you ask for every detained person to go to hospital, you're taking up two police officers off the street who could be potentially out there fighting crime for three, four, five hours whilst that person is being taken to hospital.*<sup>1105</sup>

### 7.2.3 Taking medical advice

*The fella yesterday, although he wasn't interviewed...when he first came in with his mental health issues, you would probably think "He needs an [AA]". He was assessed by an [AMHP] and I asked if he needed one... and they said "No, although he has mental health issues he clearly understands everything that's happening and everything around him". So he didn't need one. Normally, if I'm not sure, I'll put it over to them and take their advice on it.*<sup>1106</sup>

According to Code C, the decision regarding implementation of the AA safeguard is the responsibility of the custody officer. Yet, it transpired from interview and observation that, not only do HCPs (and to a lesser extent FMEs and AMHPs) play a role in identifying vulnerability, they are also key participants in deciding whether the safeguard should be implemented. Thus, whilst custody officers repeatedly reiterated that such decisions were 'a personal judgement', in reality the outcome is largely decided by HCPs (and FMEs and AMHPs where available)<sup>1107</sup> – custody officers delegate these decisions.<sup>1108</sup> As noted in Chapter 6, a custody officer will typically accept the HCPs, FMEs, or AMHPs advice, even when that contradicts the custody officer's initial thoughts on the matter.<sup>1109</sup> For example, CO15-1 felt that an AA was needed

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<sup>1105</sup> CO8-1 Interview.

<sup>1106</sup> CO11-1 Interview. As Norfolk highlighted, 70.9% of FMEs felt that an AA was required for mental disorder only when such disorder was 'significant' – Norfolk (n 954) 12. It is worth noting that the AMHP was not available at Site 1 at this time (although it was being trialled in another custody suite in the police force). It is possible that CO11-1 was referring to the HCP as he had mentioned 'healthcare professionals' earlier in the same thread.

<sup>1107</sup> The rationale for this approach was that HCPs, FMEs and AMHPs are 'experts'. It should be noted that whilst this expertise may exist in relation to mental health (although not always), it does not extend to knowledge of the Code C requirements – see sections 6.4.3 and 6.5.3.

<sup>1108</sup> See also NAAN, *There to Help* (n 39) Paper A 5.

<sup>1109</sup> There were even occasions where the custody staff felt that the detainee or suspect's condition was severe enough to warrant a mental health assessment yet the HCP, FME or

for a suspect who had mental health problems and was found was masturbating on CCTV-monitored cell, however, when the HCP stated that an AA was unnecessary, CO15-1 agreed and decided not to call one.<sup>1110</sup>

Taking a particularly cynical view one could argue that, by relying on HCPs (and to an extent FMEs and AMHPs, where available) custody officers may be able to avoid blame for any errors in judgment, particularly where questions are raised at court.<sup>1111</sup> Alternatively, the custody officer may genuinely feel that the HCP, FME or AMHP is better-placed to make these decisions, particularly as they were viewed as ‘experts’ compared to the custody officer’s minimal and often dubious knowledge.

#### 7.2.4 Leaving it up to the suspect

Similarly, the custody officer may avoid blame by leaving the decision with the suspect – if the suspect ‘agrees’ that an AA is not needed then one will not be provided.<sup>1112</sup> Custody officers, such as CO10-1, said they would ‘*speak to the [suspect] and ... say, “Well, I initially thought that you needed an [AA]. Did you need one in the past?” and they say, “No”. I say, “Well, I thought you need one but the nurse says no. Are you happy to go ahead without one?”*’<sup>1113</sup> This approach could be adopted where;

*[I]t’s either way and you say, “Do you want an [AA]?” and they say, ‘No’ ... if they’re confident in themselves, who are we, ‘There you are, this person you don’t know, they’re going to sit with you’ ... ‘I don’t want this person in my interview. Don’t know them, don’t want them’. We’ve got to go with what these people want. You can’t just force an [AA] on someone.*<sup>1114</sup>

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AMHP felt that no AA was required. Custody officers accepted the views of the HCP, FME or AMHP.

<sup>1110</sup> Interaction 89, Site 1.

<sup>1111</sup> See later in this chapter. See also sections 8.5 and 8.6.

<sup>1112</sup> This could potentially negate any admissibility contest at trial or may mitigate the custody officer’s responsibility – see Chapter 8, particularly sections 8.6, and specifically 8.6.3, and 8.7.

<sup>1113</sup> CO10-1 Interview. See also sections 7.2.3 above and 7.3.2 below.

<sup>1114</sup> CO14-1 Interview.

Custody officers seemed to suggest that it was unfair to go against that suspect's wishes if the suspect felt that an AA was not required. It is unclear whether they explain the benefits of having an AA and whether the suspect is making an informed decision.<sup>1115</sup> The AA was seen as something thrust upon the suspect, for example, '[t]hey might live independently; they might have a job and everything else. So who are we to decide almost, "Now you need someone else to tell you what to do"'.<sup>1116</sup> Perhaps more insidiously, custody officers could also discourage suspects from obtaining an AA:

*CO14-1 described an 'incident' earlier that day when he was informed by the suspect that he could not read or write but later, when he advised him that he would have to obtain an AA for him and that would lead to a delay, the suspect changed his mind and said that he could, in fact, read and write. He was then said to illustrate this by reading the 'Notice to Detained Persons' aloud.*<sup>1117</sup>

### 7.3 Calling the AA: persuasive factors

There are occasions, however, where it is felt that an AA is not necessarily needed, or may not be needed, but one is called anyway. Within the following section I will explore the persuasive factors influencing implementation of the AA safeguard.

#### 7.3.1 Requested by the solicitor

An AA may be sought where requested by a legal representative.<sup>1118</sup> As noted in Chapter 6, a solicitor or other legal representative may be used as an informant. Yet, the solicitor or legal representative was not merely a means by which to identify vulnerability; more importantly a

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<sup>1115</sup> That they would do so seems unlikely. It did not see such an explanation offered during my time in custody. Rather, there were occasions when the suspect was discouraged from obtaining an AA for reasons of, for example, efficiency or the suspect's capability.

<sup>1116</sup> CO1-1 Interview.

<sup>1117</sup> Interaction 14, Site 1. Of course, being able to read something verbatim does not mean that one understands – or understands the significance of – it.

<sup>1118</sup> Palmer and Hart also found that an AA might be obtained upon a solicitor's request – Palmer and Hart (n 76) 62-64.

request by the solicitor could often be a motivating factor for implementing the safeguard. Custody officers may be encouraged to implement the AA safeguard *‘if a solicitor says [that the suspect needs an AA because] there’s always then going to be an issue at court’*.<sup>1119</sup> Initially, attempts may be made to placate the legal representative and explain that an AA is not required. If the solicitor or legal representative insists, an AA will be obtained. Again, a balancing act is performed – the disadvantages of failing to obtain an AA (questions of admissibility at a later stage or time taken to justify the decision) will outweigh the disadvantages of getting an AA (a delay to the investigation and time taken to call and secure an AA).<sup>1120</sup>

The solicitors request may, however, be at odds with the medic’s advice – *‘[t]he solicitor will go for consultation and...the [HCP] says they don’t need an [AA] and then the solicitor says, “I think he needs an AA”’*.<sup>1121</sup> A solicitor’s request may not necessarily result in the implementation of the safeguard in such an instance. For example, at interview one custody officer expressed his reluctance to call an AA where the solicitor requests one but the HCP, FME or AMHP deems it unnecessary:

*If ...the solicitor flags it up saying, ‘I think we do need an [AA] here’, I say ‘Well, your client’s been assessed and it’s deemed not necessary’. If I’m going to go over and above the head of the medical professional, it puts in jeopardy and queries their position within the organisation and justice system. If we’re not going to be bound by the decisions that they make then why are they here?’*<sup>1122</sup>

This custody officer’s approach, according to the above quote, would be to explain why the suspect does not require an AA – medical advice is the ruling authority on this matter. Moreover, the purpose of the HCP, FME or AMHP is to provide authoritative decisions that

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<sup>1119</sup> CO10-1 Interview. The latter part of the quote is significant – see Chapter 8, particularly section 8.6.3.

<sup>1120</sup> See also Chapter 8.

<sup>1121</sup> CO12-1 Interview.

<sup>1122</sup> CO13-1 Interview. This quote is also interesting as it suggests that this custody officer feels ‘bound’ by the advice of the HCP, FME or AMHP – see section 6.5.3.



oblige the custody officer to adopt a particular stance – their advice should not be challenged, especially not on the basis of a request by a solicitor.

### 7.3.2 Previous AA

Whilst Code C does not dictate such an approach, it makes sense that, unless the suspect's condition has improved so dramatically that he or she is no longer 'AA vulnerable', the use of an AA on a previous occasion could dictate that one should be used in the present situation.<sup>1123</sup> In addition to this method being used as to aid identification, it may also be used as a persuasive factor when implementing the AA safeguard.<sup>1124</sup> As discussed in Chapter 6, the use of the AA on previous occasions indicates that the suspect may require an AA on the present occasion, particularly for those newer to the job.<sup>1125</sup> One custody officer did, however, express disagreement with this approach (whilst admitting that he uses this method himself):

*I think that's a bit of a copout really, looking at previous records because you should, I think, base your decision on what you see in front of you at the time. And to me, if you ask a person, 'When you've been interviewed at the police station at the past, have you had an [AA]?', that's almost saying, 'I think you should have one' ... I'm not saying that I haven't done that myself but looking at that situation logically, if you're asking that question then clearly the question is going through your head that you suspect that this person should have one... That's the reason why you're asking them if they had one in the past. And even if they say, 'No', that doesn't change the fact that you're looking at them now thinking, 'This person perhaps is the kind of person that would benefit from an [AA]'.<sup>1126</sup>*

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<sup>1123</sup> Or conversely he or she was 'fine' on previous occasions but on a particular occasion his or her condition had deteriorated. This was highlighted by CO24-2 at interview, 'They can come in two days later on, if they've had a relapse or suffering a bit more...something's affected them, perhaps being arrested two days earlier has had an effect on them, [then] they may then need that [AA] to make them aware, to look after them, to make sure they know what is going on'. The use of a previous AA links-in with using history as a means to identify vulnerability, as discussed in Chapter 6.

<sup>1124</sup> As noted earlier in this chapter and elsewhere in the thesis, there are overlaps between definition, identification and implementation.

<sup>1125</sup> In particular, CO31-2 and CO20-1.

<sup>1126</sup> CO8-1 Interview.

As noted in Chapter 6, custody officers could adopt the previous AA approach for, conversely, *not* applying the AA safeguard, i.e. where the suspect did not have an AA previously, this would act as an indication that one is not needed currently. The previous AA serves merely as an indicator<sup>1127</sup> or may increase the likelihood of an AA being used again.<sup>1128</sup> However, it was recognised that the previous AA approach improved efficiency, particularly because with '[s]ome people, you just know, they've been in custody that many times, you just know... that they always have an [AA]. So you just get one because it's quicker to do it now rather than to go right round the houses only to come back to the same answer'.<sup>1129</sup>

### 7.3.3 Seriousness of the case

Custody officers also stated that they assess how serious the offence is<sup>1130</sup> and what may be required of the suspect when questioned.<sup>1131</sup> An AA may not be obtained where the custody officer feels that the case is straightforward, i.e. where the offence is minor, where there could be a clear admission, where the suspect was caught red-handed, or where investigation would result in no further action, a caution or a fine.<sup>1132</sup> A suspect who is alleged to have committed murder or rape may be more likely to be provided with an AA than someone who is suspected of, for example, shop-theft.<sup>1133</sup> The reason given by custody officers was that the line of

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<sup>1127</sup> As stated by CO1-1 at interview.

<sup>1128</sup> As stated by CO33-2 at interview.

<sup>1129</sup> CO9-1 Interview.

<sup>1130</sup> Palmer and Hart found that custody officers were similarly motivated. They also found that this problem is 'compounded by judicial decisions which fail to scrutinise' the effectiveness of the safeguards – Palmer and Hart (n 76) 88 – see section 8.6.3 on this latter point.

<sup>1131</sup> Depending on the perspective this could be viewed as a crime control or due process consideration – see section 8.2. As I have indicated, however, the motivating factor is safeguarding the evidence. Robertson, Pearson and Gibb suggest that the seriousness of the offence could influence whether an AA was called – see Graham Robertson, Richard Pearson, and Robert Gibb, 'Police interviewing and the use of appropriate adults' (1996) 7 (2) *Journal of Forensic Psychiatry* 297.

<sup>1132</sup> As Choongh has noted, not all arrests result in prosecution. Sometimes individuals are arrested and detained as part of a social disciplinary objectives – see Choongh, *Policing as Social Discipline* (n 29).

<sup>1133</sup> Shop-theft was the most commonly cited 'straightforward' offence. These cases may not actually be 'straightforward' and it may be very easy for the suspect to make mistakes and incriminate him or herself, falsely or otherwise. Even those who have 'capacity' may make mistakes – see McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 70-71.

questioning would be more complex in a more serious case, the investigators may be more likely to ‘*tie the [suspect] up in knots*’,<sup>1134</sup> or there may be questions surrounding requisite mens rea. What custody officers fail to recognise, or choose to ignore, is that questions regarding mens rea may also be important for less serious offences. It is not, as McBarnet argues, that certain offences are uninteresting and unproblematic, it is instead that they are treated as such by the police, the courts, and the legal profession.<sup>1135</sup> Perhaps, more importantly, it is the court at which the case will be tried – if ‘*it was a case that was particularly serious and was going to end up being heard in the Crown Court and questions were going to be asked...*’<sup>1136</sup> then an AA could be called for a suspect who perhaps does not otherwise fit the ‘AA vulnerable’ requirements, such as someone with mild depression. Yet, someone with bipolar disorder who is also in contact with Disability Services may not be provided with an AA if it is felt that the matter is ‘straightforward’, as this observation highlights:

*The suspect is in contact with Disability Services, has fits at night and suffers from bipolar disorder. The suspect has been arrested on suspicion of criminal damage. He reports that he is feeling anxious, has asthma and is on medication. CO3-1 places him on Level 3 observations and asks the HCP to assess him. CO3-1 feels that an AA was not necessary as it was a straightforward investigation (although the matter ‘has to be investigated as it is a domestic matter’). It was also felt that the suspect had been given many opportunities for voluntary interview but had refused. The HCP agreed with CO3-1, stating ‘I’m happy that he doesn’t need [AA], if you’re happy’. CO3-1 also felt that it would have been detrimental to keep the suspect in custody overnight for the purpose of getting an AA, when the AA would ‘contribute very little or nothing to the detained person’.*<sup>1137</sup>

The custody officer needs to consider the consequences of non-implementation and the potentiality for loss if questions are later asked:

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<sup>1134</sup> CO30-2 Interview.

<sup>1135</sup> See McBarnet, *Conviction* (n 576).

<sup>1136</sup> CO8-1 Interview.

<sup>1137</sup> Interaction 52, Site 1. A number of elements can be seen here such as the role of the HCP (see section 7.2.3 above) and the view that the AA could lead to a delay in detention (see section 1.3.1).

*Because for a shop-theft, if we didn't have an [AA] present and they went to court and at court they said, 'Actually, I'm not admitting to that now. I wasn't very well and they didn't have an [AA] for me'. The consequence is a shop-theft that you lose at court. GBH, murder, obviously it's the serious end. That, I think, we would be so heavily criticised that why we didn't have an [AA] present for those offences... If it's at the higher end, you should have an [AA]. Just to safeguard, if not to negate any defence at court, but also to ensure that their needs are met whilst they're at the custody suite.'*<sup>1138</sup>

*Basically it's safeguarding them in that respect because obviously in the interview situation, if I was to ask you 'You went into the shop, what did you do?', you say 'Well, I went into the shop, picked up this, put it in bag and walked out', 'Did you pay for it?', 'No', 'Did you attempt to pay for it?', 'No', 'Had you got means to pay for it?', 'No'. What else am I going to ask you? Whereas say a very serious offence, you're going to be asking a lot more about background, relationships between yourself and the victims, there's an awful lot more that can trip people up on, be likely to contradict themselves which, those contradictions, those mistakes that they might make, could then be used in court and that could then sway the case one way or the other with the jury. But say, with the basic theft, if you've got capacity you're not going to trip yourself up, are you?'*<sup>1139</sup>

#### 7.3.4 Benefit to the suspect

Within a serious case, the AA may be more beneficial to the suspect, as the above quotation from CO30-2 suggests. Further, CO28-2 (above) whilst citing the need to safeguard the evidence, also highlights that the AA safeguard may also '*ensure that their needs are met whilst they're at the custody suite*'.<sup>1140</sup> Whilst this may have been an after-thought or added simply for my benefit, it may suggest that custody officers, through implementing the safeguard, want

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<sup>1138</sup> CO28-2 Interview. This quote illustrates a partial misunderstanding of the admissibility rules.

<sup>1139</sup> CO30-2 Interview.

<sup>1140</sup> CO28-2 Interview.

to protect suspects and ensure that the best outcome is sought for the suspect.<sup>1141</sup> It could suggest that custody officers *do* wish to protect suspects, particularly those who they feel *need* to be protected such as those exhibiting childlike qualities or those with no experience of custody.<sup>1142</sup> These notions of fairness seemed to extend only to those deemed worthy of protection.

*It's all about making sure that we do it fairly, isn't it? If somebody's in custody and they're vulnerable, yes they might have committed a crime but if we're going to investigate that crime, we've got to be fair to everybody. So there's no point getting an interview done with somebody and the interview's not fair, that they feel pressurised in the interview, you know they haven't got any support.*<sup>1143</sup>

In more serious cases, the absence of an AA, according to the custody officer, is more unfair to the suspect and puts him or her at a greater disadvantage.<sup>1144</sup> As noted above, however, less serious offences can often be problematic, in part because they are treated as unproblematic. Although the punishment may not be as severe, as Feeley notes, the process can be the punishment.<sup>1145</sup> A suspect in custody under suspicion of a 'low level' offence may be easily persuaded or tricked into confessing<sup>1146</sup> or may be encouraged to deal with the matter outside of the courtroom. It is perhaps not so much that the suspect under suspicion of a 'low level' offence will not face disadvantage and perhaps more so that the police will not face scrutiny.

#### 7.4 Comparative decisions: young suspects and risk

Young suspects and vulnerable adult suspects are included under the Code C guidance on vulnerability and the AA safeguard.<sup>1147</sup> Yet, custody officers do not necessarily view young suspects as vulnerable. Rather:

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<sup>1141</sup> This could be due process (broadly conceived) – see section 8.2.2.

<sup>1142</sup> See section 5.4.3.

<sup>1143</sup> CO9-1 Interview. This quote also suggests the presumption of guilt – see section 8.2.1.

<sup>1144</sup> See Chapter 8.

<sup>1145</sup> Feeley (n 173).

<sup>1146</sup> See McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 70-71.

<sup>1147</sup> See section 1.3.

*A lot of the juveniles are effectively wrong people who have done something and basically they want their parents here out of choice.... the difference with the juvenile is that they're not vulnerable necessarily unless they're vulnerable juveniles. But if you take a normal juvenile, just by virtue of their age, they are deemed vulnerable by law, but they're not necessarily vulnerable by nature.*<sup>1148</sup>

One could therefore suggest that the AA safeguard is implemented for young suspects in the same manner that it is for adults – those who are not, in the eyes of the custody officer, recognized as vulnerable do not benefit from the presence of the AA. But this is not the case – custody officers, whilst disputing the vulnerability of many young suspects, nevertheless implement the AA safeguard:

*There are juveniles that you wonder whether or not really do need somebody sat with them. But we have no discretion on that. Adults, you do have that subjective discretion of whether you think they need one or not. And it purely comes down to the individual custody sergeant ... that makes that decision.*<sup>1149</sup>

As will be discussed later, the AA safeguard for young suspects has been placed on a statutory footing but such a requirement does not yet exist in relation to vulnerable adults. Discretion would also be more difficult to exercise in relation to young suspects even if such a statutory requirement did not exist as discretion cannot be read into the phrase '17 or under' (whereas the terms 'mentally vulnerable' and 'mentally disorder' can be subject to interpretation).<sup>1150</sup>

In addition to making decisions regarding the AA safeguard upon booking-in, custody officers must also decide upon an appropriate care plan for the detainee whilst he or she is in custody. As with vulnerability, risk can be identified at least in part by the risk assessment tools.<sup>1151</sup> Decisions should be taken in accordance with the guidelines set out in the College of Policing's APP on Detention and Custody.<sup>1152</sup> The detainee can present a risk to self, through self-harm,

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<sup>1148</sup> CO18-1 Interview.

<sup>1149</sup> CO3-1 Interview.

<sup>1150</sup> See section 8.6.1.

<sup>1151</sup> A number of the methods discussed in Chapter 6 apply here.

<sup>1152</sup> College of Policing, *APP: Detention and Custody* (n 153).

suicide, or physical ill health or injury, and/or drug or alcohol addiction; or to others, through violent or aggressive behaviour or possible transmission of infectious diseases.<sup>1153</sup> Depending on the risk assessment, some detainees will require hourly visits, some need visited every thirty minutes; some will need to be roused, others merely checked; some will be monitored by way of CCTV, some will be largely left alone in the cell and a small minority will require constant observation (a police officer will sit by the door of the cell).<sup>1154</sup> For CO30-2, as with other custody officers, the main aim within custody was to ensure that *'everybody that comes in leaves alive'*.<sup>1155</sup> Further, compliance with the risk procedures takes precedence over compliance with PACE – previously the aim was *'to make sure that we didn't lose investigations and that things were done properly'*<sup>1156</sup> whereas *'now ... the greater focus and greater priority is care of these people whilst they're in detention'*.<sup>1157</sup> This was echoed by CO23-2 who, although not interviewed, discussed the importance of risk during my observations. He explained that 'Safer Detention' was the main priority *'these days'* as *'no one wants a death in custody'* and said that whilst there should be an attempt to avoid a breach of PACE, it is *'not the end of the world as the worst that happens is that the evidence is excluded at court'*. He compared this to a death or injury in custody which could *'result in the officer losing his job'*.<sup>1158</sup>

The obsession with risk was evident during observations and often custody officers were so preoccupied with gaining an accurate picture of risk that they were (perhaps counterproductively) dogged in their approach:

*The suspect was arrested for threatening a police officer. He was spoken to by a police and community support officer in relation to traffic-related offences, upon which he was alleged to make threats of violence. He disclosed, during the risk assessment, that he suffered from high blood pressure, depression, vertigo, suicidal thoughts, and is alcohol-dependant. CO3-1 proceeded to ask him about his suicide attempts, such as*

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<sup>1153</sup> *ibid.*

<sup>1154</sup> See College of Policing for more information on the level of observations – *ibid.*

<sup>1155</sup> CO30-2 Interview.

<sup>1156</sup> CO2-1 Interview.

<sup>1157</sup> *ibid.* The pertinence of risk within policing has been noted elsewhere – see Richard V Ericson and Kevin D Haggerty, *Policing the Risk Society* (Clarendon Press: 1998).

<sup>1158</sup> Interaction 2, Site 2.

*when the last suicide attempt occurred and the method by which he attempted to commit suicide. After some questioning, it was clear that the suspect was getting upset. He was unable to answer and so CO3-1 proceeded to give examples ('Did you try to strangle yourself? Overdose? Cut yourself?'). The suspect broke down and started to cry. CO3-1 then told the suspect that he would give him time 'to try to compose himself'. After a couple of minutes, CO3-1 resumed his questioning and the suspect answered some of the questions (albeit uncomfortably). He stated that he had suicidal thoughts almost daily. He refused legal advice and was not provided with an AA. After the suspect was taken to his cell, CO3-1 came over to me and made attempts to justify his persistent questioning. He recognised that the suspect began to cry because of a result of 'how I spoke to him' but he said that this was necessary in order to get this information.<sup>1159</sup>*

Custody officers receive annual training on 'Safer Detention',<sup>1160</sup> and this particular element of the job features heavily in the initial custody officer training course. By contrast, there is no annual training on vulnerability for the purpose of the AA safeguard. Moreover, whilst custody officers thought this was covered during their initial training, they could not remember the content. The only exception to this was CO22-2 who was somewhat aware of the Code C definitions (he had recently trained new custody officers on their training course). Whilst custody officers can explain and appreciate risk, as with vulnerability, it can be difficult to identify. What matters is not that the custody officer *actually identifies* the risk but that he follows the steps in doing so, records the required information, and acts according to the information available:

*No amount of questions you ask on risk assessments are going to stop someone from fitting because they are withdrawing from alcohol or stop someone harming themselves because they suffer from schizophrenia and the voices are telling them to do it.... But the important thing is we do identify the people who are liable or at risk of doing that so we can put the control measures in place.<sup>1161</sup>*

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<sup>1159</sup> Interaction 104, Site 1.

<sup>1160</sup> ACPO (n 152). See also College of Policing, *APP: Detention and Custody* (n 153).

<sup>1161</sup> CO4-1 Interview.



The reason for adopting such an approach will be discussed in Chapters 8 and 9.

## 7.5 Concluding remarks

Within this chapter I have explored custody officer decision-making, addressing the various factors that can persuade or dissuade custody officers when deciding whether to implement the AA safeguard. These justifications may occur when the suspect is ‘AA vulnerable’<sup>1162</sup> – that is someone who presents as vulnerable, i.e. does not seem ‘normal’, behaves in a childlike manner and/or, and most fundamentally perhaps, does not understand what is happening – or ‘Code C vulnerable’ – that is someone who is mentally vulnerable or mentally disordered – and where the custody officer may be unable to disprove vulnerability through other means or they may be after-the-fact rationalisations. The custody officer may decide to leave the decision with someone else (an HCP, FME, or AMHP, or the suspect), may be influenced by the solicitor, or may take into consideration how efficient implementing the AA safeguard may be. The custody officer may also decide to implement the safeguard for a suspect in a serious case but may decide that someone suspected of, for example, theft does not need the support of an AA. Custody officers may avoid scrutiny for their decisions in a number of ways, as discussed above. A final question remains – what influences custody officers when they are defining, identifying and making decisions on vulnerability? This will be discussed in the following two chapters.

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<sup>1162</sup> See section 5.4.

## CHAPTER 8: COMPREHENDING THE CUSTODY OFFICER APPROACH

*The whole subject of the triangle of criminal, copper and the courts is so intricate, practically and philosophically, that it can't possibly be explained in a short answer.*<sup>1163</sup>

### 8.1 Introduction

This thesis has been mainly concerned with a 'gap' between the law in books and the law in action – a 'gap' between how vulnerability and the AA safeguard appear in legislation and guidance, and how this translates to the use of the safeguard in practice. A potential 'gap' between the law in books and the law in action cannot be easily explained, rather the matter is much more complex and intricate, and there are numerous factors that may influence or partially explain why the AA safeguard can often be left unimplemented. The law is not static but is instead 'flexible and fluid',<sup>1164</sup> and whilst legal rules may be 'carefully prescribed... inevitably they cannot and perhaps should not provide a formulaic answer to the diverse and idiosyncratic range of circumstances and settings that the police encounter and in which the police are called on to make decisions and to act'.<sup>1165</sup> Factors such as how custody officers define vulnerability, how custody officers identify vulnerability and why they implement the safeguard may help explain why this 'gap' appears. But the issue is perhaps more complex than that – one must try to understand *why* custody officers, for example, define vulnerability for the AA safeguard (in the manner set out in Chapter 5), identify vulnerability according to their own observations and largely discount information provided by the suspect (as discussed in Chapter 6), and allow certain factors such as the seriousness of the offence to persuade them when deciding to implement the AA safeguard (as explored in Chapter 7). Thus far, although

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<sup>1163</sup> Colin MacInnes, *Mr Love and Justice* (Allison and Busby 1980) 98.

<sup>1164</sup> Layla Skinns, 'The role of the law in policing: the well-trodden path, the road less travelled and the road ahead' (2012) *Cahiers politiestudies* 225, 226.

<sup>1165</sup> *ibid.* I would agree with this in part but in reference to the AA safeguard, as will become apparent, I believe there is a difference between positive and negative discretion. Further, in relation to the AA safeguard, I believe that the police use discretion to take something away from someone.

numerous criminal justice, legal, or socio-legal studies have been conducted within custody,<sup>1166</sup> a study is yet to examine vulnerability and the AA safeguard with such nuance.<sup>1167</sup>

Whilst the criminal justice system can be analysed through the use of theory, interactions within the process are multi-faceted and complex. As such, any one theory can therefore only go so far as to describe reality. What's more, not all parts of the criminal process are influenced by the same factors or affected by the same actors. The criminal process is, as the term implies, a *process*. Custody officers are actors at one point within this process; they are important actors but actors nevertheless. Custody officers can make choices and thus may be considered to have agency. Such choices can be motivated by certain values, be that personal, occupational, managerial, moral, or legal (I will return to this Chapter 9). But there is also a question as to how far custody officers may be influenced by the broader structures within which they work and within which society operates. For example, they may be impacted-upon by the socio-political<sup>1168</sup> and the historical.<sup>1169</sup> Such factors do not completely dictate cultural knowledge and nor does cultural knowledge completely dictate practice, and police officers may be viewed as having 'an active role to play in developing, reinforcing, resisting and transforming cultural knowledge'.<sup>1170</sup> In essence, they may be viewed as active rather than 'passive carriers of police culture'.<sup>1171</sup> There is, however, ongoing debate in 'sociological theory and research'<sup>1172</sup> regarding how individuals shape the world (agency) or how far 'society and material constraints [shape the] behaviour and beliefs'<sup>1173</sup> of an individual. As should be evident from

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<sup>1166</sup> These have been referenced throughout this thesis. See also, for example, Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002).

<sup>1167</sup> In addition to those cited elsewhere in this thesis, see also Harriet Pierpoint, 'Quickening the PACE? The Use of Volunteers as Appropriate Adults in England and Wales' (2008) 18 *Policing and Society* 397.

<sup>1168</sup> See Skinns, *Police Custody* (n 116).

<sup>1169</sup> See Janet BL Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press 1997).

<sup>1170</sup> *ibid* 74-5.

<sup>1171</sup> *ibid*.

<sup>1172</sup> Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998) 39.

<sup>1173</sup> *ibid*.

this chapter, this thesis recognises that both agency and structure feed into custody officer decision-making.<sup>1174</sup>

Within this chapter I will explore a number of theories relating to criminal justice practice and, more specifically, the theories relating to policing, before addressing where characteristics of these theoretical constructs appeared in the data. In sum, I am exploring both the theory and the reality of the implementation of the AA safeguard, from the perspective of the custody officer. The aim of this discussion is not to provide a full review or critical appraisal of the theory, rather it is to explore it in sufficient depth so that the custody officer approach to vulnerability and the AA safeguard can be explained. In the latter part of this chapter I will analyse the data, drawing attention to the theories where appropriate. Before doing so I will explore the theory, resting largely on Packer's due process and crime control models<sup>1175</sup> and the theories discussed by Dixon.<sup>1176</sup> Some overlap exists between Dixon's discussion and Packer's work – this is testament to the overwhelming influence that Packer's models have had on how we understand the criminal justice system. Packer's models have been developed, celebrated, and critiqued; whilst such development is significant when addressing specific aspects of the criminal process (or wider justice system), it is perhaps less so in relation to this particular topic under investigation. Thus, with the exception of the bureaucratic model(s), these other theories will not be discussed herewith.<sup>1177</sup>

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<sup>1174</sup> Of all the theoretical insights, I find McConville, Sanders and Leng's social constructionism most convincing.

<sup>1175</sup> Packer, *The Limits of the Criminal Sanction* (n 193). Packer initially proposed these models in initially in Herbert L Packer 'Two Models of the Criminal Process' (1964) 113 (1) *University of Pennsylvania Law Review* 1.

<sup>1176</sup> Dixon (n 23).

<sup>1177</sup> For an exploration of the various criminal justice theories see Michael King, *The Framework of Criminal Justice* (Croom Helm 1981). See also Choongh, *Policing as Social Discipline* (n 29) for a discussion of the social disciplinary model of policing. See Bottoms and McClean for a discussion of the liberal bureaucratic model – Anthony E Bottoms and John D McClean, *Defendants in the Criminal Justice Process* (Routledge 1976). In Chapter 9 I will explore a normative model proposed by Ashworth and Redmayne – see Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4<sup>th</sup> edn, OUP 2010). Whilst earlier drafts of this thesis explored Sanders and Young's 'enhancement of freedom model', I have decided not to explore it within this thesis – see Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4<sup>th</sup> edn, OUP 2013). Sanders and Young's model combines Packer's models with the fundamental human rights position and attempts to reconcile the conflict between differing aims, values and interests within the criminal justice system. Sanders and Young argue that the primary purpose of the criminal law is to promote and enhance freedom but there nevertheless

## 8.2 Modelling the criminal process

Packer's models of the criminal process, which have informed much of criminal justice theoretical discourse, represent two conflicting value 'choices' – crime control and due process. The criminal justice system may be more heavily influenced by one value or the other or may alternatively combine both to varying degrees.<sup>1178</sup> Crime control and due process, rather than being dichotomous, share some 'common ground'<sup>1179</sup> – four assumptions, which provide the analytical framework within which the models are based. These four assumptions are as follows – how criminal conduct is defined is distinct from the identification and handling of criminals; the criminal process is invoked by those furnished with the responsibility to do so; law enforcement officials must be subject to scrutiny and control; and the alleged criminal is an independent actor who can compel the 'operators of the process' to prove to the independent adjudicator that the defendant is guilty.<sup>1180</sup>

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remains a controversial problem of allocation. To resolve this, Sanders and Young propose that the aim, value or interest that best promotes freedom should be prioritised – Sanders, Young and Burton (n 1177) 48. The model has been subject to some criticism, particularly for being utilitarian (although Sanders and Young prefer to think of it as 'distribution-sensitive consequentialism' – Sanders, Young and Burton (n 1177) 49). It has also been criticised, most notably, by Ashworth and Redmayne who argue that rights theories are anti-consequentialist in nature and thus the human rights approach may be herewith incompatible with 'freedom' (Ashworth and Redmayne (n 1177) 46). The model, as Ashworth and Redmayne also note, would involve constant 'freedom-based calculations' (Ashworth and Redmayne (n 1177) 47) and, whilst disputed by Sanders and Young, would therefore be difficult to employ and empirically test – Ashworth and Redmayne (n 1177) 47. Also problematic is that 'freedom' remains regrettably under-developed and the term is also highly-contestable and open to interpretation – Ashworth and Redmayne (n 1177) 47. Other criticisms have been levelled at the model: it uses Packer's typology in a bipolar manner, imbuing it dichotomous quality that Packer did not intend it to have – Ralph Henham, 'Human Rights, Due Process and Sentencing' (1998) 38 (4) *British Journal of Criminology* 592, 593; and it attempts to fit every issue in the framework like a square peg into a round hole – Ralph Sandland, 'Review of Criminal process: an evaluative study' [1995] *Criminal Law Review* 679, 679. The promotion of freedom may also be incompatible with the AA safeguard. It is these criticisms outlined, coupled with the potential incompatibility of the freedom model with the contention raised in Chapter 9 (i.e. the reconceptualisation of vulnerability), that lead to the theory's exclusion within this thesis.

<sup>1178</sup> In reality, a system will generally display some compromise between the competing demands. Packer did not propose that either of these systems were the ideal nor did he intend that either model correspond solely with any particular criminal process.

<sup>1179</sup> Packer, *The Limits of the Criminal Sanction* (n 188) 154-57.

<sup>1180</sup> *ibid* 157.

### 8.2.1 Crime control

The crime control model sees repression of crime as the primary function of the criminal process. By repressing crime, law and social control can be reinforced. In order to do so, the system must achieve a high percentage of apprehension and conviction and thus must operate efficiently at all stages (detection, apprehension, prosecution, conviction and disposal). To ensure efficiency, a high number of offenders are processed using limited resources.<sup>1181</sup> This in turn requires informality and a standard, routinised procedure. Judicial processes are shunned in favour of extra-judicial processes, as are ‘ceremonial rituals’<sup>1182</sup> and legal challenges.<sup>1183</sup> Instead, quality control is left largely to the police who are trusted to perform their tasks. The prosecution is also largely trusted as they can, on the basis of their administrative expertise, effectively and efficiently ‘screen out’ the innocent at an early stage of the investigation. Early extra-judicial screening is preferred over courtroom screening (through cross-examination) due to its efficiency.<sup>1184</sup> The system operates on the presumption of guilt – efficient screening ensures that those who are probably guilty progress quickly through the process.<sup>1185</sup> Whilst the crime control model places overwhelming trust in the police and prosecution, it also accepts the inevitability of mistakes. However, it tolerates this so far as it allows the system to meet its ultimate aim.<sup>1186</sup> What’s more, minimal safeguards are implemented to promote confidence in the system and support the deterrent efficacy of the criminal law.<sup>1187</sup>

Whilst Packer cites numerous examples of the model in operation, for the purposes of this discussion it is sensible to limit discussion to detention and interrogation.<sup>1188</sup> In a crime control system, the police are provided with the opportunity to interrogate the suspect, who is viewed

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<sup>1181</sup> *ibid* 158.

<sup>1182</sup> *ibid* 159.

<sup>1183</sup> *ibid* 159, 229-30.

<sup>1184</sup> *ibid* 159.

<sup>1185</sup> *ibid* 160. Packer notes that is not the opposite to the presumption of innocence, a ‘normative and legal’ concept fundamental to the Due Process model – see Packer, *The Limits of the Criminal Sanction* (n 188) 162.

<sup>1186</sup> *ibid* 164-65.

<sup>1187</sup> *ibid* 165.

<sup>1188</sup> See *ibid* 186-90 for further discussion on crime control in practice.

as ‘the best source of information’.<sup>1189</sup> Timing and time are crucial – to ensure that the suspect remains psychologically vulnerable, he or she is not afforded an opportunity to rally outside forces<sup>1190</sup> and, whilst indefinite detention is not permitted, the rules should be flexible and should allow the police to consider the relevant factors such as the gravity and complexity of the crime and the ingenuity of the suspect. The suspect should not, without justification, be held incommunicado and, whilst his or her family are allowed to know of his or her whereabouts, they are prevented from conversing as they may impede the police investigation.<sup>1191</sup> Although rules allowing coercive tactics, illegal arrests, and unreasonable searches may be forbidden, illegally obtained evidence would not be excluded nor would a conviction be quashed if the rules were breached.<sup>1192</sup> Moreover, whilst the police are discouraged from coercing a confession from an innocent suspect, he or she is required to prove that the confession was elicited as such and is therefore unreliable.<sup>1193</sup> In sum, crime control resembles an ‘assembly-line conveyor belt’<sup>1194</sup> that carries a continuous stream of standardised cases to the workers who stand at their assigned station performing the task to bring the product closer to completion.

### 8.2.2 Due process

In contrast to the crime control assembly line conveyor-belt, due process resembles an obstacle course where ‘each of [the] successive stages [are] designed to present formidable impediments to carrying the accused any further along the process’.<sup>1195</sup> A due process system is distrusting of the state, casts doubt on the morality and utility of the criminal sanction, and places the individual at the forefront of the process.<sup>1196</sup> The complexity of the due process ideology renders it difficult to define and as such a contrast with crime control serves as a useful starting point. Whilst due process does not oppose the repression of crime,<sup>1197</sup> it queries the crime

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<sup>1189</sup> *ibid* 187.

<sup>1190</sup> For further discussion on the impact of external factors on confession see Gudjonsson, *The Psychology of Interrogations* (n 362) ch1.

<sup>1191</sup> Packer, *The Limits of the Criminal Sanction* (n 188) 188.

<sup>1192</sup> *ibid* 167-68.

<sup>1193</sup> *ibid* 189.

<sup>1194</sup> *ibid* 159.

<sup>1195</sup> *ibid* 163.

<sup>1196</sup> *ibid* 165-66, 170-71.

<sup>1197</sup> Rather, it welcomes it.

control method. It is also at odds with crime control in relation to the reliability of fact-finding processes – where crime control credits the ability of the police and prosecution to operate within an informal environment (allowing remit for case construction), due process casts doubt on this assertion. Instead it prefers adjudicative, adversarial, formal fact-finding processes, which afford the accused with a ‘full opportunity’<sup>1198</sup> to examine the case against him or her and to put forward his or her submissions in front of a publicly heard, impartial tribunal.<sup>1199</sup> Moreover, all decisions must be open to scrutiny and challenge. In its purest form, this would leave the opportunity for appeal open, provided there is an allegation of factual error – due process does not demand finality.<sup>1200</sup> Furthermore, absolute efficiency is rejected when it ‘demands short-cuts around reliability’<sup>1201</sup> and the opportunity for mistakes must be minimised, prevented or eliminated to the greatest extent possible. Given the resources available, this would clearly lead to a reduction in quantitative output<sup>1202</sup> suggesting that fewer suspects and defendants are processed through the system.

Given the ‘coercive, restricting and demeaning’<sup>1203</sup> nature of the criminal process and the potential loss of liberty, the due process model permits a reduction of efficiency in order to protect the individual from state oppression.<sup>1204</sup> Moreover, in such a system the state must prove its case against the accused beyond reasonable doubt, in accordance with the procedures proscribed by law and by the authorities acting within their prescribed power to do so.<sup>1205</sup> A key tenet of the due process system is the presumption of innocence and, even where factual guilt has been established, the system requires that legal guilt be established only where the rules and the ‘integrity of the process’<sup>1206</sup> are adhered to.<sup>1207</sup> These rules do not have a

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<sup>1198</sup> *ibid* 164.

<sup>1199</sup> *ibid* 163-64.

<sup>1200</sup> *ibid* 164.

<sup>1201</sup> *ibid* 165.

<sup>1202</sup> *ibid* 163.

<sup>1203</sup> *ibid* 165-66.

<sup>1204</sup> *ibid*.

<sup>1205</sup> *ibid* 167.

<sup>1206</sup> *ibid* 166.

<sup>1207</sup> The case must be held in an appropriate venue by a tribunal with the requisite jurisdiction to make that finding of guilt, the maximum time in which to conduct the proceedings must not have been surpassed, the defendant must not have been convicted or acquitted for the same or similar offence previously, and he or she must not fall into a category of individuals who cannot be held liable for their actions – see Packer, *The Limits of the Criminal Sanction* (n 193) 166.



connection with factual guilt but can have an impact upon whether the accused is determined legally innocent.<sup>1208</sup> These protective rules also extend to evidentiary barriers and, as such, where evidence is illegally obtained, the factually guilty would be released even where their conviction would stand without such evidence. This approach serves as a penalty to those who breach the rules and thereby induces conformity.<sup>1209</sup> Moreover, as a fair trial requires equal justice, the state must ensure that financial incapacity does not prevent the accused from submitting an effective defence.<sup>1210</sup> Due process is essentially a negative model, placing limits on the exercise of state power.

These limits can be illustrated through Packer's example of detention and interrogation under a due process system. Firstly, for an arrest to be valid it must be based upon 'probable cause to believe that the suspect has committed the crime'.<sup>1211</sup> Arrests are made so that the suspect may answer the case against him or her, not for the purposes of case construction.<sup>1212</sup> Secondly, he or she must be brought before a magistrate 'without unnecessary delay'<sup>1213</sup> and given an opportunity to contest the legality of the arrest.<sup>1214</sup> During the period between arrest and presentation before the magistrate, the police cannot interrogate the suspect.<sup>1215</sup> As soon as an arrest is made, the suspect must be told his or her rights, including the right to remain silent and the right to legal counsel.<sup>1216</sup> Self-incriminating statements are excluded if, during the period between which the suspect is arrested and brought before a magistrate, the police failed to inform the suspect of his or her rights; questioning took place before he or she was informed of his or her rights (unless he or she expressly waived them); if the confession was given after exceeding the period of necessary delay; or if the confession was produced as a result of

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<sup>1208</sup> *ibid.*

<sup>1209</sup> *ibid* 168.

<sup>1210</sup> *ibid* 169-70.

<sup>1211</sup> *ibid* 190.

<sup>1212</sup> This can be contrasted with the crime control model. See McConville, Sanders and Leng, *The Case for the Prosecution* (n 18).

<sup>1213</sup> Packer, *The Limits of the Criminal Sanction* (n 188) 190.

<sup>1214</sup> *ibid.*

<sup>1215</sup> *ibid* 190-91.

<sup>1216</sup> *ibid* 191.

coercion.<sup>1217</sup> Rather than focusing upon reliability, these rules place a burden on the state to compile its own case whilst providing the privilege against self-incrimination.<sup>1218</sup>

### 8.2.3 The utility of Packer's models

Amongst other things,<sup>1219</sup> Packer's work has been criticised for failing to consider the relationship between crime control and due process<sup>1220</sup> and the impact that factors such as speed may have internally on both values.<sup>1221</sup> Moreover, law enforcement is not the only source of crime control – crime control may also occur through social and economic factors and resource management in the form of targets, performance indicators, and bureaucracy.<sup>1222</sup> Packer has also been criticised for failing to resolve some of the conflicting values within the due process model.<sup>1223</sup> Both the apparent dichotomy between the two models and the meaning of the term 'crime control' have also generated considerable debate.<sup>1224</sup> Thus, whilst Packer's models serve as useful heuristic tools through which to analyse the decisions made and actions taken within the criminal process,<sup>1225</sup> they are nevertheless limited in both their explanatory and exploratory power.

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<sup>1217</sup> *ibid* 169-70.

<sup>1218</sup> *ibid*.

<sup>1219</sup> Such as failing to consider 'victim-related matters' – see Ashworth and Redmayne (n 1177) 41. Further, Packer's model was criticised for conceptualising the criminal process as a 'battle' – see Griffiths (n 189). The models have, however, been commended for being 'remarkably durable' – Kent Roach, 'Four Models of the Criminal Process' (1999) 89 *Journal Criminal Law and Criminology* 671, 673.

<sup>1220</sup> Ashworth and Redmayne (n 1177) 40.

<sup>1221</sup> *ibid* 41. This will be discussed later in greater detail.

<sup>1222</sup> *ibid* 40-41.

<sup>1223</sup> Whilst he acknowledged a potential conflict, Packer 'shied away from the inescapable upshot that a model which is internally inconsistent is flawed' – see Stuart Macdonald, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11(2) *New Criminal Law Review* 257, 271.

<sup>1224</sup> See McConville, Sanders and Leng; Smith; and Duff – McConville, Sanders and Leng, *The Case for the Prosecution* (n 18); David J Smith, 'Case Construction and the Goals of the Criminal Process' (1997) 37 (3) *British Journal of Criminology* 335; Mike McConville, Andrew Sanders and Roger Leng, 'Descriptive or Critical Sociology: The Choice is Yours' (1997) 37 (3) *British Journal of Criminology* 347; and Peter Duff, 'Crime Control, Due Process and "The Case for the Prosecution"' (1998) 38 *British Journal of Criminology* 611.

<sup>1225</sup> Ashworth and Redmayne (n 1177) 39-40.

That said, his models have been commended for being an ‘astute and broad-minded attempt to conceptualise a change’<sup>1226</sup> and a ‘constitutional revolution’.<sup>1227</sup> The models can explain aspects of the criminal justice system in operation – for example, as Sanders, Young and Burton note, there are many due process obstacles within the English criminal justice system such as reasonable suspicion for arrest, detention authorised only if ‘necessary’, the right to legal advice, the granting of legal aid for defence and the evidentiary standard of proof beyond reasonable doubt.<sup>1228</sup> Crime control has also influenced the criminal process, particularly since the coming into force of the CJPOA 1994 whereby, inter alia, the English courts may draw adverse inferences from an accused’s silence.<sup>1229</sup> Moreover, detention is used as a method to achieve reasonable suspicion, stop-and-search is based on instinct rather than reasonable suspicion, and defendants are encouraged to plead guilty through plea-bargaining incentives.<sup>1230</sup> For McConville and Baldwin, the English criminal justice system fails to uphold even the minimal requirements of due process, instead favouring an ‘extreme demonstration’ of crime control where the ‘routine processing of cases assumes ascendancy over safeguarding individuals’ rights’.<sup>1231</sup>

PACE is a perfect example of due process and crime control values enshrined in one piece of legislation.<sup>1232</sup> After years of police malpractice, PACE was enacted, inter alia, to codify the protections for suspects that were inadequately contained within the Judges’ Rules.<sup>1233</sup> Not only did it increase powers for the police (crime control), it sought to balance them with safeguards for suspects (due process).<sup>1234</sup> One significant step towards due process was the

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<sup>1226</sup> Hadar Aviram, ‘Packer in Context: Formalism and Fairness in the Due Process Model’ (2011) 36 (1) *Journal of Law and Social Inquiry* 237, 242.

<sup>1227</sup> *ibid* 242.

<sup>1228</sup> Sanders, Young and Burton (n 1177) 27.

<sup>1229</sup> See CJPOA 1994, ss 34-37. See also Chapter 1.

<sup>1230</sup> Sanders, Young and Burton (n 1177) 27.

<sup>1231</sup> Mike McConville and John Baldwin, *Courts, Prosecution and Conviction* (Clarendon Press 1981) 153.

<sup>1232</sup> Although, as will be seen later, one should remain sceptical when assessing the efficacy of the ‘due process’ safeguards.

<sup>1233</sup> See section 1.2.

<sup>1234</sup> Rod Morgan, ‘Review Article: The Process is the Rule and the Punishment is the Process’ (1996) 59 *Modern Law Review* 306, 309. See also Mike Maguire, ‘Regulating the Police Station: The Case of the Police and Criminal Evidence Act 1984’ in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP 2002) 80.

replacement of ‘voluntariness’ with ‘reliability’<sup>1235</sup> – voluntary confessions could nevertheless be false whereas reliability addresses accuracy (whether true or otherwise) *and* police impropriety.<sup>1236</sup> Potentially the most significant development under PACE was the introduction of the role of custody officer<sup>1237</sup> and the requirement for a custody record. Whilst PACE has been seen to create ‘a new climate...in which there is strict adherence to the rules’,<sup>1238</sup> McConville, Sanders, and Leng have proposed that PACE has been ‘easily absorbed’<sup>1239</sup> by the police, thereby having a non-impact on police practices.<sup>1240</sup> More recent rhetoric has been steeped in crime control, with a desire to ‘rebalance’ the criminal justice system to favour the police, victims and witnesses<sup>1241</sup> whilst promoting efficiency and effectiveness. Despite such criticisms, Maguire noted that PACE has brought ‘much needed clarity where there had previously been no clear rules’.<sup>1242</sup>

#### 8.2.4 Bureaucratic model

King, in his work ‘The Framework of Criminal Justice’ explores six models of the criminal process, one of which will be discussed in this section.<sup>1243</sup> Within the bureaucratic model, rules are a central feature – individuals are approached with uniformity and impartiality, each being

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<sup>1235</sup> PACE, s 76.

<sup>1236</sup> Although, as noted in Chapter 4, there are issues with the courts’ approach to police impropriety or breach of the rules (see section 4.4.2).

<sup>1237</sup> See section 1.3.

<sup>1238</sup> Tom Williamson, *Strategic Changes in police interrogation* (PhD Thesis, University of Kent 1990) 1 as cited in Clive Coleman, David Dixon and Keith Bottomley ‘Police investigative procedures: researching the impact of PACE’ in Clive Walker and Keir Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (2nd edn, Blackstone 1999) 66.

<sup>1239</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 189.

<sup>1240</sup> *ibid.*

<sup>1241</sup> Michael Zander, ‘Response to “Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984, Home Office Consultation Paper, March 2007”’ 1-2, available at [www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/PACE%20-%20MZ%20Response%20to%20CP%20May%202007.pdf](http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/PACE%20-%20MZ%20Response%20to%20CP%20May%202007.pdf) accessed 4 May 2016.

<sup>1242</sup> Maguire, ‘Regulating the Police Station’ (n 1235) 92.

<sup>1243</sup> In addition to elaborating on Packer’s models, King also explored the status degradation model, the medical model and the power model – see King (n 1177). On status degradation see also Choongh, *Policing as Social Discipline* (n 29). See also Chapter 2 where I have noted that search and removal procedures can be experienced as degrading.

subjected to the ‘same rational assessment’.<sup>1244</sup> This model is not dissimilar to due process in that it requires ‘a framework of substantive and procedural norms binding upon and serviceable to both the government and the governed’.<sup>1245</sup> However, the key distinction is the focus – due process aims to protect the individual from coercive state power whereas the bureaucratic model seeks to process all individuals subject to a standard, closed system of rules, ‘which operate independently of political considerations and regardless of who is in the dock’.<sup>1246</sup> The courts are required to manage conflict whilst remaining neutral, applying the law equally to all regardless of age, race, sex, colour, creed, social status or political beliefs.<sup>1247</sup> Elements of the crime control system can also be seen in the bureaucratic model – both strive to minimise costs and maximise efficiency by avoiding duplication to the greatest extent possible between criminal justice actors.<sup>1248</sup> As will be illustrated later, these models only explain facets of the implementation of the AA safeguard. Thus, within the following section I will explore those theoretical constructs that are more specific to policing.

### 8.3 Understanding police behaviour: rules and the law in policing

*The view that policing behaviour is chiefly shaped by rules may well be wrong. Because a rule exists, it does not follow that it automatically and rigidly governs day-to-day policing behaviour. At the extreme, a rule may be universally ignored and never invoked to discipline anyone.*<sup>1249</sup>

PACE and its accompanying Codes can be seen as a series of rules setting out police powers and procedures and setting boundaries on those powers. Whilst, as noted in Chapter 4, PACE makes little mention for the rules protecting vulnerable suspects, this is instead dealt with in Code C. Yet, as I have illustrated in Chapters 5, 6 and 7, custody officers do not necessarily abide by these rules. The existence of a rule does not equate with conformity to that rule –

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<sup>1244</sup> King (n 1177) 22.

<sup>1245</sup> Isaac D Balbus, *The Dialectics of Legal Repression* (Russell Sage Foundation 1973), 4 as cited in *ibid* 21.

<sup>1246</sup> King (n 1177) 22.

<sup>1247</sup> *ibid*.

<sup>1248</sup> *ibid* 22-23.

<sup>1249</sup> David J Smith and Jeremy Gray, *Police and People in London. Volume 4: The Police in Action* (Policy Studies Institute 1983) 169.

decisions are not always subject to scrutiny, owing in part to low visibility, collegial solidarity, and a lack of direct supervision. As such, it may be difficult to ascertain whether the police have followed the rules.<sup>1250</sup> Further, adherence to the rules is not always conducive to ‘doing the job well’.<sup>1251</sup> Within this section, I am going to explore how we might come to understand custody officer interpretation of the law. The starting point for such discussion is discretion, as this is something which arose repeatedly during the study i.e. that the rules on the AA safeguard were discretionary. Thereafter, I will address the function that various rules can perform before going on to discuss how we might attempt to explain discretion and the function of rules.

### 8.3.1 Discretion

Discretion is an essential component to understanding the law in policing in both theory and practice and understanding how these differ.<sup>1252</sup> As James Q. Wilson noted, ‘the police department has the special property... that within it discretion increases as one moves *down* the hierarchy’.<sup>1253</sup> Discretion arises because police officers are ‘free to make choices among possible courses of action or inaction’<sup>1254</sup>; they can ‘decide who is arrested, stopped, questioned and so on’.<sup>1255</sup> Police work is not simply about law enforcement (indeed, it could be argued that law enforcement is only marginally relevant), but is instead about service provision and order maintenance.<sup>1256</sup> As Skolnick highlights, discretion may be delegated (and is an inevitable part of police work) or unauthorised (i.e. stemming through a lack of supervision or insufficient supervision).<sup>1257</sup> Discretion is fundamental to policing in the United Kingdom as

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<sup>1250</sup> *ibid* 170.

<sup>1251</sup> *ibid* 170.

<sup>1252</sup> Louise Westmarland, ‘Police Cultures’ in Tim Newburn (ed), *Handbook of Policing* (2<sup>nd</sup> edn, Willan 2008) 255.

<sup>1253</sup> James Q Wilson, *Varieties of Police Behaviour* (Harvard University Press 1968) 7. Original emphasis.

<sup>1254</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969) 4. See also Carl B Klockars, *The Idea of Police* (Sage 1985) 93. Klockars recognises that discretion also arises because decisions may not be subject to review. He refers to discretion as selective enforcement.

<sup>1255</sup> Westmarland, ‘Police Cultures’ (n 1252) 255.

<sup>1256</sup> Dixon (n 23) 3-6.

<sup>1257</sup> Jerome Skolnick, *Justice without Trial* (Wiley 1966).

the police do not necessarily always have to enforce the law.<sup>1258</sup> According to Liebling and Price, this results from one for three reasons.<sup>1259</sup> Firstly, rules are worded vaguely and ‘can never perfectly describe a situation or action’.<sup>1260</sup> Some cases very clearly fall within the rule (and are thus at the core) and some sit somewhere along the spectrum (i.e. within the penumbra).<sup>1261</sup> Secondly, situations are never exactly the same and rules can therefore not ‘cover every imaginable situation’.<sup>1262</sup> And finally, organisations are often unclear with regards to what they expect, and there may be ‘confusion or contradiction between different aims and objectives’.<sup>1263</sup> For the police, discretion may be necessary when the law is too broad in scope (overreach), when discretion is required to ensure that the purpose of the law is fulfilled, because police resources are limited and the police must then prioritise, and because in some circumstances enforcement does not make sense (i.e. the law is ‘bad law’).<sup>1264</sup> Decisions take in to account the ‘broad environment, particular context, and interpretative practices: their surrounds, fields and frames’.<sup>1265</sup>

In the context of the AA safeguard, custody officers may be conferred discretion because the Code C guidance is unclear or open to interpretation<sup>1266</sup> (i.e. the terms mental vulnerability and

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<sup>1258</sup> David Steer, *Police cautions: a study in the exercise of police discretion* (Blackwell for the Penal Research Unit, Oxford 1970).

<sup>1259</sup> Alison Liebling and David Price, ‘Prison officers and the use of discretion’ in Lorraine R Gelsthorpe and Nicola Padfield (eds), *Exercising discretion: decision making in the criminal justice system and beyond* (Willan 2002) 80.

<sup>1260</sup> *ibid* 81.

<sup>1261</sup> See Hart (n 454).

<sup>1262</sup> Liebling and Price (n 1259) 81.

<sup>1263</sup> *ibid*. See also Keith Hawkins, ‘Order, rationality and silence: some reflections on criminal justice decision-making’ in Lorraine R Gelsthorpe and Nicola Padfield (eds), *Exercising discretion: decision making in the criminal justice system and beyond* (Willan 2002) 187.

<sup>1264</sup> Klockars (n 1254) 97-102. Klockars gives a fifth reason – the power of citizen discretion – which does not seem relevant to the implementation of the AA safeguard – Klockars (n 1254) 102-104.

<sup>1265</sup> Hawkins, ‘Order, rationality and silence’ (n 1263) 189 (reference omitted). They may also be made in repetitive ways and are categorised as ‘normal cases’ or ‘abnormal cases’ – *ibid* 212. Understood in the context of culture, one can see that decisions are often made uniform and predictable. See also Hawkins ‘Preface’ in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon Press 1992) v; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 31.

<sup>1266</sup> As would be argued by a legalist – see section 8.3.3. There may be some debate as to whether implementation of the AA safeguard is subject to discretion or ‘interpretative judgment’ – Simon Bronnitt and Philip Stenning, ‘Understanding Discretion in Modern Policing’ (2011) 35 *Criminal Law Journal* 319, 321. Most certainly, the definition of

mental disorder can be interpreted in various ways),<sup>1267</sup> because not every suspect is the same (and nor are the facts of the case the same), and/or because organisational objectives are unclear or absent (or focussed instead on risk management). Police culture and the operation of the criminal process also interact with decision-making in such a way that custody officers have discretion whether or not to implement the AA safeguard for a vulnerable adult suspect. The situation is much different for a young suspect who, although often not recognised as ‘genuinely vulnerable’,<sup>1268</sup> is nevertheless provided with an AA. Firstly, the duty to provide an AA is a statutory one conferred by the CDA 1998. Secondly, there is no ambiguity in the rule: 17 or under cannot be subject to interpretation. By contrast, whilst the AA safeguard for vulnerable adults could be placed on a statutory footing (as NAAN have suggested), this would not remove discretion as the terms ‘mental vulnerability’ and ‘mental disorder’ will always be open to some interpretation.<sup>1269</sup>

The law, more generally, as Hawkins notes, is ‘merely one set of restraints upon, or guidance for, individual action among a varied array of social forces’.<sup>1270</sup> This is particularly true within policing. When making his or her decision, the decision-maker will take account of ‘the role of decision objectives, the incentives or disincentives to forms of behaviour, questions of socialization or training, or the importance of organizational routines’.<sup>1271</sup> Therefore, the law is not the only motivating factor and will not always have the effect of producing conformity with the rules. Custody is not necessarily low visibility<sup>1272</sup> but discretion nevertheless exists, at least in part, because these decisions are rarely (and perhaps unsuccessfully) scrutinised and/or because the law is unclear<sup>1273</sup> – custody officers are largely left to their own devices when making decisions.<sup>1274</sup>

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vulnerability is subject to the latter; the decision whether to implement the AA safeguard for someone recognised as vulnerable falls into the former category.

<sup>1267</sup> Although as Hawkins notes, is ‘merely one set of restraints upon, or guidance for, individual action among a varied array of social forces’ – Hawkins ‘Preface’ (n 1265) v.

<sup>1268</sup> See Kemp and Hodgson (n 121).

<sup>1269</sup> NAAN have also recommended that the Code C be revised to clarify that all vulnerable adults require an AA– NAAN, *There to Help* (n 39).

<sup>1270</sup> Hawkins ‘Preface’ (n 1265) v.

<sup>1271</sup> *ibid.*

<sup>1272</sup> For example, CCTV and audio-recording is in operation in custody – see section 2.5.2.2. See also Newburn and Hayman (n 1167).

<sup>1273</sup> See section 4.2 and 4.3.

<sup>1274</sup> They do, of course, have to account for the decisions at times.



### 8.3.2 The function of rules

Whilst custody officers have discretion when making decisions, rules are not unimportant and can have the effect of producing conformity.<sup>1275</sup> The PSI Report highlighted how various rules function – they may be internalised,<sup>1276</sup> discourage behaviour where a breach is likely to be discovered,<sup>1277</sup> or ‘give an acceptable appearance to the way that police work is carried out’.<sup>1278</sup> The first set of rules, working rules, which are agreed-with or adopted into consciousness, are more ‘likely to have a far more consistent controlling influence’<sup>1279</sup> and will guide an officer’s actions. The second type of rules are those which are not internalised but will be taken ‘into account when deciding how to act’.<sup>1280</sup> Such rules are inhibitory and will only discourage certain types of behaviour where a breach is likely to be discovered.<sup>1281</sup> The third type, presentational rules, place a ‘gloss on policing behaviour so as to make it acceptable to the wider public’.<sup>1282</sup> These rules derive not from the police but more so from the law and ‘are part of a (successful) attempt by the wider society to deceive itself about the realities of policing’.<sup>1283</sup> As the PSI Report noted, ‘the same rule may perform more than one function, or may be used differently by different officers or at a different time’.<sup>1284</sup> The rules themselves are not unimportant; instead it depends on the function, the interpretation, the usage, and the interaction of the rules with the ‘norms and objectives of working groups of police officers’.<sup>1285</sup> As I will illustrate later, the Code C guidance on vulnerability and the AA safeguard can be interpreted in a similar manner.

This formulation is not, however, without its flaws – as Dixon has noted, ‘[b]y focusing on the effect of specific rules, [the report] understates the need to consider the cumulative effect of

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<sup>1275</sup> See also Ericson for a discussion of rules and discretion – Richard V Ericson, ‘Rules in Policing: Five Perspectives’ (2007) 11 (3) *Theoretical Criminology* 367.

<sup>1276</sup> Smith and Gray (n 1249) 171.

<sup>1277</sup> *ibid.*

<sup>1278</sup> *ibid.*

<sup>1279</sup> *ibid* 170.

<sup>1280</sup> *ibid* 171.

<sup>1281</sup> *ibid.*

<sup>1282</sup> *ibid.*

<sup>1283</sup> *ibid.*

<sup>1284</sup> *ibid.*

<sup>1285</sup> *ibid.*

groups of rules. In addition, rules are not self-executing: an apparently ‘presentational’ rule may be made to work in an inhibitory way...’<sup>1286</sup> Dixon also suggests that there is a need to include other types of rules, citing the examples of ‘reactive rules’ (rules that are ‘created by the police hierarchies in response to specific incidents’<sup>1287</sup>) and ‘routinized rules’ (rules that have become ritualized<sup>1288</sup>). Indisputably, rules are subject to police interpretation, as highlighted in Chapters 5, 6, and 7.

Within the following section I will address the potential reasons why the police have ‘discretion’ and can interpret the rules in a particular manner. I will rely predominantly on Dixon’s three main conceptions of the law in relation to policing.

### 8.3.3 A fault with the law: the legalist approach

The focus within legalism (or the legalistic-bureaucratic conception) is ‘only or primarily... [on] the law governing it’.<sup>1289</sup> Within this conception, police actions and decisions can be directed by ‘training, policy statements and internal regulation’.<sup>1290</sup> For the legalist, a gap between the law in books and the law in action is caused by ambiguities in the law – it is not the police but the law which is to blame. To close the gap one must clear-up the ambiguities with further legal regulation.<sup>1291</sup> As Dixon notes, problems are perceived by policy-makers and legislators with legalism in mind.<sup>1292</sup> According to Lacey, the ‘legal or jurisprudential way or ways of looking at the world’<sup>1293</sup> suggests that problems typically arise ‘from ambiguities or “gaps” in the rules, calling for clearer interpretations or further legislative or quasi-legislative action’.<sup>1294</sup> The adequate response for the legalist is to clarify and codify police powers<sup>1295</sup> – the implementation of PACE (and in particular Code C) in response to the ‘inadequacies’ of

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<sup>1286</sup> Dixon (n 23) 8.

<sup>1287</sup> *ibid.*

<sup>1288</sup> *ibid.*

<sup>1289</sup> *ibid.*

<sup>1290</sup> *ibid.*

<sup>1291</sup> *ibid.* 2.

<sup>1292</sup> *ibid.* 1.

<sup>1293</sup> Nicola Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon Press 1992) 362.

<sup>1294</sup> *ibid.*

<sup>1295</sup> Dixon (n 23) 1.

the Judges' Rules is indicative of legalism. Such an approach also suits the police – as Dixon notes, 'if problems in policing arise, it is the law which has become unrealistic and inadequate'.<sup>1296</sup> The rules are 'blueprints, guides to a possible reality, an abstract and partial account of how things could or should be done, rather than an account of how things are'.<sup>1297</sup> Legalism, for Dixon, is closely tied to bureaucracy and the idea that police organisations operate as 'effective bureaucracies'.<sup>1298</sup> The police organisation is thus a well-oiled machine; provided instructions are given, the machine can operate accordingly.

#### 8.3.4 Culturalism: a pervasive police culture

For culturalists (or interactionists)<sup>1299</sup> this machine has its own characteristics and traits which can influence its modus operandi. Reiner has identified these traits as a sense of mission, action, cynicism, pessimism, suspicion, isolation/solidarity, machismo, racial prejudice and pragmatism.<sup>1300</sup> Skolnick highlights how the police place an emphasis on regularity and predictability.<sup>1301</sup> This enables them to make sense of the (frequently troublesome) world in which they are in. Police culture is not, however, monolithic, as Reiner points out.<sup>1302</sup> Indeed, many academics have explored and evidenced the differences in police culture, to the extent that one cannot speak of 'police culture' but rather 'police cultures'<sup>1303</sup>: Cain examined the

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<sup>1296</sup> *ibid.*

<sup>1297</sup> David Bradley, Neil Walker and Roy Wilkie, *Managing the Police: Law, Organisation, and Democracy* (Wheatsheaf 1986) 121 as cited in Dixon (n 23) 5.

<sup>1298</sup> Dixon (n 23) 5.

<sup>1299</sup> See throughout this section. See also in the context of the United States and England: Peter K Manning, *Police Work: The Social Organization of Policing* (MIT Press 1977); in the context of the United Kingdom: Simon Holdaway, *The British Police* (Edward Arnold 1979); Holdaway, *Inside the British Police* (n 753); Nigel G Fielding, 'Police culture and police practice' in Mollie Weatheritt (ed), *Police Research: Some Future Prospects* (Avebury 1989); Simon Holdaway, 'Discovering structure. Studies of the British police occupational culture' in Mollie Weatheritt (ed), *Police Research: Some Future Prospects* (Avebury 1989); and in the context of the United Kingdom, United States, Belgium and the Netherlands: Maurice Punch (ed) *Control in the Police Organisation* (MIT Press 1983).

<sup>1300</sup> Reiner, *The Politics of the Police* (n 18) 119-132.

<sup>1301</sup> Skolnick (n 1263).

<sup>1302</sup> As Reiner notes, 'police culture is not monolithic, and there is both structured and individual diversity' – Reiner, *The Politics of the Police* (n 18) 132.

<sup>1303</sup> Westmarland, 'Police Cultures' (n 1252). Westmarland has argued that police culture has broadened along with the inclusion of others within the policing family – Westmarland, 'Police Cultures' (n 1252) 253.

differences between rural and urban forces;<sup>1304</sup> Reuss-Ianni and Ianni reported differences between ‘street cop’ and ‘management cop’ in the New York City police force;<sup>1305</sup> Hobbs, in his research in East London, illustrated how rank<sup>1306</sup> and type of job, as well as geographical location, could have an impact on the culture of the police officers;<sup>1307</sup> Young, in a British study, reported differences between who he referred to as ‘thief takers’, ‘uniform carriers’, ‘polis’ and ‘civvies’;<sup>1308</sup> and Chan, in her research in New South Wales, illustrated how culture could not be separated from the wider socio-political and historical context.<sup>1309</sup> There may also be a difference between what is said in the canteen and what is done in the street.<sup>1310</sup>

Whilst there are indeed differences, Paoline urges that the similarities too are recognised.<sup>1311</sup> And further, the differences may not be as stark as some purport. For example, Loftus found that whilst there were cultural differences between two stations in the same force, these were subtle,<sup>1312</sup> and as such concluded that there was more or less a universal police culture. Whether culture varies significantly or not, there are some constants within police occupational and canteen culture, and such characteristics influence how the police interpret rules. The rules may indeed be devalued, whereby the law is seen as ‘at best, marginally relevant and, at worst, a serious impediment to the business of policing’.<sup>1313</sup>

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<sup>1304</sup> Maureen Cain, *Society and the policeman's role* (Routledge and Kegan Paul 1973).

<sup>1305</sup> Elizabeth Reuss-Ianni and Francis AJ Ianni, ‘Street Cops and Management Cops - The Two Cultures of Policing’ in Maurice Punch (ed) *Control in the Police Organisation* (MIT Press 1983) 270.

<sup>1306</sup> See also Robert Reiner, *Chief constables: bobbies, bosses or bureaucrats?* (OUP 1991).

<sup>1307</sup> Hobbs (n 1044). Waddington has argued that there is ‘competitive individualism’ within detective culture – PAJ Waddington, *Policing Citizens: Authority and Rights* (UCL Press 1999) 124.

<sup>1308</sup> Malcolm Young, *An Inside Job: Policing and Police Culture in Britain* (Clarendon Press 1991).

<sup>1309</sup> Chan (n 1169). Chan argues that policing cannot be divorced from matters such as capitalism and, in Australia, colonialism.

<sup>1310</sup> What is said in the canteen is ‘expressive talk designed to give purpose and meaning to inherently problematic occupational experience’ – PAJ Waddington, ‘Police (canteen) sub-culture: an appreciation’ (1999) 39 (2) *British Journal of Criminology* 287, 287. As such, culture may be used as a resource rather than a representative of certain values – Holly Campeau, ‘‘Police culture’ at work: making sense of police oversight’ (2015) 55 (4) *British Journal of Criminology* 669.

<sup>1311</sup> Eugene A Paoline, ‘Taking stock: Toward a richer understanding of police culture’ (2003) 31 (3) *Journal of Criminal Justice* 199.

<sup>1312</sup> Loftus (n 204) 125.

<sup>1313</sup> Dixon (n 23) 9.

Culturalists (or interactionists) have, however, been criticised for neglecting the impact of the law in shaping police culture.<sup>1314</sup> As Reiner notes:

The interactionist largely assumed that formal rules were primarily presentational... They are the terms in which conduct has to be justified, but do not really affect practice. It is the police subculture that is the key to understanding police actions. This culturalist perspective sometimes amounted to an extreme rule scepticism.<sup>1315</sup>

The formal rules are not, however, defunct as ‘interactionist studies themselves point to some impact of formal rules, for example in the emphasis on rank-and-file solidarity aimed at shielding deviant practices from the senior ranks, and the need always to have a good story to “cover your ass”’.<sup>1316</sup> Police culture thus has an influence on how police officers interpret rules and how they exercise discretion.<sup>1317</sup>

#### 8.3.5 Structuralism: a flawed system?

The third conception, structuralism, seeks to position this ‘gap’ within the wider context of political and judicial discourse and decision-making. Baldwin and Kinsey, similar to the PSI Report (as discussed above), ‘recognise that rules can take different forms, and so it is vital to choose an appropriate type’.<sup>1318</sup> They are particularly critical of the RCCP and how it ostensibly took a police view with regard to the recommendations made,<sup>1319</sup> particularly in that it ‘endors[ed] much of existing police practice’.<sup>1320</sup> For Baldwin and Kinsey, one must consider the legal rules alongside the subcultural norms of the police – rules can be breached or ignored, practices by the police may be condoned by the courts,<sup>1321</sup> and rules can be impacted upon by

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<sup>1314</sup> *ibid* 14-15.

<sup>1315</sup> Reiner, *The Politics of the Police* (n 18) 209. See also Paoline (n 1311).

<sup>1316</sup> Reiner, *The Politics of the Police* (n 18).

<sup>1317</sup> Westmarland argues that police culture is essential to understanding the exercise of discretion – Westmarland, ‘Police Cultures’ (n 1252) 255.

<sup>1318</sup> Dixon (n 23) 20.

<sup>1319</sup> Robert Baldwin and Richard Kinsey, *Police Powers and Politics* (Quartet Books 1982) 202.

<sup>1320</sup> *ibid* 208.

<sup>1321</sup> See, for example, Chapter 4 for a discussion on how the courts tackle a breach of Code C.

circumstance and situation, as well as geographical location.<sup>1322</sup> The rules, whilst important, are influenced by factors such as ‘status, sanctions, degree of specificity, procedure and enforcement practice’.<sup>1323</sup> Grimshaw and Jefferson similarly urged that structural determinants be considered in order to understand how the police operated. These structural determinants (‘law, work and democracy’<sup>1324</sup>) had to be considered under different conditions. For Grimshaw and Jefferson, whilst legal regulation could bridge the gap between law and practice,<sup>1325</sup> this alone was insufficient – it requires supplementation with ‘principles of justice’<sup>1326</sup> which ‘guide the exercise of discretion... in all areas where the law itself can offer no guidance’.<sup>1327</sup> For McBarnet, whose work has received great attention<sup>1328</sup>, it is not necessarily police practice which deviates from the ‘ideals of legality’<sup>1329</sup>, the formal law also neglects the due process safeguards.<sup>1330</sup> The focus should not be on the ‘petty officials’<sup>1331</sup> (e.g. the police) but instead on the judicial and political elite,<sup>1332</sup> particularly as the police are tacitly encouraged by superiors and the elite to deviate ‘from the ideals of legality’.<sup>1333</sup> McBarnet

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<sup>1322</sup> Dixon (n 23) 22. However, even though *this* thesis was conducted in two separate police forces with different organisational cultures, the rules on AAs were implemented in the same way.

<sup>1323</sup> Robert Baldwin, ‘Regulation and Policing by Code’ in Mollie Weatheritt (ed), *Police Research: Some Future Prospects* (Avebury 1989) 166.

<sup>1324</sup> Roger Grimshaw and Tony Jefferson, *Interpreting Policework: Policy and Practice in Forms of Beat Policing* (Allen and Unwin 1987) 290.

<sup>1325</sup> Dixon (n 23) 26.

<sup>1326</sup> Grimshaw and Jefferson (n 1324) 284.

<sup>1327</sup> *ibid.*

<sup>1328</sup> As Dixon notes, McBarnet’s work is an ‘underdeveloped combination of structuralism and radical realism’ and displays ‘significant ambivalence’ – Dixon (n 23) 31 and 38. Dixon also points towards McConville, Sanders and Leng’s critique of McBarnet – Dixon (n 23) 45. See also Jerome Skolnick, ‘Conviction by Doreen J McBarnet’, (1982) 73 (3) *Journal Criminal Law and Criminology* 1329, 1331; McConville and Baldwin, *Courts, Prosecution and Conviction* (n 1231) 7.

<sup>1329</sup> McBarnet, *Conviction* (n 576) 31.

<sup>1330</sup> Doreen J McBarnet, ‘False Dichotomies in Criminal Justice Research’ in John Baldwin and Keith Bottomley (eds), *Criminal Justice: Selected Readings* (Martin Robertson 1978). See also Doreen J McBarnet, *Crime, Compliance and Control: Collected Essays in Law* (Ashgate, 2004) 121; Doreen J McBarnet, ‘Police and the State: Arrest, Legality and the Law’ in Gary Littlejohn, Barry Smart, John Wakeford and Nira Yuval-Davis (eds) *Power and the State* (Croom Helm 1978); McBarnet, *Conviction* (n 576).

<sup>1331</sup> McBarnet, *Conviction* (n 576) 8.

<sup>1332</sup> *ibid.*

<sup>1333</sup> Reiner, *The Politics of the Police* (n 18) 210. See also McBarnet, *Conviction* (n 576); and McConville, Sanders and Leng, *The Case for the Prosecution* (n 18).

urges that the criminal process be considered within an account of the state as a whole – one must first consider whether the judicial and political elite implement due process rhetoric and, correspondingly, whether such rhetoric is embodied within the law, before postulating whether the police undermine this due process rhetoric. The ‘Warwick School’<sup>1334</sup> combine structuralism with interactionism in their social constructionist account of the law in policing.<sup>1335</sup> Such ‘social construction takes place within structural contexts, and it is these which determine outcomes’.<sup>1336</sup>

Whilst each of these theoretical constructions has important implications for understanding the ‘gap’ between the implementation of the AA safeguard in books and in action, the Warwick School’s social constructionism perhaps provides the most accurate explanation. Later in this chapter I will explore these theories in relation to the data.

#### 8.4 The custody officer approach: crime control and due process

As alluded to in Chapters 5, 6 and 7, there is a degree to which due process or fairness is considered by custody officers when they implement the AA safeguard. This is particularly true where the suspect is believed to be genuinely vulnerable. Yet, it is worth noting that custody officer’s role is significantly more ‘crime control’ oriented – indeed, the conveyor belt analogy was used by CO22-2 during interview when describing his role.<sup>1337</sup> Custody largely resembles a work station where workers filter out cases before passing them on elsewhere. In relation to vulnerability more specifically, the use of a custody officer standardisation, as explored in Chapter 5, ensures uniformity but also allows for a degree of informality. By employing a standard definition, rather than strictly adhering to the Code C, custody officers can safeguard the most vulnerable, safeguard the case, and do so efficiently. Such standardisation also alludes to the bureaucratic model. Yet, as King notes:

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<sup>1334</sup> The term ‘Warwick School’ has been coined by Dixon to describe the work of McConville, Sanders and Leng, *The Case for the Prosecution* (n 18).

<sup>1335</sup> See McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 11. See also Dixon (n 23) 41.

<sup>1336</sup> Dixon (n 23) 44. For Dixon, this is ‘the theoretical bite of the Warwick School’s approach’ – Dixon (n 23) 44.

<sup>1337</sup> The rhetoric of consumerism was also apparent in Loftus’ research – see Loftus (n 204) 109.

Perhaps it is fair to say that considerations of efficiency and cost-benefit effectiveness, while never far from the consciousness of clerks, lawyers, policemen, probation officers and magistrates, usually take second place to more pressing demands arising from the particular ideologies each of these groups subscribe to in the course of their role performances within the criminal justice system, be they due process, crime control, rehabilitation or otherwise. Yet, when these ideological demands are weak or are ignored or neglected by these actors, it is usually the organisational considerations for effective processing of cases which come to the fore.<sup>1338</sup>

Thus, where crime control is weak (i.e. the case does not require ‘saving’) bureaucracy (i.e. efficiency) will be the prime consideration. Conversely, where there are overriding objectives, bureaucratic demands will take second place. For example, if the custody officer were to exercise his discretion, in line with his personal beliefs (i.e. many young suspects do not require an AA), he would not only speed up the custody process but also reduce cost to the taxpayer. This would however attract great scrutiny. It makes sense for the custody officer to follow the rules – a failure to do so may bring personal or professional repercussions.<sup>1339</sup>

## 8.5 The reality of the custody officer approach: the function of rules

As discussed in Chapter 7, custody officers do not necessarily recognise the vulnerability of young suspects but will implement the AA safeguard regardless. As also noted in the Chapter 7, the custody officer views the safeguard for adults as somewhat discretionary. Using the PSI typology, one can see that the rules for young suspects are inhibitory – custody officers do not necessarily think that the safeguard should be implemented but will obtain an AA regardless. The rules on adult suspects are only inhibitory where, for example and as discussed in Chapter 7, the offence is more serious, the solicitor requests an AA, or where the case is likely to end up in the Crown Court. Otherwise the rules are presentational. This is not to say that the AA safeguard is never a working rule – there may indeed be instances for both young and adult suspects alike where the custody officer believes that an AA should be called, for example

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<sup>1338</sup> King (n 1177) 107-8.

<sup>1339</sup> This will be explored in greater detail in Chapter 9.



where the suspect is genuinely vulnerable.<sup>1340</sup> Such rules could also be routinised in the sense that the custody officer gives little thought to actual vulnerability but rather acts in a ritualistic manner. The question in this instance is why the rules work as such.<sup>1341</sup> I will explore the example of risk in custody before exploring why custody officers adopt the approach evidenced in Chapters 5, 6 and 7.

As also explored in Chapter 7, custody officers noted how risk management assumes greater priority over the rules contained within PACE and Code C (which, of course, includes the AA safeguard). Further, vulnerability and risk can be identified through similar means,<sup>1342</sup> however, custody officers are less dismissive of the information provided by the detainee, with a more cautious approach taken towards risk. Discretion exists to a greater degree with regard to the AA safeguard when compared with the rules on risk management. Some custody officers suggested that the rules on risk management were, at least in part, a reactionary measure to reduce the number of deaths or injuries in custody (or to try to mitigate responsibility where a death did occur).<sup>1343</sup> Further, custody officers made it clear in observations and/or interview that the main priority is to prevent deaths in custody.<sup>1344</sup> Yet, custody officers do not necessarily agree with these rules:

*A high proportion of the people who come in here are going to be the more vulnerable members of society for various reasons and I think a lot of the questions that we're told to ask are just back covering questions and questions which prompt people to give the answers that you want and I think it's just a bit of a back covering exercise. Paying lip service, the way we actually do it here. We don't actually treat people on a one to one*

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<sup>1340</sup> See section 5.4.

<sup>1341</sup> See Dehaghani, 'He's just not that vulnerable' (n 165) for a greater discussion on the impact of these theories in the context of the AA safeguard and vulnerability.

<sup>1342</sup> Through the risk assessment – see section 6.4.1 and 7.4.

<sup>1343</sup> CO2-1 Interview and CO3-1 Interview. CO3-1 mentioned at interview that the developments to the risk assessment were in response to one of his 'jobs' where a detainee, who he had booked in and who had been released by another custody officer, took his own life within 48 hours of release. I did not wish to ask more detail as CO3-1 seemed very uncomfortable talking about this.

<sup>1344</sup> CO2-1 Interview; CO4-1 Interview; CO10-1 Interview; CO12-1 Interview; CO16-1 Interview; CO17-1 Interview; CO20-1 Interview; CO21-2 Interview; CO24-2 Interview; CO28-2 Interview; CO29-2 Interview.

*basis and see how they are. It's just a list of questions and it's those questions which are there to suit anyone and everyone that comes in the door, which can't be a proper way of assessing risk, if we were really concerned that much about it.*<sup>1345</sup>

Such rules are therefore presentational and/or inhibitory. The reason for this inhibitory function will be explored in greater detail below.

## 8.6 Vulnerability and the AA safeguard: explaining the 'why'

Within the following section I will attempt to explain what influences custody officer interpretation of the law, relying on the material explored above. I will build-upon this discussion in Chapter 9, the concluding chapter, where I will explore the grounded theory. The reliance within this section will be predominantly on the data explored in the previous chapter (Chapter 7) but will also draw-upon elements explored within Chapters 4, 5 and 6.

### 8.6.1 A problem with the rules?

Following a legalistic approach, the difference between the use of the AA safeguard for young suspects and for adult suspects can be explained by the ambiguities in the rules. Whilst age is perhaps easier to identify,<sup>1346</sup> identification of vulnerability in adult suspects, as explored in Chapter 6, is not entirely problematic. Instead, how custody officers define vulnerability (as set-out in Chapter 5) and how they choose to use the information (as discussed in Chapters 5, 6 and 7) impacts upon the implementation of the AA safeguard. However, the *guidance*, or rather the wording of the guidance, for young suspects and adult suspects does differ significantly in one regard – age is clearly set out in Code C i.e. there can be no interpretation of what '17 or below' means, whereas the terms 'mental vulnerability' and 'mental disorder'

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<sup>1345</sup> CO16-1 Interview.

<sup>1346</sup> Ascertaining age is not, however, problem-free. During observation there was one occasion where a young suspect was initially thought to be an adult. The date of birth of the suspect placed her at 23 (she also gave a pseudonym). After being booked-in she was sent to have her samples taken. A warning came-up on PNC after her fingerprints were taken – the fingerprints matched another record. This other record had a date of birth which placed the suspect at 15 years old. Whilst this may have happened (unknowingly) on more occasions, this is arguably the exception rather than the rule.

could be subject to some interpretation. The legalistic approach would treat the rules and their ambiguities as blameworthy.

As noted in Chapter 4, Code C does not provide the definitions for adult vulnerability until later in the guidance. Moreover, as I have also argued within Chapter 4, these definitions are neither clear nor comprehensible and, as explored in Chapter 5, custody officers struggle with operationalising the definitions. However, as I have examined elsewhere,<sup>1347</sup> where guidance is sufficiently clear an AA may be obtained for an adult suspect regardless of other factors. For example, CO9-1 stated that *'[a]nyone that is on the autistic spectrum, our rule book says, "They will have an AA" so... no matter how serious or mild you would get an [AA]'*,<sup>1348</sup> however the same custody officer stated, *'[i]f somebody booked into custody said that they suffered from schizophrenia, I wouldn't automatically say, "Right [AA] for you then", because it might be that they suffer from schizophrenia but they take medication for it, they're compliant with that medication and they're fit to be dealt with'*.<sup>1349</sup> As evidenced in Chapter 5, custody officers have a tendency to focus on the suspect's capacity when deeming him or her 'AA vulnerable'. For the legalist, this may be due to flaws in the guidance – a great deal of the Code C guidance lends itself to a capacity-based approach.<sup>1350</sup>

Not only are the ambiguities in the guidance, the rules may also be less authoritative for adults when compared with young suspects. The guidance on adult suspects is contained later in the Code – this may suggest that the safeguards for adults are of lesser importance compared with young suspects. Further, the Notes for Guidance, as Zander notes, assume an even lower status than the Codes 'in terms of their authority'.<sup>1351</sup> Secondly, and perhaps more importantly, the CDA 1998 s 38 (4) (a) imposes a statutory duty upon Youth Offending Teams to provide AAs for all young suspects. A similar duty does not exist for adults, although this was a suggested

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<sup>1347</sup> Dehaghani, 'He's just not that vulnerable' (n 165).

<sup>1348</sup> CO9-1 Interview. It should be noted that not every custody officer was aware of this additional guidance.

<sup>1349</sup> *ibid.*

<sup>1350</sup> See sections 4.2 and 4.8.

<sup>1351</sup> Michael Zander, *Zander on PACE: The Police and Criminal Evidence Act 1984* (Sweet and Maxwell 6th edn, 2013) 369. A question could be raised as to why the definition is contained in the main guidance or, at the very least, an Annex – see Dehaghani, 'He's just not that vulnerable' (n 165). However, as Zander notes, there is very little practical difference between the Notes for Guidance and the Code. See also Zander (n 550) 343-5.

recommendation for reform in 2008.<sup>1352</sup> Following a legalist argument, a ‘gap’ between the books and action is caused by ambiguities in the law. An appropriate solution would be to fill this gap with more legal regulation (either through Code C or additional internal regulation (such as the College of Policing APP)).<sup>1353</sup>

#### 8.6.2 A problem with the culture?

The legalist argument is flawed – a statutory duty to provide an AA to vulnerable adults may encourage implementation but it will not necessarily ensure that every vulnerable adult is given an AA. As Chapters 5, 6 and 7 have illustrated, the implementation of the AA safeguard is also dependant on other factors, such as how vulnerability is defined, how it may be identified, and why the custody officer may implement (or rather not implement) the safeguard. As illustrated in Chapter 6, custody officers are often provided with information through which to ascertain whether the suspect has a mental disorder or a mental vulnerability. Instead, it is often what the custody officers choose to do with this information that can result in non-implementation of the safeguard. As explored in Chapters 5 and 6, custody officers discount the information provided by the suspect, viewing the suspect as an unreliable source of information. Moreover, as explored in Chapter 5, those with depression were treated with cynicism and suspicion, as were many others with mental disorder. Culturalists would therefore point to certain characteristics within policing as influencing police decision-making – police actions are a result of (sub)culture.<sup>1354</sup> Custody officers take into account the cost, in terms of detriment to other functions of policing, when making their decisions.<sup>1355</sup> Code C, rather than guiding police actions, is a serious impediment to the function of policing<sup>1356</sup> – it is quite possible that custody officers ignore parts of the Code C guidance because of the detriment caused to an effective and efficient custodial process. Further, it is simply pragmatic to interpret vulnerability

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<sup>1352</sup> See Jessica Jacobson, *No One Knows, Police responses to suspects with learning disabilities and learning difficulties: A review of policy and practice* (Prison Reform Trust 2008). The author recommended that the AA provision be extended to vulnerable adult suspects to bring it in line with the provisions for young suspects.

<sup>1353</sup> See Chapter 4. See also Dehaghani ‘Custody Officers, Code C and Constructing Vulnerability’ (n 484). I will return to my recommendations in section 9.3.

<sup>1354</sup> See for example Holdaway, *The British Police* (n 1299); Holdaway, *Inside the British Police* (n 748).

<sup>1355</sup> See section 7.2.2.

<sup>1356</sup> See Dixon (n 23) 9.

according to a capacity-based approach because the AA's role, according to the custody officer, is mainly to facilitate communication.<sup>1357</sup> Even if the AA acts as an ally or a support, such support is really only needed for adult suspects who appear childlike or who are unable to look-after themselves adequately.<sup>1358</sup> Moreover, relying on one's observation skills and the HCPs advice, and dismissing what the suspect self-reports, is a practical approach and one that makes sense.<sup>1359</sup> Within the culturalist conception, the rules are, of course, not obsolete but instead 're-worked, refracted in one direction or another...'.<sup>1360</sup> The police see, also, value in having "a good story to 'cover your ass'".<sup>1361</sup> This was clear in the following explanation:

*We could have a very competent child, with no other issues with them, who basically just need to make sure that everything is being done right... I think it's just open to criticism. I think if nothing was used and it was just the police interviewing a juvenile then it could be just said that the police are coercing them, having chats, all sorts, bully them into something. And so I think it wouldn't protect the police service if the juvenile didn't have an [AA]. I think that's where a lot of the issues would come.*<sup>1362</sup>

### 8.6.3 A problem with the structure?

The question this raises is – why must custody officers 'cover their asses'? The structuralist account would situate the problem with the judiciary and political elite.<sup>1363</sup> As explored in Chapters 1 and 4, the exclusionary rules of evidence provide a remedy to suspects where, for example, custody officers have failed to comply with Code C. Custody officers frequently mentioned that they would implement the safeguard because '*ultimately, if a case goes to Crown Court or magistrates' court and it comes down to a technical issue of does this person understand what they were doing, and would they have said that had they had an [AA] sitting*

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<sup>1357</sup> See sections 5.4 and 5.6.

<sup>1358</sup> See section 5.4.3.

<sup>1359</sup> See section 6.4.3 and 7.2.3.

<sup>1360</sup> Holdaway, 'Discovering structure' (n 1299) 65.

<sup>1361</sup> Reiner, *The Politics of the Police* (n 18) 209.

<sup>1362</sup> CO27-2 Interview.

<sup>1363</sup> See McBarnet, *Conviction* (n 576); 'False Dichotomies' (n 1330); *Crime, Compliance and Control* (n 1330).

*next to them? It could all be lost on that*'.<sup>1364</sup> This perhaps explains why, for example, custody officers consider the seriousness of the case, as explored in Chapter 7. Therefore, in addition to considering the implications of the case reaching the courts, they may also consider how likely the case is to reach the courts and how likely it is that the evidence will be challenged. Perhaps then, serious cases are awarded greater attention, not simply because of their alleged complexity,<sup>1365</sup> but also because of the potential for and the likelihood of loss evidence (and perhaps the case) at trial. Of course, where the case is unlikely to reach the courts, or the evidence is unlikely to be effectively challenged, then the custody officer may have little incentive to implement the safeguard, beyond protecting the suspect. In this regard, it is also worth noting that, as mentioned in Chapter 4, breach of any element of the Codes of Practice cannot render the officer liable to civil or criminal proceedings.<sup>1366</sup>

Whilst according to Zander, 'judges have often been prepared to rule that a breach of a provision in a Code results in evidence being held to be inadmissible or results in the conviction being quashed',<sup>1367</sup> the courts have not adopted this approach in every case. Rather, as illustrated in Chapter 4, the courts have reserved criticism of the police and have, on occasion, condoned the custody officer approach. The courts do not always exclude the evidence where there has been a breach of Code C, rather they assess the reliability of the confession (if considering s 76 of PACE) or the impact of admitting evidence on the fairness of proceedings (if considering s 78 of PACE).<sup>1368</sup> These are the terms upon which the courts must rely and, as such, one could suggest that the problem is not simply with the judicial elite (or in this instance at all<sup>1369</sup>) but also, or instead, with the political elite who have constructed the laws in such a manner. That said, whilst the courts are bound by the terms contained within s 76 and 78, they are not prevented from interpreting 'reliability' or 'fairness' – they could have, in a number of the cases discussed within Chapter 4, considered the evidence unreliable or that the proceedings

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<sup>1364</sup> CO12-1 Interview.

<sup>1365</sup> See section 7.3.3 above.

<sup>1366</sup> PACE, s 67 (10).

<sup>1367</sup> Zander, *Zander on PACE 2013* (n 1351) 369.

<sup>1368</sup> A s 77 direction (see section 1.3 and 4.2) only applies where the defendant can be considered 'mentally handicapped' and where evidence was given in the absence of an independent person.

<sup>1369</sup> Put simply, the courts must use the terms contained within the law and it is, perhaps, unfair to level criticism where they are unable to do otherwise.

would be rendered unfair simply because an AA was not present during the police investigative process. In other words, perhaps the courts could go further. Furthermore, as explored in Chapter 4, the courts seem to adopt a similar approach to custody officers when assessing reliability or fairness – they focus on capacity. They have also adopted the view that a solicitor can replace the AA.<sup>1370</sup> Further still, any purported ‘remedy’ requires that the case reaches the courts – it is a well-known fact that, in many cases, guilty pleas ensure that the case does not reach the courts. The courts response is, therefore, not the only problematic element – the practical functioning of the criminal justice system may also produce obstacles to the effective implementation of suspects’ rights, creating, in turn, a further lack of accountability.<sup>1371</sup> The relative dearth of cases where evidence is challenged may provide further credence to this argument and may serve to further indicate a problem with relying on admissibility as an enforcement mechanism. Further, as McBarnet would contend, it is not simply the law in action that undermines due process, rather the law in books undermines its own due process rhetoric.<sup>1372</sup> Perhaps, rather than embodying due process ideals, PACE and its accompanying Codes were intended to provide the police with what they wanted. The structuralist would point to how the rhetoric underlying the law undermines the implementation of the AA safeguard in reality – ‘it is not just police practice but the formal law... which deviates from the ideals of legality’.<sup>1373</sup>

## 8.7 Vulnerability and risk: explaining the ‘why’

As discussed above, and explored in Chapter 7, custody officers adopt a different approach when managing risk, compared with implementing the AA safeguard. As also noted in Chapter 7, keeping detainees safe has somewhat overtaken Code C and PACE as the main concern within custody. The question here is ‘why?’ As explained in Chapter 7, decisions on risk should be made pursuant to the College of Policing APP. This guidance assumes an even lower

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<sup>1370</sup> See sections 4.5 and 7.2.1.

<sup>1371</sup> As Choongh notes, the court procedures are heavily weighted in favour of crime control – see Choongh, *Policing as Social Discipline* (n 29) 209.

<sup>1372</sup> See McBarnet, *Conviction* (n 576); ‘False Dichotomies’ (n 1330); *Crime, Compliance and Control* (n 1330).

<sup>1373</sup> Mc Barnet, *Conviction* (n 576) 31. As a retort, it could certainly be argued that, whether the courts can ensure accountability or not, the complaints procedure may provide recourse. See section 9.3.2.

position than Code C or PACE. Yet, it is not the hierarchical status of the rules which matter, rather it is the implications for breach which take precedence. A failure to identify vulnerability and/or implement the AA safeguard can, as mentioned above and explored in Chapter 4, result in exclusion of evidence at trial. However, failure to identify risk and adequately ‘manage’ the detainee could result in injury, illness or death:

*Worst case scenario is that somebody dies in custody, which is probably the worst thing that can happen to a police force and anybody that’s involved with that person. So it’s important to identify what risks you’re dealing with as early as you can so you can put something in place to try and mitigate that risk or manage it.*<sup>1374</sup>

As noted in Chapter 7, the main aim is to ensure that ‘everybody that comes in leaves alive’.<sup>1375</sup> The central motivation for the greater onus on risk was to prevent deaths in custody and ‘to make sure that we, the police service, were looking after people better’.<sup>1376</sup> However, as CO17-1 highlighted, whilst the safety of the detainee would be the official reason, the unofficial reason is that:

*The job [the police force] is absolutely scared of a death in custody. They are absolutely bottling it. There’s been one or two occasions recently where people have self-harmed, that were going to self-harm anyway, and the job’s absolutely petrified of it because they won’t stand up and say, ‘Well, this person is mentally ill’ or ‘This person was going to self-harm anyway’. And the blame will always come back to the staff and not to the person who’s responsible for their own actions.*<sup>1377</sup>

This was reiterated by CO24-2:

*If we don’t identify any risk, we can’t care for these people properly. You want to avoid, without tempting fate, touching wood, a death in custody. Or any issue, or anybody coming to harm in custody. It’s why we identify risk... I don’t want anything to happen*

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<sup>1374</sup> CO20-1 Interview.

<sup>1375</sup> CO30-2 Interview.

<sup>1376</sup> CO2-1 Interview.

<sup>1377</sup> CO17-1 Interview.



*[to them] that is going to get me in trouble. So [their] care is [of] paramount importance.*<sup>1378</sup>

Deaths in police custody attract negative publicity and may result in the custody officer being suspended from duty pending investigation. Moreover, if the custody officer had erred in judgement, he may lose his job or be held criminally liable for the detainee's death.<sup>1379</sup> The custody officer must take steps to ensure that he can do as much as possible to prevent a death in custody and must express concern for the detainee, in an attempt to obtain full and accurate information regarding the detainee's mental and physical well-being. Where a detainee indicates or states that he or she may have a particular ailment, it is the responsibility of the custody officer to find out more. For example, if, when asked about physical health conditions, the detainee informs the custody officer that he or she suffers from asthma, the custody officer will ask about the medication he or she takes, the dosage, whether this medication is on his or her person or at home, if he or she experiences asthma attacks and if so, when was the last. He or she will also be seen by the HCP. Custody officers were less likely to dismiss information provided by the detainee as unreliable because of the implications associated with a death (or harm) in police custody. What is key here, therefore, is what happens as a result of non-compliance. I will return to this in Chapter 9.

## 8.8 The function of rules revisited

Thus, what we have is a combination of the legalist, culturalist, and structuralist accounts, with the latter two perhaps exerting more influence.<sup>1380</sup> The legalist conception can explain why custody officers treat adults and young suspects differently, yet it does not explain why custody officers dismiss the need for an AA when they know that the suspect's condition falls under

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<sup>1378</sup> CO24-2 Interview.

<sup>1379</sup> See Crown Prosecution Service, *Prosecution Policy and Guidance: Deaths in Custody* <[www.cps.gov.uk/legal/d\\_to\\_g/deaths\\_in\\_custody/](http://www.cps.gov.uk/legal/d_to_g/deaths_in_custody/)> accessed 8 December 2015. See also College of Policing, *APP: Detention and Custody* (n 153). In May 2016 a decision was taken to prosecute a custody officer and former detention officer for the death of a suspect in May 2014 – see BBC News, *Lisburn police station: Officer and former police employee to be charged over death of man in custody* <[www.bbc.co.uk/news/uk-northern-ireland-36255191](http://www.bbc.co.uk/news/uk-northern-ireland-36255191)> accessed 6 June 2016.

<sup>1380</sup> Perhaps in the form of McConville, Sanders and Leng's social constructionism, as mentioned earlier in this chapter.

the Code C definition of vulnerability. The culturalist perspective explains why custody officers are suspicious and cynical of suspects but does not fully explain why custody officers differ in their approach towards young and adult suspects.<sup>1381</sup> The structuralist perspective explains why they may decide not to implement the AA safeguard, yet does not necessarily explain why they hold certain views of suspects. Thus, combining the culturalist and structuralist perspectives (and to a lesser degree legalist) one can see that custody officers adopt the safeguards pursuant to their own objectives and can do so because the law, in a sense, permits this. Further, they are not necessarily reprimanded for non-implementation, but instead are largely left to their own devices when it comes to regulation. Such perspectives also help explain why discretion exists – custody officers did not, as explored in Chapter 7, feel that they should adhere strictly to what Code C states in relation to the AA safeguard, particularly because this would involve providing an AA for basically every suspect who passed through the doors and *‘the practicality of that would be to slow the system down tremendously and to cost the public an absolute fortune’*.<sup>1382</sup> In this sense, the ‘rules’ created by Code C were viewed as over-inclusive<sup>1383</sup> and, as such, discretion must be utilised. Further, custody officers did not wish for greater clarity within Code C as this would be *‘too prescriptive’*<sup>1384</sup> – Code C was praised for its flexibility and for not *‘constrain[ing] [custody officers] by definites’*.<sup>1385</sup> Whilst discretion could be said to arise from unclear legal rules,<sup>1386</sup> it is more likely to arise as a result from a lack of enforcement mechanisms.<sup>1387</sup> Where rules are subject to lesser scrutiny,

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<sup>1381</sup> See elsewhere in this chapter and Chapter 7.

<sup>1382</sup> As stated by CO22-2 at interview. Again, this links with efficiency in a crime control sense, but also reflects Sanders and Young’s idea of ‘distribution sensitive consequentialism’ – see Sanders, Young and Burton (n 1177) 49.

<sup>1383</sup> Keith Hawkins, ‘Introduction’ in Keith Hawkins (ed) *The Uses of Discretion* (OUP 1992) 8.

<sup>1384</sup> As CO27-2 stated at interview, *‘I think you’d struggle because with every mental disorder there will be a spectrum in that between a low and high. So to say that someone had a certain mental disorder and therefore would require an [AA] x, y, z could become too prescriptive’*. Custody officers seemingly wanted more clarity with regard to mental disorder for the purposes of risk management.

<sup>1385</sup> CO28-2 Interview. On this point, Manning and Hawkins noted that whilst the law is viewed by officers as a ‘resource’, too much law is an ‘impediment’ – see Peter K Manning and Keith Hawkins, ‘Police decision-making’ in Mollie Weatheritt (ed) *Police Research: Some Future Prospects* (Avebury 1989) 152.

<sup>1386</sup> See section 8.7.1.

<sup>1387</sup> As mentioned in this chapter and discussed elsewhere.

discretion may increase. And, conversely, discretion decreases when scrutiny increases – where custody officers are uninhibited by the rules, they have utmost discretion.

## 8.9 Conclusion

The aim of this chapter was largely two-fold – to explore the theory in relation to policing and to explore the factors influencing custody officer decision-making. The models examined within this chapter are important in understanding the custody officer approach. As the discussion perhaps indicates, Packer's and King's models are limited in this regard. The legalist, culturalist and structuralist conceptions offer much greater explanatory power. As this thesis has illustrated, whilst the AA safeguard is a rule, it is not a rule which is implemented systematically and consistently. Custody officers take a range of factors into account when deciding whether to implement the safeguard.<sup>1388</sup> It is, however, important to recognise that rules may have varying functions and their use may depend, *inter alia*, on the wider context of the case, how the police view the rules, and/or how clear or effective that rule is. Within the latter part of this chapter, I have explored custody officer interpretation in practice, drawing upon discussion from Chapters 4, 5, 6, and 7. I have elucidated where, if at all, such theories appear within the data and how the custody officer approach can be explained. There is value in each of the theoretical perspectives but one must not '[slip] into the naïve meccano model of theoretical formation'<sup>1389</sup> but instead to 'draw on elements of various approaches'.<sup>1390</sup> This chapter, in doing so, has provided a nuanced, textured, and multi-faceted account of the custody officer approach. Yet, the final element, the grounded theory, still requires discussion – this has been reserved for the following chapter.

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<sup>1388</sup> See Chapter 7.

<sup>1389</sup> Dixon (n 23) 267.

<sup>1390</sup> *ibid.*

## **CHAPTER 9: CONCLUDING REMARKS AND RECOMMENDATIONS**

### **9.1 Introduction to the concluding comments**

The initial aim of this thesis was to explore how custody officers implement the AA safeguard, focusing predominantly on how they identify vulnerability, and to assess whether this has improved since the previous studies were conducted. Yet, through immersion in the field I have been able to explore the issue in more depth and nuance, addressing not only how vulnerability is identified, but also explaining how it is defined and how, and why, decisions are made. As explained in Chapter 8, not one single existing theory can fully explain how custody officers define, identify and make decisions on vulnerability for the AA safeguard. Instead a synthesis of various theories can help explain why custody officers approach vulnerability and the AA safeguard in the manner outlined in Chapters 5, 6, and 7. These theories do not necessarily get to the core of what custody officers are doing when they implement the AA safeguard, or, equally, when they do not implement it. The theories might explain why there is a ‘gap’ between law in books and law in action but they cannot tell us how custody officers view this aspect of their role. Therefore, within this chapter I will explore the grounded theory. This theory has emerged from observing custody officers at work for close to six months, interviewing 23 custody officers for around an hour, having numerous informal conversations (as discussed in Chapter 2), and listening attentively to what the custody officers say about themselves and their role. It is unlikely that such insights could be gained without such immersion in the world of the custody officer. It is also by absorbing the custody officers’ views and perspectives, and also addressing how, for example, the courts approach vulnerability for the AA safeguard, that I can offer some recommendations. Thus, within this chapter, I will also explore how I propose vulnerability for the purposes of the AA safeguard be conceptualised. It is also worth noting that whilst I was immersed in the custody officers’ world(s) for six months, there still undoubtedly remains a lot to be said and done. I will, therefore, address the limitations and potential avenues for future research later in this chapter. Finally, I will (re)-state the contribution this thesis has made.

## 9.2 Constructing grounded theory

As aforementioned, within the previous chapter I addressed how various existing theoretical insights can facilitate understanding of the ‘gap’ between the law in books and the law in action, in respect of vulnerability and the AA safeguard. Albeit to lesser or greater degrees, crime control, due process, and bureaucratic values ostensibly influenced custody officer decision-making. Further, the implementation of the AA safeguard (dependent on definition, identification and decision-making) was affected by ambiguities in the law. Such ‘ambiguities’ were exploited by custody officers pursuant to cultural values and they were able to do so due to, at least in part, a lack of scrutiny and oversight. Legal rules are malleable and are moulded and shaped to suit the police and their objectives. In this regard, custody officers can most definitely be viewed as ‘facilitators’ rather than ‘doorkeepers’<sup>1391</sup> i.e. they facilitate the police objective of interviewing and evidence-gathering more so than protecting the suspect’s due process entitlements.<sup>1392</sup> But this is not to say that this explains the entire picture. Rather, whilst legalism, and to a greater degree, culturalism and structuralism can help explain the custody officer approach, these can be incorporated within a more specific theory. These theories do not fully explain the distinction between vulnerability and risk management. Custody officers, in this regard, often referred to ‘walking a tight-rope’ or ‘having our hands tied behind our backs’. Often decisions were made because of accountability. For example, CO4-1, when discussing an occasion when he was required to change a risk-management decision,<sup>1393</sup> stated:

*You have to cover your back. You have to cover your back. Because that was what the family were saying, the family were saying, ‘We’ve got these issues’. And rest assured, because this is what happens quite often, ‘We have these issues and if you don’t do anything and something goes wrong, we’re going to be pointing the finger at you’. Our hands are tied.*<sup>1394</sup>

Decisions on risk were, therefore, taken by the custody officer in a manner which would best keep him from scrutiny should anything go awry. As illustrated in Chapter 7, custody officers

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<sup>1391</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 55.

<sup>1392</sup> Supposing that the law actually confers such due process safeguards.

<sup>1393</sup> See n 987.

<sup>1394</sup> CO4-1 Interview. See also Chapter 6 at n 987.

will also make decisions on vulnerability in a way that best keeps them from facing scrutiny. Decisions are taken, firstly, for personal purposes – for example, custody officers will undoubtedly consider the level of work associated with calling an AA. In this sense, custody officers are not necessarily any different from other workers.<sup>1395</sup>

As discussed in Chapter 7, implementing the AA safeguard will cost (precious) time and may keep the suspect in custody for longer (thus increasing the time that the custody officer is responsible for him or her). Yet, where a suspect does not understand the interview process,<sup>1396</sup> an interview without an AA may be fruitless or, at the very least, time and energy-intensive. It is not necessarily that the custody officer *wants* to prevent the suspect from being safeguarded – it may be simply because he does not think the safeguard is needed. Further, in cases where the case may reach the courts and questions may be asked, the custody officer may be more likely to implement the AA safeguard, if only to save himself and the police from scrutiny or to save the case.<sup>1397</sup> Moreover, the solicitor can replace the AA because he or she can perform a similar role, but also because where a solicitor is requested, it is much easier to simply arrange for one person to be called, rather than two at the same time (which is often difficult to arrange). Further, the solicitor can facilitate communication<sup>1398</sup> and the solicitor can request an AA, if an AA is required. The solicitor's failure to do so may potentially counteract any possibility that the evidence will be successfully challenged at court (or, even, such a challenge be even raised). Given the court's approach, as discussed in Chapter 4, the custody officer may be willing to hedge his bets. He may not, however, be willing to take chances when dealing with 'prisoner welfare' and risk, because a breach of 'Safer Detention' carries with it greater personal and professional repercussions than a breach of Code C.<sup>1399</sup> If the custody officer fails to put the various safeguards in place and the suspect comes to harm, he may be responsible for more than just losing the case – he may face personal consequences.<sup>1400</sup> Even where he

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<sup>1395</sup> As Punch has noted, researchers often become 'mesmerised by the police world and attribute behaviour uniquely to its culture whereas fruitful similarities, and contrasts, abound with workers in other types of organisational setting' – Maurice Punch, *Conduct Unbecoming: the social construction of police deviance and control* (Tavistock 1985) 187.

<sup>1396</sup> See section 5.4.

<sup>1397</sup> The latter here is a crime control objective – see section 8.2.1.

<sup>1398</sup> See sections 5.6 and 7.2 on the AA safeguard. See Chapter 4 on the court's approach.

<sup>1399</sup> See sections 7.4 and 8.7.

<sup>1400</sup> Prosecutions for unlawful deaths are unlikely and, where pursued, ostensibly do not result in a conviction – see INQUEST, 'Statistics, Unlawful Killing Verdicts and Prosecutions'

does not face criminal sanction, he may be suspended from duties pending investigation. The police force may also be obliged to answer questions and may shoulder some of the blame. Thus, whilst the custody officer may be seen to make decisions firstly for crime control and secondly for bureaucracy, this instead suggests something different – custody officers make decisions firstly for personal reasons and then for professional reasons.

Not only are decisions taken pursuant to personal or professional objectives; vulnerability is also constructed according to these objectives and identified in a manner which best suits, and makes sense, to custody officers. For example, whilst vulnerability can be broadly construed, it does not make sense to custody officers to employ this definition for the purposes of the AA safeguard. Both ‘AA vulnerability’ and the AA safeguard can be interpreted pursuant to a police purpose.<sup>1401</sup> Vulnerability is also identified in a way, which best makes sense to custody officers. Further, as explored in Chapter 6, the identification of vulnerability can be likened to an investigation – custody officers understand this pursuant to a perspective that best suits their professional background. Ultimately, when making decisions on the AA safeguard, the custody officer chooses the path of least resistance – he will do whatever is required for an easy life.<sup>1402</sup> This may also explain why, for example, he relies on the HCP for advice – it is easier to defer a decision to someone else, particularly someone with more ‘expertise’.<sup>1403</sup>

The custody officer’s interpretation of the law cannot simply be explained by ‘crime control’, ‘bureaucracy’, ‘due process’ nor ‘legalism’, ‘culturalism’, or ‘structuralism’. Custody officers are human beings, and human beings adopt an approach which is most favourable to them and which makes most sense to them when making decisions. The custody officer, when faced with civil or criminal sanction, will be more likely to adhere to the rules in order to ‘cover his ass’. A rule is therefore more likely to be inhibitory, or perhaps even internalised, where there is

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<<http://www.inquest.org.uk/statistics/unlawful-killing-verdicts-and-prosecutions>> accessed 4 May 2016.

<sup>1401</sup> See sections 5.4-5.6.

<sup>1402</sup> For example, it has been well-established that custody officers routinely authorise detention. They do so, at least in part, because it is easier to do so rather than argue with the arresting officer, only to be overruled by a superior later on – see Roxanna Dehaghani, ‘Automatic authorisation: an exploration of the decision to detain in police custody’ (2017) 3 Criminal Law Review 187.

<sup>1403</sup> See sections 6.4.3 and 7.2.3.

more at stake. Further, personal purpose is likely to override professional purpose. The ‘status, sanctions, degree of specificity, procedure and enforcement practice’<sup>1404</sup> are important but, of greater importance is whether the sanction will affect the custody officer.

### 9.3 Recommendations

Within the previous chapter I explored how theory interacts with custody officer interpretation of vulnerability and the AA safeguard. Moreover, I have explained that custody officers approach vulnerability in a manner pursuant to personal and professional objectives. The question, therefore, is – what can be done about their interpretation of vulnerability and the AA safeguard? The first response would be nothing – custody officers should be able to use their discretion when implementing the AA safeguard. However, as Reiner has noted, whilst ‘discretion is lauded as not only inevitable but wise and desirable’,<sup>1405</sup> it is not used in an ‘equal opportunity’ manner.<sup>1406</sup> For the AA safeguard, discretion is not necessarily used in a positive manner, i.e. to safeguard suspects who would not otherwise fall under the guidance, rather it is used in a negative manner, i.e. to remove the safeguard from suspects who are, in fact, caught by the guidance.<sup>1407</sup> Thus, it is not, as Reiner has stated, ‘equal opportunity’.<sup>1408</sup> One suggestion would therefore be to remove discretion altogether. This could be achieved in a number of ways.

#### 9.3.1 Improving the provisions

One could adopt the approach that police practice will adapt if provisions are ‘tightened-up’. The definitions of adult vulnerability could be moved from the Notes for Guidance to the main Code or an Annex. Further, the status of Code C could be changed<sup>1409</sup> so that breach of Code C is handled as a civil or criminal matter.<sup>1410</sup> This, of course, requires that custody officers

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<sup>1404</sup> Baldwin, ‘Regulation and Policing by Code’ (n 1323)166.

<sup>1405</sup> Robert Reiner, ‘Policing and the Police’ in Mike Maguire, Rod Morgan and Robert Reiner (eds) *The Oxford Handbook of Criminology* (OUP 1996) 1010.

<sup>1406</sup> *ibid* 1010.

<sup>1407</sup> Although that potentially depends on one’s interpretation of vulnerability.

<sup>1408</sup> Reiner, ‘Policing and the Police’ (n 1405) 1010.

<sup>1409</sup> This was a suggestion made in the NAAN report – see NAAN (n 39).

<sup>1410</sup> See PACE, s 67 (10).



know what to look for and can look for it. Thus, the definitions of vulnerability contained within Code C could be clarified and made more comprehensible. However, as Lord Bradley has noted, ‘even when talking to professionals in this field, I found that there was a lack of consensus in defining the boundaries between learning disability, borderline learning disability and learning difficulty’.<sup>1411</sup> Clarifying the guidance may illustrate to custody officers what is clearly required, yet an alteration to the guidance may be futile if custody officers cannot operationalise the definitions.<sup>1412</sup> Moreover, being unable to fully operationalise the definitions does not equate to not knowing what they are – custody officers seem to pay little attention to the guidance and instead adopt their own definition. Clarification of legal guidance may improve their knowledge of the safeguard if they consult the guidance, but it will not ensure compliance. It has also been suggested, as with the requirements for young suspects, that a statutory duty to provide AAs for adults should be implemented.<sup>1413</sup> Yet, and as alluded to in Chapter 8, the term ‘juvenile’ requires no interpretation – a child is either 17 and below or not. The definitions for adult vulnerability, as evidenced in Chapters 4 and 5, are much more complex and, as such, discretion can still be read-into them. Further, as McConville, Sanders and Leng have noted, the introduction of PACE did not necessarily change police practices<sup>1414</sup> – the problem lies not simply with the legal guidance but also with police culture in the context of a lack of judicial oversight.

### 9.3.2 Accountability in the courts?

A ‘tightening-up’ of legal provisions would also require more activity by the courts. For example, decisions could be much more readily open to challenge by the courts. Compliance comes about through fear of sanction; the likelihood of compliance increases with the severity of the sanction and the likelihood of detection.<sup>1415</sup> Currently, a breach of Code C cannot result in civil or criminal sanction<sup>1416</sup> but instead exclusion of evidence at trial. Further, the sanction

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<sup>1411</sup> Bradley (n 113) 19.

<sup>1412</sup> I will return to this recommendation, in part, later.

<sup>1413</sup> See Jacobson (n 1358). See also NAAN (n 39).

<sup>1414</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18). See also Reiner, *The Politics of the Police* (n 18).

<sup>1415</sup> In line with deterrence theory.

<sup>1416</sup> PACE, s 67 (10).

is not always applied and the courts seem reluctant to criticise police practice.<sup>1417</sup> The courts could, for example, exclude evidence for any breach of Code C regardless of its effect on reliability or the fairness of proceedings. This would, of course, require a change in the requirements under ss 76 and 78 of PACE, i.e. legislative change must occur before judicial change can happen. However, for the sanction to be (potentially) applied, the case must first reach the courts<sup>1418</sup> – this is low probability, given the large number of guilty pleas. Also, this does not necessarily ensure that the suspect avoids contact with the criminal process.<sup>1419</sup> Furthermore, the result of a breach of Code C, i.e. exclusion of evidence at trial, cannot, at least in the eyes of the custody officer, be compared with a breach of College of Policing APP, i.e. the death of, or harm to, the detainee and, as a result, potential civil or criminal sanction.<sup>1420</sup> To attach such a sanction to a wilful breach of Code C may be an option, but it could, similarly, be a step too far.

The police complaints procedure may provide recourse. However, this supposes that the suspect realises his or her rights have been breached, and follows the complaints procedure.<sup>1421</sup> In practice, the complaints procedure may be problematic. For example, in Choongh's study, some suspects illustrated a reluctance to complain about police malpractice or violence, particularly because they felt like it was a waste of time, because the police would 'get away with it' regardless, or because they would be specifically targeted in the future for having previously complained.<sup>1422</sup> Such 'defeatism... is perhaps not unjustified'<sup>1423</sup> – one of the arresting officers in Choongh's study, after being asked whether a detainee (who had claimed he would make a complaint) had actually made the complaint, replied 'I don't know and I can't

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<sup>1417</sup> See section 4.4.2.

<sup>1418</sup> See section 8.6.3.

<sup>1419</sup> As the process can often be the punishment – see Feeley (n 167).

<sup>1420</sup> The general feeling was such that 'make sure no one dies; everything else we can sort out'.

<sup>1421</sup> Moreover, upon perusal of the IPCC website, I could not find any isolated complaints for the non-implementation of the AA safeguard for adult suspects. Complaints did mention non-implementation but were brought for other reasons – for example, one complaint concerned, in part, the non-implementation of the AA safeguard in respect of a suspect who had learning difficulties who later died after self-harming. See Independent Police Complaints Commission, Case 2.6 Bulletin 8 – General, October 2009, <[www.ipcc.gov.uk/sites/default/files/Documents/bulletin82.6.pdf](http://www.ipcc.gov.uk/sites/default/files/Documents/bulletin82.6.pdf)> accessed 26 April 2016.

<sup>1422</sup> Choongh, *Policing as Social Discipline* (n 29) 196.

<sup>1423</sup> *ibid* 83.

say that I really care. He can do what he wants; we always have his type making complaints – it means nothing’.<sup>1424</sup> Further, many suspects may just wish to put the ordeal behind them.

### 9.3.3 Filling the ‘gap’ with ethics and training?

Given that interpretation occurs pursuant to police cultural values, and such values are endemic, it may be impossible to fully remove the ‘gap’ between the law in books and the law in action.<sup>1425</sup> Adoption of the ‘intensely practical scheme’<sup>1426</sup> of the European Convention on Human Rights (ECHR) may help fill this gap, along with the use of ethical principles.<sup>1427</sup> Ethical principles are important within the criminal process – the police, for example, by virtue of their position, have the power to radically alter the life of another. They are the ‘ultimate gatekeepers of citizenship and respectability’<sup>1428</sup> due to their ‘crucial role in protecting hard-to-reach and vulnerable groups’.<sup>1429</sup> Given that, as illustrated above, custody officers act in a largely self-interested manner, ethical guidelines could ensure that discretion is instead used in a positive manner. Ethical principles may be able to guide the custody officers in their decision-making capacity and ensure that discretion is used fairly and in the interests of the suspect,<sup>1430</sup> that those in need of additional assistance are afforded respect rather than dismissed as problematic, and that custody officers, as public servants, abide by high standards of integrity.<sup>1431</sup> The Council of Europe’s Code of Police Ethics sets out an extensive range of policies on ethical policing for European police forces.<sup>1432</sup> The College of Policing has also released a Code of Ethics, pursuant to s 39A (5) of the Policing Act 1996 as amended by s 124

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<sup>1424</sup> *ibid.*

<sup>1425</sup> Supposing there is a ‘gap’ – the structuralists may suggest otherwise.

<sup>1426</sup> Ashworth and Redmayne (n 1177) 37.

<sup>1427</sup> *ibid* 62.

<sup>1428</sup> Peter Neyroud and Alan Beckley, *Policing, Ethics and Human Rights* (Willan 2001) 38.

<sup>1429</sup> *ibid.*

<sup>1430</sup> See above in reference to ‘positive’ and ‘negative’ discretion.

<sup>1431</sup> Neyroud and Beckley (n 1428).

<sup>1432</sup> Council of Europe, *European Code of Police Ethics* (Recommendation 10 2001). See also Alan Wright, ‘Ethics and Corruption’ in Tim Newburn, Tom Williamson and Alan Wright (eds) *Handbook of Criminal Investigation* (Willan 2007) 591-4. This 2001 Code of Ethics supersedes the Council of Europe, ‘Declaration on the Police’ (Resolution 690 Council of Europe 1979).

of the Anti-Social Behaviour, Crime and Policing Act 2014.<sup>1433</sup> An ethical model could encourage compliance with the AA guidelines<sup>1434</sup> and may alter the current police perception of vulnerable suspects as ‘social junk’.<sup>1435</sup> Custody officers may be more willing to invest time and effort in safeguarding the vulnerable, whilst also being mindful of the detrimental implications of not implementing the AA safeguard. An ethical approach could potentially drive reform of the criminal process and successfully confront the long-standing, engrained, and problematic occupational policing culture.<sup>1436</sup> It may help to strengthen disciplinary rules and procedures thus bolstering individual rights within the criminal process. However, it remains to be seen whether ethical principles could fill the ‘gap’ between the law in books and the law in action or whether these would extend to guaranteeing implementation of the AA safeguard for every suspect who meets the criteria set out within Code C. Further, there are doubts over whether an ethics-based approach is capable of infiltrating police culture. For example, Bittner has commented that prejudice is unavoidable in police work and has raised scepticism regarding the kind of ethics the police are required to adopt.<sup>1437</sup> What’s more, if the rhetoric of the law fails to embody due process principles, it is unlikely that ethical guidelines can remedy police practice.

Custody officers could also be provided with training – this suggestion was advanced by Palmer, who suggested that ‘the introduction of basic training for all police officers in the recognition of mental illness and learning difficulties will reduce the potential for breaches of the Codes’.<sup>1438</sup> As noted above, and as discussed in Chapters 5, 6 and 7, custody officers often have a sufficient awareness of the requirements set-out within Code C. It is what they choose to do with this information that often results in non-implementation of the safeguard. Further,

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<sup>1433</sup> College of Policing, *Code of Ethics: A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales* (College of Policing 2014)

< [www.college.police.uk/What-we-do/Ethics/Documents/Code\\_of\\_Ethics.pdf](http://www.college.police.uk/What-we-do/Ethics/Documents/Code_of_Ethics.pdf) > accessed 26 April 2016.

<sup>1434</sup> Although no reference is made to these within the Code of Ethics – *ibid*.

<sup>1435</sup> Steven Spitzer, ‘Towards a Marxian Theory of Deviance’ (1975) 22 (5) *Social Problems* 638.

<sup>1436</sup> It is not, however, monolithic – see Reiner, *The Politics of the Police* (n 18) above.

<sup>1437</sup> Egon Bittner, *The Functions of Police in Modern Society* (National Institute of Mental Health 1970) as cited in Alan Wright, ‘Ethics and Corruption’ (n 1432) 596.

<sup>1438</sup> Clare Palmer, ‘Still Vulnerable After All These Years’ [1996] *Criminal Law Review* 633, 635.

as Palmer herself recognised, previous research indicated that a failure to implement the AA safeguard occurs ‘even when custody officers are aware of the illness or handicap’.<sup>1439</sup> Indeed, her own study confirmed ‘that breaches of this type continue to occur’.<sup>1440</sup> Moreover, as mentioned in Chapter 8, custody officers largely did not welcome more training on Code C – they felt they already knew enough in order to implement the AA safeguard.

Training guidelines or ethical principles could, therefore, act merely as a ‘sticking-plaster’ rather than getting to the core of the issue. As addressed above, custody officers interpreted the law in a way that best suited their needs. As McConville, Sanders and Leng have noted, malpractice, which is ‘*integral and routine* part of the investigative process in England and Wales’,<sup>1441</sup> does not necessarily occur as a result of cultural pressures or occasional enthusiasm.<sup>1442</sup> Instead, custody officers, rather than searching impartially for vulnerability, construct it in a manner which suits a personal or police purpose.<sup>1443</sup> Thereafter, they also implement the safeguard in a manner pursuant to their own needs and in the best interests of the investigation.

#### 9.3.4 (Re)-constructing vulnerability?

We are left, largely, with two problems. Firstly, ensuring compliance is an onerous, if not impossible, task. Secondly, a true, accurate reflection of the suspect’s vulnerability is difficult, if not impossible, to ascertain.<sup>1444</sup> Even if custody officers are to adopt the Code C definition of vulnerability and implement the safeguard for every suspect who is identified as vulnerable, this requires that identification procedures are flawless. Whilst the identification of innate vulnerability can be assisted through the procedures described in Chapter 6, it is not without its challenges. Further, as noted in Chapter 3, vulnerability can arise through a situational state

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<sup>1439</sup> *ibid* 639.

<sup>1440</sup> *ibid*.

<sup>1441</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) as cited in Mike Maguire and Clive Norris, ‘Police Investigations: Practice and Malpractice’ (1994) 21 *Journal of Law and Society* 72, 74.

<sup>1442</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18).

<sup>1443</sup> *ibid*.

<sup>1444</sup> For example, in Choongh’s study, some detainees found confinement more difficult than others – Choongh, *Policing as Social Discipline* (n 29) 97. It may be difficult to truly and accurately assess the effect of detention on each detainee or suspect.

and can be something internal to the individual. If vulnerability is something that manifests internally, the question arises as to how the custody officer is to identify this. Vulnerability within police custody could, however, be reconceptualised to include all suspects. I will address the arguments in favour of this approach below.

The police, by focusing on the suspect's level of understanding (see section 5.4.4), fail to appreciate that those who do not have issues with comprehension may nevertheless experience difficulty understanding legal rights or providing reliable and accurate information. Furthermore, those with mental disorder (where it does not result in issues with comprehension and capacity) or mental vulnerability may nevertheless be suggestible or compliant. False confessions, as outlined in section 3.3, can occur in the absence of a mental disorder (or even mental vulnerability). But perhaps an even greater problem exists: the definition of vulnerability as contained within Code C is unclear (see Chapter 4, and more specifically sections 4.2 and 4.8). The focus on capacity, comprehension, and communication is undoubtedly compounded by much of the rhetoric of Code C. For example, Code C explains that a vulnerable suspect is one who may provide false, misleading or self-incriminating evidence. It may well be that to a custody officer, this means someone who does not understand what is happening. What is missing within Code C is an explanation of how the nature of police custodial detention and the daunting nature of the criminal process may prompt someone to act against their own best interests. Yet, acting in one's best interests may not mean not providing false, unreliable or misleading information, it could also mean not saying anything at all; it could, in essence, mean obstructing the police interview and wider investigation; it could even mean lying to the police. The rhetoric of reliability is also contained within s 76 PACE. Perhaps this focus is misguided: surely, vulnerability means not being able to act in one's own best interests, whatever this means.

Thus, vulnerability for the purposes of the AA safeguard need not only be conceptualised as a mental state, capacity, or condition. As noted in Chapter 3, vulnerability can be something inherent to the human condition – by virtue of our embodiment, we are all vulnerable. Yet, it is not our inherent vulnerability that demands that safeguards are implemented within the criminal process. Rather, it is situational vulnerability, i.e. criminalisation or detention in custody (see section 3.4), which renders all suspects potentially or actually vulnerable within

police custody. Vulnerability can be viewed as something which results from the unequal relations between the detainer and the detained – as Hodgson notes, police custody is a space where the police have the upper hand ‘through physical, territorial and information control’.<sup>1445</sup> Further, as Gudjonsson argues, even with markedly improved legal provisions, any type of custodial interrogation is coercive when viewed in terms of police power and control.<sup>1446</sup> The power imbalance between detainer (the state) and the detained (the suspect) may interfere with the suspect’s ability to act in his or her own best interests and may thus render him or her vulnerable. The opportunity, for any suspect, to interact with an individual who is not at all involved in the investigation (i.e. not a police officer or solicitor) could lessen this power imbalance.

Whilst one may, of course, argue that there are various due process safeguards available in custody (such as those mentioned in Chapter 1), as alluded to above, the nature of custody may undermine the suspect’s ability to realise or enforce his or her rights.<sup>1447</sup> It is debatable, moreover, whether all suspects understand and can invoke their rights when in custody, particularly when they have no experience of the criminal process or are experiencing stress as a result of, for example, being arrested. The rights are initially read to the suspect upon booking-in, after having been asked a range of questions about his or her mental and physical well-being and subjected to a search and, as such, it is debatable how much he or she will be able to digest the information provided.<sup>1448</sup> What’s more, even if able to grasp and make sense of these rights, there may be a reluctance to exercise the rights (particularly the right to legal advice) for fear of appearing bothersome or, more poignantly, for fear of appearing guilty. This may be compounded by educational difficulties which may render the uptake of rights almost impossible.<sup>1449</sup> The provision of an independent third party may enable the suspect to enforce

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<sup>1445</sup> Hodgson, ‘Adding Injury to Injustice’ (n 447) 90.

<sup>1446</sup> Gudjonsson, *The Psychology of Interrogations* (n 362) 25. Gudjonsson also suggested that coercion in police interviews might lead to Post-Traumatic Stress Disorder; however, a direct link has yet to be established – Gudjonsson n (362) 35.

<sup>1447</sup> See Rock (n 173).

<sup>1448</sup> See for example Sanders, Young and Burton (n 1177) in relation to police ploys used that impact upon the uptake of legal advice. See also Rock (n 173).

<sup>1449</sup> As Rock notes, ‘reading in detention is particularly difficult because it necessitates reading alone’ – Rock (n 173) 109. Some suspects may have previously relied on social networks to facilitate reading, custody ‘dismantles’ this. Whilst the AA goes some way to remedying this, it nevertheless provides an institutional or ‘public, formal official and structured’ rather than

and exercise these rights effectively. Further, the right to legal advice, whilst intended to ‘balance’ the scales against the power to detain,<sup>1450</sup> is ‘triggered only by a *positive* request’.<sup>1451</sup> There are numerous reasons why an individual may not avail of his or her right to legal advice – out of fear that a request is an indication of guilt; due to a feeling that one has ‘nothing to hide’; because of a desire to be released as soon as possible; or owing to a willingness to confess (and a failure to understand the benefits of requesting legal representation).<sup>1452</sup> Vulnerability arises, *inter alia*, from being brought into contact with the criminal process,<sup>1453</sup> being detained in police custody,<sup>1454</sup> or having adverse inferences drawn from your silence,<sup>1455</sup> or being unable or unwilling to exercise your rights. Thus, on this basis, it could be argued that all suspects (and, of course, all other detainees) are vulnerable within police custody.<sup>1456</sup> The focus, within an adversarial criminal justice process, should not be, as Code C and s 76 PACE would suggest, on the provision of reliable information but instead on somehow restoring the inherent power imbalance and thus enabling the suspect to act in his or her own best interests.

### 9.3.5 Reformulating the safeguards?

A reformulation of vulnerability requires, too, a reformulation of the AA safeguard. Thus, a safeguard, such as, or similar to, the AA safeguard, could be available to all who are required to undergo police interview under suspicion of committing a criminal offence.<sup>1457</sup> A re-

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‘private and informal everyday’ – see David Barton and Mary Hamilton, *Local Literacies: Reading and Writing in one community* (Routledge 1998) 16 as cited in Rock (n 173) 109-110. This can be remedied if the AA is a friend or family member.

<sup>1450</sup> See Dixon (n 23).

<sup>1451</sup> McConville, Sanders and Leng, *The Case for the Prosecution* (n 18) 50.

<sup>1452</sup> See also Kemp, ““No time for a solicitor”” (n 30); Skinns, ““Let’s get it over with” (n 30).

<sup>1453</sup> See Feeley (n 168).

<sup>1454</sup> Choongh highlighted in his study how 57% of detainees experienced confinement as distressing, and engendering feelings of powerlessness – Choongh, *Policing as Social Discipline* (n 29) 97. There is a clear link between distress, powerlessness and vulnerability – see sections 3.3 and 3.4.

<sup>1455</sup> See section 1.3. That the criminal process and being locked-up in police custody can exacerbate vulnerability is something recognised by lawyers in the Netherlands and Italy – see van Oosterhout (n 728) 252 in the context of the Netherlands and Cesari, de Felice and Patone (n 728) 206 in the context of Italy.

<sup>1456</sup> Being detained was viewed by custody officers as a factor potentially affecting vulnerability (yet more so in terms of risk of suicide and self-harm).

<sup>1457</sup> As such it would also apply to voluntary interviews.



conceptualisation would eradicate problems with identification and definition, and would remove discretion. It could also have the added effect of deterring police officers from bringing suspects into custody or encouraging custody officers not to authorise detention unless absolutely necessary,<sup>1458</sup> and would ensure that ‘first-timers’ (who are recognised as vulnerable by custody officers) are afforded vulnerability status.

Such a proposal to extend the category of vulnerability may attract criticism because, undoubtedly, some suspects *do* require greater assistance than others. Yet, it is also worth noting that, as has been highlighted in previous research, the AA safeguard can be problematic.<sup>1459</sup> CO16-1 highlighted problems with the communicative function of the AA at interview:

*The [AA] – they’re not medically trained; they’ve not worked with vulnerable adults or youths in the community or anything like that. People, they go away to uni [sic] and they do degrees on and they’ve studied this for years and they’re developed in their field. And yet here, you’ve got someone coming in who likes helping people and [is] dealing with everyone’s abilities and disabilities. And again, it’s just not right. If someone comes in who speaks French, you don’t sort of shout at them and speak slowly, you get a French interpreter. If somebody who comes in who can’t hear, can’t speak, you don’t get somebody who can do a bit of Makaton, you get somebody who can do British Sign Language. So, if someone’s got a particular issue that’s making them vulnerable in custody, then I don’t know why we’re ignoring it and saying, “Yeah, we’ll just get this person in.” It’s just saying to me, if you’ve got a heart problem and your GP’s [does the] surgery or the local vet [does] it because they’re qualified generally. You’ve got to have your specialists and this is why we’re just ticking the boxes and doing a little bit to say that we’re looking after vulnerable people but if we want to do it properly ... We could have specialists in these areas that you can bring in.*<sup>1460</sup>

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<sup>1458</sup> On the arrest and detention procedure see Kemp, ‘PACE, Performance Targets and Legal Protections’ (n 62). See also Dehaghani, ‘Automatic Authorisation’ (n 1402). For example, in Choongh’s study, three suspects thought that their detention had been unnecessary and unfair – Choongh, *Policing as Social Discipline* (n 29) 189.

<sup>1459</sup> See section 1.3.

<sup>1460</sup> CO16-1 Interview.

CO16-1 went on to give a concrete example of where the system falls down:

*You've got some twenty-year-old bloke who lives with his partner and because he's got a learning difficulty... suddenly you'll get some sixty-year-old bloke that he's never seen before, that he's got no interest in whatsoever, has nothing in common with and that person is meant to help him with communication... Some sixty-year-old [person] who knows less about the words and the slang and everything else that you use and they're meant to be helping you with your communication. The ideas for why these [AAs] are here are good [sic] but then it doesn't work... If it was outside the police station and he wanted some help or assistance, he wouldn't go and speak to the old boy who's in here, he would go and speak to Danny the youth worker down the road who's down with the young [people] and understands what they're going through... They can empathise with the person. But they've got no understanding at all. So all this assisting with communication, it isn't there nowadays, it just isn't there.<sup>1461</sup>*

Thus, whilst a generic safeguard could be created for all suspects, it may also be time to consider whether an additional tailored safeguard be provided to those with capacity or comprehension issues. Of course, for both a name change would be required – for example, a specialist advocate<sup>1462</sup> could assist generally and an intermediary<sup>1463</sup> could be provided for those with capacity and comprehension issues.<sup>1464</sup> What is key here is that the specialist advocate and intermediary are equipped to perform the role(s) that they are required to do. As noted above, Code C places an emphasis on obtaining reliable information and thus the AA, as it currently stands, could be seen as a method through which to get the suspect to talk or to otherwise extract the information required. Instead, the purpose of this safeguard should be to put someone in a position that they would otherwise be in if they were not vulnerable. This would require a number of things: an explicit commitment to the suspect (i.e. that the purpose of the safeguard is for the suspect, not for the police and not as something neutral or

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<sup>1461</sup> CO16-1 Interview.

<sup>1462</sup> This term was suggested by Palmer (n 1438) 641.

<sup>1463</sup> Such as that available under the YJCEA 1999.

<sup>1464</sup> See below.

independent), a clear understanding of the safeguard from those performing it, adequate training, and the extension of legal privilege.

Finally, there may be practical obstacles to implementing change – for example, as noted by Ventress, Rix and Kent, ‘realistically... it would be extremely difficult to provide an [AA] in all cases where somebody is “mentally disordered” within the meaning of section 1 of the [MHA] 1983’.<sup>1465</sup> Providing safeguards costs both time and money. As discussed above, however, fewer suspects could be brought into custody. The issue ultimately rests with the criminal process more broadly – assessment of the criminal law and criminal procedure is required in order for any further recommendations to have impact.<sup>1466</sup>

#### 9.4 Moving forward: pushing past the limits

This thesis has done a number of things, some of which share similarities with previous research and some of which add new insights to previous research. The contribution is manifold – the thesis provides insightful data on vulnerability and the AA safeguard through observation and interviews, thus producing a triangulated account of vulnerability in police custody; it has synthesised a number of factors (definition, identification and decision-making), thus providing a multi-faceted and nuanced exploration of vulnerability in police custody; and it has addressed the matter in reference to the existing theory, whilst also bringing new theoretical ideas to the fore. Whilst succeeding in some areas, this thesis is perhaps limited in others. In addition to the challenges discussed in Chapter 2, I felt that the research was restricted by my relative inexperience – it was the first time I had conducted fieldwork, I lacked confidence, particularly in the beginning, and I often found it difficult to ask challenging questions of the custody officers. That said, this inexperience often worked in my favour as I could ask questions that more experienced researchers perhaps could not – I could use my naivety to my advantage. As noted in Chapter 2, data collection and analysis is subject to the researchers own construction – collection was undoubtedly influenced by what I felt was important or interesting, questions were asked according to what I felt was salient, and themes arose according to what I believed

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<sup>1465</sup> Ventress, Rix and Kent (n 516) 371.

<sup>1466</sup> For example, adverse inferences could be abolished. Whether or not such inferences have an adverse effect on the defendant’s case, their psychological impact in ‘getting the suspect to talk’ cannot be ignored.

the data was telling me. As such, another researcher may have produced an entirely different thesis, even if addressing the same questions. Whilst it is important to recognise the limitations, given that the research shares some similarities with previous findings (as highlighted throughout this thesis), this is not a cause for concern.

As discussed in Chapter 2, the decision was made, quite early into the process, only to interview custody officers. Whilst interviewing HCPs, FMEs, AMHPs, other police officers, solicitors, AAs, or suspects may have produced interesting data, my focus was on custody officers and how *their* actions influenced the law in practice. Interviews with other individuals would, however, be an interesting avenue for future exploration, in particular how far the definitions provided by HCPs, FMEs and AMHPs mirror those given by custody officers,<sup>1467</sup> or how suspects understand and experience vulnerability.<sup>1468</sup> A training ‘intervention’ with custody officers may also prove beneficial in assessing whether training or the application of ethical principles would impact upon implementation of the AA safeguard, i.e. with an experimental group receiving training and ethics guidance and a control group not. Further, more research could be conducted on the AA safeguard to assess whether the AA can perform each of his or her functions, and/or whether the suspect feels that the AA’s presence is beneficial. Finally, thought should be given to reformulation of vulnerability and the AA safeguard. The thesis, whilst answering a number of questions, has raised others and it is these I seek to answer in the forthcoming years.

## 9.5 Contributions and conclusions: constructing vulnerability in police custody

Within this thesis I have addressed how the implementation of the AA safeguard by custody officers translates from the law in books (as explored in Chapter 4) to the law in action (as discussed in Chapters 5, 6 and 7), focusing specifically on adult suspects. As discussed in Chapter 1, previous studies have addressed parts of this question before but, by immersing myself in the world of the custody officer (see Chapter 2, particularly section 2.5.2.1) I have

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<sup>1467</sup> See for example Norfolk (n 954).

<sup>1468</sup> Such work could build upon Choongh’s study – see Choongh, *Policing as Social Discipline* (n 29). The HMIC report also contains some interesting insights into how suspects/detainees experienced police custody – HMIC, *Welfare of Vulnerable* (n 81).

been able to address the questions with such nuance, complexity, and texture. Within Chapters 5, 6 and 7 I have illustrated that definition, identification and implementation are all essential to understanding vulnerability for the purposes of the AA safeguard. Further, in Chapter 8, I have explained why the gap between the law in books and the law in action has emerged (if it indeed exists), relying on insights from Chapters 4, 5, 6 and 7. Here it is important to heed the words of Reiner and Leigh:

Analysing the relationship between law and police practice requires a synthesis of the ‘culturalist’ and ‘structuralist’ positions... The art of successfully regulating policing practice is dependent on understanding the complex relationship between formal rules and procedures, the sub-cultural rules of the police themselves, the structure of the police organization, and the practical exigencies of the tasks of policing.<sup>1469</sup>

As mentioned in the introduction, this thesis has also sought to cast a critical eye over the vulnerability provisions. Within Chapter 3 I explored how vulnerability can be defined more broadly and within this chapter I have illustrated how a reconceptualization may remove discretion and ensure that suspects are safeguarded within custody. The resolution is not simple but not impossible either. It does, however, require a sea-change in policing practice, police culture, and the structure of the criminal process. Yet, as I have cautioned above, the matter is much bigger than occasional or frequent non-implementation of the AA safeguard; rather it is the criminal process, a process which is the punishment,<sup>1470</sup> which undoubtedly requires reconceptualisation.

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<sup>1469</sup> Robert Reiner and Leonard Leigh, ‘Police Power’ in Christopher McCrudden and Gerald Chambers (eds), *Individual rights and the law in Britain* (Clarendon Press 1994) 78-9. See also Dixon (n 23) 267-8.

<sup>1470</sup> Feeley (n 167).

## Appendix 1

### **Interview questions – Site 1**

Explanation of interview

Time, Date, Custody Officer

Role

Tell me a bit about yourself and your role as custody officer. How long have you been in this role?

How do you feel in your role? Are there any things you would like to improve or change?

Risk

Can you explain in your own words why it is important to identify risk?

What is the purpose of the risk assessment? Do you think it works in identifying risk?

What type of resources, if any, do you use to identify risk?

Vulnerability

How useful is the risk assessment in identifying whether somebody requires an appropriate adult?

What are you looking for in order to identify whether someone requires an appropriate adult?  
How do you make your decision to call an appropriate adult?

[What type of resources, if any, do you use to identify that someone needs an appropriate adult?]

How do you identify that someone has a learning difficulty? [Unlike mental health issues, there isn't a designated question on the risk assessment that asks about learning difficulty, there is only a question on reading and writing.]

Could you please explain the following terms in your own words?

Mentally disordered

Mentally vulnerable

If someone came to you and reported depression, can you explain what your decisions would be? What would you need to know to make your decision?

Can you explain the purpose of the appropriate adult safeguard?

Thank you for your involvement today. Do you have any questions you would like to ask me?

### **Custody Officer Interview on Vulnerability and Risk**

Explanation of interview

Time, Date, Custody Officer

#### **Role**

Tell me a bit about yourself and your role as custody officer. How long have you been in this role?

How do you feel in your role? Are there any things you would like to improve or change?

#### **Risk**

Can you explain in your own words why it is important to identify risk?

2.2 What is the purpose of the risk assessment? Do you think it works in identifying risk?

[What type of resources, if any, do you use to identify risk?]

#### **Vulnerability**

How useful is the risk assessment in identifying whether somebody requires an appropriate adult? What are you looking for in order to identify whether someone requires an appropriate adult? How do you make your decision to call an appropriate adult?

[What type of resources, if any, do you use to identify that someone needs an appropriate adult?]

How do you identify that someone has a learning difficulty? [Unlike mental health issues, there isn't a designated question on the risk assessment that asks about learning difficulty, there is only a question on reading and writing.]

Could you please explain the following terms in your own words? There is no right or wrong answer.

Vulnerable

Mentally disordered

Mentally vulnerable

If someone came to you and reported depression, can you explain what your decisions would be? What would you need to know to make your decision?

Can you explain the purpose of the appropriate adult safeguard?

Are the terms around vulnerability, set out in Code C of PACE, helpful to you?

[Do you think you would benefit from some clarification?]

Do you feel you can benefit from any additional training in relation to Code C of PACE and the appropriate adult safeguard?

What are your views on the use of appropriate adults for juveniles? [Can you explain why the approach between juveniles and adults is different?]

Thank you for your involvement today. Do you have any questions you would like to ask me?

**Participant Information Sheet for \_\_\_\_\_ Police, 11 November 2014**

**Name of department: School of Law**

**Title of the study: Identifying and Defining Vulnerability – A Comparative Study**

**Introduction**

The researcher, Roxanna Fatemi-Dehaghani, is currently a PhD Candidate and Graduate Teaching Assistant at the University of Leicester. She can be contacted at: School of Law, Fielding Johnson Building, University of Leicester, LE1 7RH. Alternatively, Roxanna may be emailed at [rfd8@le.ac.uk](mailto:rfd8@le.ac.uk) or contacted at 0116 252 2363. Roxanna has a Bachelor Degree in Law (LLB) from Queen's University, Belfast and a Masters in Forensics, Criminology and Administration of Justice (LLM) from Maastricht University, the Netherlands.

**What is the purpose of the study?**

The PhD research explores how suspects might be vulnerable when in police custody. Previous research studies have recognised that identifying who is vulnerable (and who is not) is a very difficult task to carry out for the custody officer in charge. This study investigates the difficulties facing custody/investigative officers; how they perceive their role; and improvements that can be made to current procedures. The ultimate goal of this research study into vulnerability is to provide a new working-tool to assess best practice. The study will also address the different notions and legal provisions regarding vulnerability in the two jurisdictions studied. This is to gain a better understanding of the impact that these notions or provisions may have/not have.

**Do you have to take part?**

Participants will be observed whilst at work for a period of 3 to 4 months and will also be interviewed during this period (at a time which is convenient for them and towards the end of the observation period). Participant involvement is on a voluntary basis and, as such, participants may withdraw at any stage, without detriment.

**What will you do in the project?**

As stated above, participants will be observed whilst at work and will be invited to attend an interview. The finished PhD thesis will be made available to the participants. The dates and location will be agreed between the researcher, the participants and the police organisation.

**Why have you been invited to take part?**

The selection process was on the basis of locality. The participants have been selected due to the nature of their role within the organisation.

**What are the potential risks to you in taking part?**

There should be no risks involved in this study. If the participant has any concerns, these should be raised with the researcher.

**What happens to the information in the project?**

This study will be completely confidential and anonymous. The location of the study will be altered, for example 'Northtown' 'Engtown' or 'Nedtown' and each officer will be referred to as 'Officer A NI', 'Officer B NI', 'Officer A E&W', 'Officer B E&W', 'Agent A NL', 'Agent B NL' and so on. Field notes, as well as the final



## Appendix 3

thesis, will not include any information that could lead to identification of the participant. Participants must not say anything at interview that could be personally identifiable (anything which is said will be either deleted or held in accordance with the Data Protection Act 1998). The only form of personally identifiable data will be the Consent Form. This will be scanned and stored on an encrypted research drive for up to 7 years. This will be accessible to the School of Law.

All notes will be held in accordance with the common law on confidence and will be returned for safe storage to Leicester University for up to 7 years. If you decide to withdraw from the study, any notes, images, videos, recordings or data collected will be deleted.

Thank you for reading this information. Please ask any questions if you are unsure about what is written here.

### **What happens next?**

[If the participant is happy to be involved in the project, they will be asked to sign a consent form to confirm this.

If the participant does not want to be involved in the project, they will be thanked for their attention.]

Information can be provided upon request and a copy of the published thesis will be provided to the organisation so that the participants may access it.

### **Researcher contact details:**

Roxanna Fatemi-Dehaghani  
School of Law, Fielding Johnson Building  
University of Leicester  
LE1 7RH  
Email: [rfd8@le.ac.uk](mailto:rfd8@le.ac.uk)

### **Supervisor details:**

Dr Steven Cammiss  
School of Law, Fielding Johnson  
Building  
University of Leicester  
LE1 7RH  
Email: [sc293@le.ac.uk](mailto:sc293@le.ac.uk)

This investigation was granted ethical approval by the University of Leicester Research Ethics Review.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

University of Leicester  
University Road  
Leicester  
LE1 7RH



I, the undersigned, confirm that (please tick box as appropriate):

1.	I have read and understood the information about the project, as provided in the Information Sheet 11 November 2014.	<input type="checkbox"/>	
2.	I have been given the opportunity to ask questions about the project and my participation.	<input type="checkbox"/>	
3.	I voluntarily agree to participate in the project.	<input type="checkbox"/>	
4.	I understand I can withdraw at any time without giving reasons and that I will not be penalised for withdrawing nor will I be questioned on why I have withdrawn.	<input type="checkbox"/>	
5.	I understand the procedures regarding confidentiality such as use of names, pseudonyms and anonymisation of data.	<input type="checkbox"/>	
6.	I understand that I must not discuss matters within interview that may make me personally identifiable. If any personally identifiable information is discussed, this will not be recorded.	<input type="checkbox"/>	
7.	I understand that should any personally identifiable information be discussed, this will not be recorded or, if recorded, will be destroyed.	<input type="checkbox"/>	
8.	I agree to the interview(s) being audio recorded.	Yes <input type="checkbox"/>	No <input type="checkbox"/>
9.	If applicable, I agree to video-recording.	Yes <input type="checkbox"/>	No <input type="checkbox"/>
10.	If applicable, separate terms of consent for interviews, audio, video or other forms of data collection have been explained and provided to me.	Yes <input type="checkbox"/>	No <input type="checkbox"/>
11.	I understand that any personally identifiable information will be held in accordance with the Data Protection Act 1998.	<input type="checkbox"/>	
12.	The use of the data in research, publications, sharing and archiving has been explained to me.	<input type="checkbox"/>	
13.	I understand that other researchers will have access to this data only if they agree to preserve the confidentiality of the data and if they agree to the terms I have specified in this form.	<input type="checkbox"/>	
14.	I, along with the Researcher, agree to sign and date this informed consent form.	<input type="checkbox"/>	

**Participant:**

\_\_\_\_\_  
Name of Participant

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Researcher:**

\_\_\_\_\_  
Name of Researcher

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**PLEASE NOTE THAT THERE IS A THIRD PARTY  
CONDUCTING RESEARCH IN THIS CUSTODY SUITE**

THIS INDIVIDUAL IS NOT A LEGAL REPRESENTATIVE, AN  
APPROPRIATE ADULT OR A POLICE OFFICER AND CANNOT  
PROVIDE DIRECT ASSISTANCE

THE PURPOSE OF THE RESEARCHER'S PRESENCE IS TO  
ASSESS HOW THE POLICE INTERACT WITH THOSE  
BROUGHT INTO CUSTODY

NO PERSONAL INFORMATION WILL BE GATHERED – THE  
RESEARCHER IS FOCUSING ON THE CUSTODY OFFICER

ANYTHING SAID OR DONE DURING THE COURSE OF THE  
STUDY WILL REMAIN CONFIDENTIAL

IN EXTRAORDINARY CIRCUMSTANCES THE RESEARCHER  
MAY HAVE TO INTERVENE

ANY CONCERNS SHOULD BE RAISED WITH THE CUSTODY  
OFFICER

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