

Vulnerability and the Appropriate Adult Safeguard: Examining the Definitional and Threshold Changes within PACE Code C

Roxanna Dehaghani

Cardiff University

Chris Bath*

National Appropriate Adult Network

☞ Appropriate adults; Children; PACE codes of practice; Police powers and duties; Suspects; Vulnerable adults

In October 2017, the Home Office carried out a public consultation on proposed changes to the Police and Criminal Evidence Act 1984 Code C. These changes relate to vulnerable suspects and the appropriate adult (AA) safeguard. In July 2018, significant revisions were passed by Parliament and later brought into force. This paper explores two areas of revision: the definition of vulnerable suspects for whom an appropriate adult is required and the decision-making threshold for police officers. It sets out these aspects as they stood under the 2017 Code and as proposed at the consultation stage, and then examines the final changes drawing upon previous research, including empirical research in police custody.

Introduction

The Police and Criminal Evidence Act (PACE) 1984 was implemented in 1986 and introduced a legislative framework through which to regulate police powers and fortify suspects' rights. Before PACE was introduced, the Judges' Rules and their accompanying Administrative Directions provided instructions to the police on how they were to treat suspects in custody. The Judges' Rules lacked enforceability and failed to protect suspects; this was most evident in the Confait case where one mentally vulnerable adult and two juveniles were erroneously convicted of various offences connected with the death of Maxwell Confait.¹ Within the broader framework of suspects' rights, PACE also introduced the appropriate adult (AA) safeguard. The AA safeguard exists to accord additional protection to

*The authors would like to thank David Ormerod for providing a timely outcome for the paper and to the anonymous reviewer for their constructive feedback. As always, any errors or omissions are that of the authors.

¹ See C. Price and J. Caplan, *The Confait confessions* (Marion Boyars, 1977); D. Brown, T. Ellis and K. Larcombe, *Changing the Code: Police Detention Under the Revised PACE codes of Practice* (Home Office: 1992), p.70; H. 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 (HMSO, 1977/78).

juveniles (those below the age of 18) and adult suspects who may be considered vulnerable.² The AA safeguard in relation to adults is not contained in PACE proper but, rather, in the accompanying Codes of Practice.³

Other than in exceptional circumstances, an AA must be present where individuals who fall into the categories above are detained or voluntarily interviewed regarding their involvement or suspected involvement in a criminal offence or offences, and/or asked to provide or sign a written statement under caution or record of interview.⁴ The AA performs a number of different, but overlapping and complementary, functions. He or she must support, advise and assist the suspect; ensure that the police act properly and fairly, informing a senior officer if not; assist with communication whilst respecting the right to silence; and ensure rights are protected, respected and understood by the suspect.⁵ The AA has a role not only in interviews but whenever the suspect is given or asked to provide information or participate in any procedure.⁶ This includes when warnings in relation to adverse inferences are given, when rights and entitlements are explained, when samples—such as fingerprints, photographs and DNA—are to be taken, when strip or intimate searches are to be conducted, and during charge, bail and police cautions.⁷

The function and limits of the role of the AA have also been recognised within the (albeit limited) case law. For example, the AA is seen as “more experienced” and someone who can answer questions and provide advice (particularly for young suspects).⁸ The AA can assist “in the face of an intimidating criminal justice system”.⁹ The AA must have empathy with the suspect¹⁰ but may not necessarily be considered “inappropriate” for criticising and contradicting the suspect.¹¹ The AA is also seen as a safeguard that can minimise the risk of unreliable information being provided by the suspect through the fair and proper conduct of the interview and through the facilitation of communication between the police and the suspect.¹²

² See Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018).

³ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018); Home Office, *Code D Revised Code of Practice for the identification of persons by Police Officers* (TSO, 2017); Home Office, *Code of Practice in connection with: The detention, treatment and questioning by Police Officers of persons in police detention under Section 41 of, and Schedule 8 to, the Terrorism Act 2000. The treatment and questioning by Police Officers of detained persons in respect of whom an authorisation to question after charge has been given under Section 22 of the Counter-Terrorism Act 2008* (TSO, 2018). Home Office, *Code E Revised Code of Practice on audio recording interviews with suspects; Code F Revised Code of Practice on visual recording with sound of interviews with suspects* (TSO, 2018).

⁴ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018), para.11.15.

⁵ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018). The function of the safeguard pre-2018 could be gleaned from a combination of Code C and supplementary Home Office guidance—see Home Office, *CODE C: Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2017), para.11.17; see also Home Office, *Guidance for Appropriate Adults*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117625/guidanceappadultscustody.pdf [Accessed 21 December 2018].

⁶ Home Office, *CODE C: Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2017), para.1.7A, 11.17.

⁷ Home Office, *CODE C: Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2017), para.16.1; 7 and 10.12; 10.11 and 10.11A; Annex A: 2B.

⁸ *Weekes* [1993] 97 Cr. App. R. 222; [1993] Crim. L.R. 211.

⁹ *R. (on the application of HC) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin); [2013] Crim. L.R. 918.

¹⁰ *DPP v Blake* [1989] 1 W.L.R. 432; (1989) 89 Cr. App. R. 179.

¹¹ *Jefferson*, *The Times*, 22 June 1993 (CA); [1993] Crim. L.R. 880.

¹² *Campbell* [1995] 1 Cr. App. R. 522; [1995] Crim. L.R. 157.

The absence of the AA is not, however, fatal to the admissibility of evidence as the presence of a solicitor can mitigate against the absence of an AA.¹³ The AA's presence, in the courts' view, is not to prevent the accused from making admissions (in *Ward*¹⁴ the AA did not explain the fact that she was not subject to legal privilege and that admissions to her could be used against the accused). Yet, perhaps confusingly, following *Miller*, the AA's presence can be seen as something that could alter the accused's behaviour such that he understands the implications of not complying with a breath test and therefore does not refuse to provide a blood specimen (thus being in breach of s.7 of the Road Traffic Act 1988).¹⁵ The AA could be said to have a calming influence on the suspect and could explain the purpose of obtaining a sample and the consequences of failing to do so.¹⁶ Thus, on the one hand the AA must explain the various legal procedures (*Miller*¹⁷) and in another instance is not required to (*Ward*¹⁸). The AA's functions may extend beyond the interview.¹⁹

Discussion of the vulnerability and AA provisions would not be complete without some recognition of the problems with the AA safeguard. The role of the AA is subject to interpretation by others including the AA him or herself.²⁰ Whilst there is no doubt that the AA must be independent of the police, this does not always equate to him or her being firmly "on the side of" the suspect.²¹ Moreover, the AA may find it difficult to intervene when the police are acting unfairly.²² There is also much debate as to which "type"²³ of AA is "better".²⁴ Moreover, even where the AA is trained, they may struggle to adapt to the specific communicative needs of

¹³ *Lewis* [1996] Crim. L.R. 260.

¹⁴ *Ward* [2018] EWCA Crim 1464 at [28].

¹⁵ *Miller v DPP* [2018] EWHC 262 (Admin); [2018] Crim. L.R. 472.

¹⁶ *Miller v DPP* [2018] EWHC 262 (Admin); [2018] Crim. L.R. 472.

¹⁷ *Miller v DPP* [2018] EWHC 262 (Admin); [2018] Crim. L.R. 472.

¹⁸ *Ward* [2018] EWCA Crim 1464 at [28].

¹⁹ See *Fogah* [1989] Crim. L.R. 141; *Maguire* (1990) 90 Cr. App. R. 115; [1989] Crim. L.R. 815.

²⁰ H. Pierpoint, "Reconstructing the Role of the Appropriate Adult in England and Wales" (2006) 6(2) *Criminology and Criminal Justice* 219–238. See also Her Majesty's Inspectorate of Constabulary (HMIC), *The welfare of vulnerable people in police custody* (HMIC, 2015).

²¹ V. Kemp and J. Hodgson, "England and Wales: Empirical Findings" in M. Vanderhallen et al (eds), *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (Intersentia, 2016).

²² J. Hodgson, "Vulnerable Suspects and the Appropriate Adult" [1997] Crim L.R. 785; S. Medford, G. Gudjonsson and J. Pearse, "The efficacy of the appropriate adult safeguard during police interviewing" (2003) 8 *Legal and Criminological Psychology* 253; C. White, "Re-assessing the social worker's role as an appropriate adult" (2002) 24(1) *Journal of Social Welfare and Family Law* 65.

²³ T. Jessiman and A. Cameron, "The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers" (2017) 45(4) *British Journal of Learning Disabilities* 246. See also R. Evans, *The Conduct of Police Interviews with Juveniles*. Royal Commission on Criminal Justice Research Study 8. (HMSO, 1993); Hodgson, "Vulnerable Suspects and the Appropriate Adult" [1997] Crim. L.R. 785; B. Littlechild, "Reassessing the role of the 'appropriate adult'" [1995] Crim. L.R. 540; National Appropriate Adult Network, *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); J. Pearse, "Police interviewing: The identification of vulnerabilities" (1995) 5(3) *Journal of Community and Applied Social Psychology* 147; H. Pierpoint, "How Appropriate are Volunteers as 'Appropriate Adults' for Young Suspects?" (2000) 22(4) *Journal of Social Welfare and Family Law* 383; H. Pierpoint, "The Performance of Volunteer Appropriate Adults: A Survey of Call Outs" (2001) 40(3) *Howard Journal of Criminal Justice* 255; H. Pierpoint, "Extending and Professionalising the Role of the Appropriate Adult" (2011) 33(2) *Journal of Social Welfare and Family Law* 139; K. Quinn and J. Jackson, "Of Rights and Roles: Police interviews with young suspects in Northern Ireland" (2007) 47(2) *British Journal of Criminology* 234; F. Rock, *Communicating rights: the language of arrest and detention* (Palgrave Macmillan, 2007); White, "Re-assessing the social worker's role as an appropriate adult" (2002) 24(1) *Journal of Social Welfare and Family Law* 65.

²⁴ The "type" of AA refers to whether the AA is a parent, other relative or friend; a volunteer; a social worker; someone from the Youth Offending Team; or someone who is paid to work as an AA. Although the question of what "better" means has still not been fully explored. This is perhaps because the law is also unclear on the precise nuances of the AA's role and the legislation seems, at least in parts, somewhat contradictory.

the suspect (assuming that these are known). The AA has been criticised for being nothing more than an agent of interrogation.²⁵

These criticisms considered, the AA can, nevertheless, have a positive effect on this early (and often only) stage of the criminal process. The AA's presence can, for example, ensure that a legal representative is present, that the legal representative assumes a more active role and is also associated with less interrogative pressure from police.²⁶ Research also indicates that vulnerable suspects particularly value the AA's support with understanding their situation and rights, emotional support, and in some cases with communication.²⁷

Perhaps more pressing is that research has highlighted various problems with the implementation of the AA in respect of adult suspects.²⁸ Definitional ambiguities and other issues may be worsened by patchy national provision in relation to adults.²⁹ In 2014, Theresa May MP, as Home Secretary, stated publicly that evidence suggested there was a lack of provision of AAs for adults and that she would commission a report to examine the issue and possible solutions.³⁰ The result—"There to Help"³¹—was published in 2015. The report detailed a number of problems with AA provision for adults in England and Wales. These issues included, but were not limited to: inadequate police practices with respect to identification of suspects' vulnerabilities, the need for AAs, and the recording of relevant data; limited availability of AAs in some areas; and variable quality of AAs.

"There to Help" highlighted the large gap between the percentage of adult suspects for whom the safeguard was applied and the actual prevalence of need. Police data suggested the AA safeguard was applied in a rate of around 3 per cent

²⁵ P. Fennell, "Mentally disordered suspects in the criminal justice system" (1994) 21 *Journal of Law and Society* 57, 67.

²⁶ Medford, Gudjonsson and Pearse, "The efficacy of the appropriate adult safeguard during police interviewing" (2003) 8 *Legal and Criminological Psychology* 253.

²⁷ Jessiman and Cameron, "The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers" (2017) 45(4) *British Journal of Learning Disabilities* 246.

²⁸ P. Bean and T. Nemitz, *Out of depth and out of sight* (University of Loughborough, 1995); K. Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009); Brown, Ellis and Larcombe, *Changing the Code: Police Detention Under the Revised PACE codes of Practice* (Home Office, 1992), p.70; R. Dehaghani, "He's just not that vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody" (2016) 55(4) *Howard Journal of Crime and Justice* 396; R. Dehaghani, "Custody Officers, Code C and Constructing Vulnerability: Implications for Policy and Practice" (2017) 11(1) *Policing* 74; G. Gudjonsson et al, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities*. Royal Commission on Criminal Procedure Research Study No. 12 (HMSO, 1993); Medford, Gudjonsson and Pearse, "The efficacy of the appropriate adult safeguard during police interviewing" (2003) 8 *Legal and Criminological Psychology* 253; National Appropriate Adult Network, *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); C. Palmer and M. 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).

²⁹ National Appropriate Adult Network, *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); M. Perks, *Appropriate Adult Provision in England and Wales: Report prepared for the Department of Health and the Home Office by Mark Perks Development Officer; National Appropriate Adult Network* (NAAN) [online]. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117683/appropriate-adult-report.pdf [Accessed 21 December 2018].

³⁰ Theresa May, "The police must treat people with mental health problems with respect and compassion: Home Secretary's speech to the Policing and Mental Health Summit" (Home Office, 2014) [online]. Available at: <https://www.gov.uk/government/speeches/home-secretary-at-the-policing-and-mental-health-summit> [Accessed 21 December 2018].

³¹ National Appropriate Adult Network, *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).

of adult detentions. However, earlier research indicated the prevalence of relevant conditions in police custody to range from 12 per cent to 38.7 per cent.³² “There to Help” also noted a correlation between rates of identification of vulnerability and the availability of AA provision. Police forces with better access to organised AA schemes had significantly higher vulnerability identification rates than those police forces with no such access. Lack of provision was found to be driven largely by pressures on local government finances and a lack of a clear legal responsibility to ensure provision. “There to Help” made 10 recommendations, which included improved tools and training for police officers, support for local commissioning including national investment, and consideration of a statutory duty to ensure AA provision for adults to give parity with children’s services.

In response, Theresa May released the following statement:

“AAs provide vital support and help to de-mystify what can be a confusing, sometimes frightening, experience in police custody. Evidence suggests there is a lack of AAs to safeguard the welfare and rights of mentally vulnerable adults in police custody. That is why I commissioned this review to determine where the problems lie. The status quo is not acceptable and I am concerned that vulnerable adults are not always receiving the support of an AA. We are currently examining the recommendations and implementation options to ensure that vulnerable people are provided with the support they are entitled to.”³³

Consequently, the Home Office established a working group to consider the report’s findings and recommendations. It then proposed changes to the PACE Codes of Practice relating to suspect vulnerability and developed a voluntary partnership agreement to encourage local authorities and Police and Crime Commissioners to solve the provision issue locally.³⁴

Public consultation on the proposed PACE Code changes ran from 24 October 2017 to 6 December 2017. The Home Office’s response to the consultation stated that 32 submissions were received from separate individuals and organisations,³⁵ including both these authors.³⁶ The submissions have not been published by the Home Office. The revised codes were laid before Parliament on 21 May 2018 and the order was approved via affirmative procedure by the House of Commons and

³²I. McKinnon and D. Grubin, “Health screening of people in police custody – Evaluation of current police screening procedures in London, UK” (2013) 23(3) *European Journal of Public Health* 399–405. See also National Appropriate Adult Network, *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), p.19.

³³Anon, “Appropriate adult not available for many vulnerable people in police custody” (*The Guardian*, 2015) [online]. Available at: <https://www.theguardian.com/society/2015/aug/26/appropriate-adult-not-available-for-many-vulnerable-people-in-police-custody> [Accessed 21 December 2018].

³⁴Home Office, *Appropriate adult PCC-local authority partnership agreement: England* [online]. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/709800/2018_Codes_CHEF_Response.pdf [Accessed 21 December 2018].

³⁵Home Office, *Police and Criminal Evidence Act 1984 (‘PACE’) Codes of Practice Consultation Response to Home Office consultation on PACE Codes C (Detention), E (Audio recording of interviews with suspects), F (Visual recording of interviews with suspects) and H (Detention – terrorism)* [online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709800/2018_Codes_CHEF_Response.pdf [Accessed 21 December 2018].

³⁶R. Dehaghani, “PACE Consultation 2017: Response of Dr Roxanna Dehaghani, Cardiff University”. Available at: https://www.researchgate.net/publication/321875877_PACE_Consultation_2017_Response_of_Dr_Roxanna_Deaghani_Cardiff_University [Accessed 23 January 2019]; C. Bath “NAAN: PACE Consultation 2017: Consultation Response December 2017”. Available at: http://www.appropriateadult.org.uk/images/pdf/2017_CodeC_NAAN_final.pdf [Accessed 21 December 2018].

House of Lords on 18 and 25 June respectively. The revised Code came into operation on 31 July having been signed by the Minister 21 days prior.

This paper provides examination and analysis of two of the changes to Code C to PACE, drawing upon research and practice. Discussion within this paper will focus on Code C and, in particular, on the definitions of vulnerability and the decision-making threshold upon which the AA safeguard must be implemented. The proposed changes are included within discussion because the process of how changes are arrived at is not only interesting in and of itself but can elucidate arguments surrounding the structure and the nature of the law, i.e. that legislating is often an iterative and evolving process, involving many individuals and groups, each with their positions and viewpoints. This paper not only critically examines the changes to Code C, but also provides the reader with the knowledge of how the changes came into being in their current form. It is the process of debate and discussion around the proposals that, at least in part, led to the changes as enshrined in the Code. Within the sections that follow, we will examine the pre-2018³⁷ definition of vulnerability and the pre-2018 threshold, thereafter examining the proposed and actual changes. In our examination of the changes actually effected, we will also critically examine possible issues with implementation.

Defining vulnerability and the “threshold” pre-2018

Prior to 2018, an adult suspect was considered “vulnerable” (and therefore an AA was required) if an officer had any suspicion that they may have any mental disorder³⁸ or may otherwise be mentally vulnerable. These two terms were further elaborated upon in the Notes for Guidance 1G, where it stated:

“‘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 Mental Health Act 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.”³⁹

The term “mentally vulnerable” focused on the functional ability of the suspect, though this was narrow and did not consider all the possible risks to the suspect and to evidence.

The term “mental disorder” is elaborated upon in the Mental Health Act (MHA) 1983 Code of Practice, which provides a non-exhaustive list of

“clinically recognised conditions which *could* [authors’ emphasis] fall within the statutory definition of mental disorder:

- Affective disorders, such as depression and bipolar disorder
- Schizophrenia and delusional disorders

³⁷ Pre-2018 refers to those Codes with the publication date preceding 2018. It should be noted that the 2017 Code was in force until 31 July 2018.

³⁸ Although note that in *Beattie*, whilst the accused was deemed to have a “mental disorder” (depression), he was not considered “mentally vulnerable” and therefore NICA saw no need for there to have been an AA during his interview—see [2018] NICA 1; see also R. Dehaghani, “Condemning and condoning non-implementation of the appropriate adult safeguard: R v Beattie (Alfred David) and Miller v DPP” [2018] Crim. L.R. 646–651.

³⁹ 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).

- 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 people⁴⁰

The term “mental disorder” can be considered more of a *diagnosis test* compared to the *functional test* set out for “mentally vulnerable”. However, due to the decision-making threshold, there was no requirement for an actual diagnosis in either case.

Pre-2018 versions of Code C also included what Dehaghani has called the “benefit of the doubt” test.⁴¹ Under this test, the officer need not establish with any certainty that the suspect is vulnerable. Rather, as para.1.4 of Code C⁴² made clear, the existence of suspicion, or external information given in good faith, was sufficient for the threshold to be met. The AA should be called “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” unless there was “clear evidence to dispel the suspicion”. This threshold was further reiterated in para.1G⁴³ where it stated:

“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 Mental Health Act 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.”

These provisions made it clear that the custody officer, or indeed any other officer, was not required to establish with any certainty that the suspect is vulnerable. Further, an officer did not require proof of vulnerability but was required to implement the AA safeguard on suspicion or good faith alone. As noted in case of *Hussien v Chong Fook Kam*, suspicion should be given its ordinary meaning

⁴⁰ Department of Health, *Mental Health Act 1983: Code of Practice* (TSO, 2015) 26 [online] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396918/Code_of_Practice.pdf [Accessed 21 December 2018].

⁴¹ R. Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁴² 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).

⁴³ It was also reiterated in Annex E para.1.

of “a state of conjecture or surmise where proof is lacking”.⁴⁴ Of course, the Code C provisions, as pointed out elsewhere,⁴⁵ could be subject to wide or narrow interpretation: for example, “any doubt” or “any suspicion” could, taken at their widest, mean that all suspects should be treated as vulnerable, and “good faith” could suggest that a suspect should be provided with an AA where they, or a third party, have provided information honestly and with the best intentions, even if disbelieved by the custody officer. An officer would therefore, technically, be in breach of the Code if they had “any suspicion” of vulnerability but did not act so that the AA safeguard was implemented. The test is subjective and, as such, if they did not suspect that the individual was vulnerable, despite having reasonably been expected to do so, officers would not be in breach of the Code unless they had been told in “good faith”. As research has shown, however, custody officers are often distrusting of suspects.⁴⁶ What’s more, the requirement of “clear evidence” to dispel the notion of vulnerability could also be subject to interpretation and, upon the strictest interpretation, it could be argued that nothing short of a full psychological assessment of the suspect could provide such evidence.⁴⁷ Of course, the reality in police custody was such that “clear evidence” was interpreted more broadly. If considered at all, it might involve the officer’s own suspicion that a suspect (or third party) was lying, perhaps reinforced with taking advice from a custody health practitioner who may or may not have relevant qualifications or training.⁴⁸

Code C in 2018: the proposals—what may have been

In this section we detail and critique the changes proposed in the draft of Code C published by the Home Office in October 2017 for a public consultation concluding on 6 December 2017. The specific focus is on the definition of vulnerability and the threshold required to implement the AA safeguard.

The first proposal that we shall focus on is the proposed change in the definition of vulnerability. The initial proposal within Code C was to replace “mentally disordered or mentally vulnerable” with the term “vulnerable adult”. As noted above, pre-2018, an AA was required where there was any suspicion that an adult had “any mental disorder” (as defined by the MHA 1983) or was otherwise “mentally vulnerable” (i.e. a suspect who, because of their mental state or capacity, may not have understood the significance of what is said, of questions or of their replies).⁴⁹ The proposals, as put forward for public consultation, removed the requirement for a person with any mental disorder to be provided with an AA (the *diagnosis test*). The term “vulnerable adult” was instead defined purely in terms of the *functional test* albeit with an expanded list of risk factors. A “vulnerable adult” would mean

⁴⁴ *Hussien v Chong Fook Kam* [1970] A.C. 942; [1970] 2 W.L.R. 441, Lord Devlin at [948].

⁴⁵ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁴⁶ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁴⁷ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁴⁸ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁴⁹ This, in essence, defined vulnerability in terms of functional ability.

“any person who, because of their mental state or capacity, or for any other reason, may have difficulty understanding the implications for them of procedures and processes connected with their detention, or voluntary interview, including their rights and entitlements because:

- (i) they may not understand the significance of what they are told, of questions they are asked or of their replies
- (ii) may be particularly prone in certain circumstances to:
 - providing unreliable, misleading or incriminating information without knowing or wishing to do so;
 - accepting or acting on suggestions from others without consciously knowing or wishing to do so; or
 - becoming confused and unclear about their position.”⁵⁰

Gudjonsson has identified four types of vulnerability⁵¹: The first is mental disorder, which includes mental illness, learning disability, and personality disorder; the second encompasses abnormal mental states such as anxiety, phobias, bereavement, intoxication, withdrawal and mood disturbance; the third is intellectual functioning; and the fourth is personality, i.e. innate natural traits such as suggestibility, compliance and acquiescence.⁵² This is not to say that all individuals within these categories are always vulnerable but rather that falling within these categories places them at greater risk. Vulnerability is dynamic and can arise from both individual and situational factors. Being involved in a traumatic event, being suspected of having committed a criminal offence, and/or being arrested all have the potential to generate stress that enhances or even creates vulnerability. Gudjonsson suggests, therefore, that those with mental disorder (to include learning disability and brain injury), learning difficulty, mental ill health, and personality traits such as suggestibility, compliance, and acquiescence can be vulnerable but are not necessarily so, simply by virtue of their condition.⁵³ Individual and situational factors can interact so as to produce significant risks to the person and to evidence. This may mean that, without appropriate safeguards, factually guilty individuals are not held to account for their actions because evidence is held to be inadmissible⁵⁴ or that factually innocent individuals are subjected to a miscarriage of justice (whether via the conviction and sentence of a court or an out of court disposal, for example).

The AA is there as a procedural safeguard to ensure that specified risks are, so far as is possible, mitigated. It could also be seen as a reasonable adjustment.⁵⁵ As such, any and all of those who may be at risk should be provided with an AA. In order to be effective, a definition of vulnerability must include all those suspects who are vulnerable. At the same time, the definition should seek to exclude, so

⁵⁰ Home Office, *Draft revised code C (detention)* (TSO 2017) [online]. Available at: <https://www.gov.uk/government/consultations/revising-pace-codes-c-h-e-and-f> [Accessed 21 December 2018]

⁵¹ G. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, 2003), pp.61–75.

⁵² It should be recognised that the focus of the psychology and law/legal psychology literature is on false confession or risk thereof. If the AA safeguard is also taken to be a “reasonable adjustment” then it should apply whether or not there is an explicit risk to evidence.

⁵³ Bath, “NAAN: PACE Consultation 2017: Consultation Response December 2017”. Available at: http://www.appropriateadult.org.uk/images/pdf/2017_CodeC_NAAN_final.pdf [Accessed 21 December 2018].

⁵⁴ Although as argued elsewhere, this may not be as significant an issue as it may appear—see Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁵⁵ See Equality Act 2010. See also Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

far as is possible, those for whom the safeguard is not required. In addition to issues of efficiency, this is an important issue of principle because the AA safeguard is not (and cannot be) optional for the suspect once police determine the need for it to be applied because of the consequent risks to justice. The definition should not insult or degrade the people who it includes, nor discourage engagement with the resulting safeguards/adjustments. Therefore, a purely functional test is most certainly positive in *principle*. It recognises that not all individuals who have been diagnosed with a mental disorder are at particular risk of the problems that the AA safeguard is intended to mitigate.

However, a definition must also consider the need to be clear, unambiguous and applicable in practice. Given the difficulties that custody officers have faced when attempting to understand and implement the existing vulnerability and AA provisions,⁵⁶ it was unclear whether this test would be deliverable in practice. The removal of the term “mental disorder” was seen to be potentially detrimental to both safeguarding individuals and safeguarding evidence. The term, as defined under the MHA, is both broad and clear. The elaboration provided in the MHA Code of Practice supports its practical application (see above and see later discussion). However, it could be argued that the term “mental disorder”, on its own, is problematic when constructing vulnerability because it assumes that the individual who has a mental disorder is unable to function and participate effectively. This brings with it the risk that someone is provided with an AA when it is unnecessary, insulting⁵⁷ or even perceived as discriminatory.

The term “vulnerable adult” was viewed as particularly problematic for a number of reasons. The first concerned the use of the term in other domains, such as health and social care. The Home Office made the case that this would support engagement and partnership working between the police, health and social care: the term benefitted from such wide and common usage that it would be well understood within policing and would encourage all parties to recognise the importance of their role in ensuring AA provision.⁵⁸ Yet, as with vulnerability more generally,⁵⁹ there is no consensus on the term “vulnerable adult” and it should not be assumed that consensus exists. For example, in social care, a vulnerable adult is

“someone over the age of 18 who is or may be in need of community care services by reason of mental or other 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.”⁶⁰

This definition describes a significantly different group of people, generating the risk of confusion and conflict. While the development of a common language is a laudable aim, this requires common meaning, not simply common words. Again, the term “vulnerable adult” could also be insulting, and indeed inaccurate,

⁵⁶ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁵⁷ A. Beckett, *Citizenship and Vulnerability: Disability and Issues of Social and Political Engagement* (Palgrave Macmillan, 2006).

⁵⁸ Personal Correspondence.

⁵⁹ For discussion, see K. Brown, *Vulnerability and young people: care and social control in policy and practice* (Policy Press, 2015).

⁶⁰ Lord Chancellor’s Department cited by M. Dunn, I. Clare and A. Holland, “To Empower or to Protect? Constructing the ‘Vulnerable Adult’ in English Law and Public Policy” (2008) 28(2) *Legal Studies* 234, 239.

for those labelled such.⁶¹ The term suggests that some people are vulnerable in their entirety (as if others are invulnerable), rather than focusing on the way in which the specific context renders them vulnerable to certain risks. Lastly, the pre-2018 definition explicitly applied to a person “of any age”, while “vulnerable adult” clearly does not. While AAs are provided for juvenile suspects in any case, it remains important to recognise that many will have additional vulnerabilities beyond age.

The proposed changes to definition were particularly problematic, it was felt, when combined with the threshold increase (i.e. the threshold needed for police officers to implement the vulnerability criteria under Code C (including the requirement for an AA)). As noted above, a police officer was required to implement the AA safeguard where he or she had any suspicion or was “told in good faith that a person of any age may” be vulnerable. The proposals would have introduced the requirement that a police officer had “reason to believe” that the suspect was vulnerable before acting. This would introduce a higher threshold and be impracticable for police operationally. This would risk a further decrease in the application of the AA safeguard and was not supported by the strong research evidence that suspect vulnerability is significantly under-identified.⁶² Whilst suspicion means recognising a *possibility*, belief means a relatively *high probability*. The “reason to believe” threshold was problematic because a police officer would potentially be required to identify that there was enough evidence (i.e. the reason) to justify a decision that required relatively high probability (i.e. belief). This could be almost impossible, given the already existing difficulties with identifying vulnerability.⁶³ This would have both conceptual and practical implications. Firstly, the requirement of “reason to believe” currently applies to only the most invasive and coercive police powers. On the terms “reasonable grounds to suspect” and “reasonable grounds to believe”,⁶⁴ the Police National Legal Database states:

“The different formulations seek to impose a higher threshold for powers requiring ‘reasonable grounds to believe’ which involve the invasion of a person’s privacy, continued detention etc. and decisions which require more mature reflection and consideration. In contrast, powers which are frequently exercised, for example stop and search and arrest powers are conditional upon the existence of ‘reasonable grounds to suspect’. This is a much lower standard than ‘believe’. In legal terms ‘reasonable grounds to believe’ requires something closer to certainty...It is not necessary to have substantial proof before one can be said to ‘believe’ but the existence of a belief implies that there is more information available...Simple test: If there are ten steps from mere suspicion to certainty, then reasonable suspicion may be as low as step two or three, whilst reasonable belief may be as high as step seven or eight.

⁶¹ See Brown, *Vulnerability and young people: care and social control in policy and practice* (Policy Press, 2015). See also Beckett, *Citizenship and Vulnerability: Disability and Issues of Social and Political Engagement* (Palgrave Macmillan, 2006).

⁶² See National Appropriate Adult Network, *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).

⁶³ See National Appropriate Adult Network, *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).

⁶⁴ It is recognised that “reasonable grounds to suspect” and “reasonable grounds to believe” are not necessarily synonymous with “reasonable suspicion” and “reasonable belief”, however similarities can be drawn.

A police officer may receive information from various sources, some of it anonymous, stating that a person is responsible for an offence; he would have reasonable grounds to “suspect” but certainly not ‘believe’.”⁶⁵

Applying the threshold of “reason to believe” results in the application of the same threshold that applies to the use of the most invasive and coercive of police powers to a procedural safeguard. This is neither fair, reasonable nor proportionate. Further, on a practical basis, requiring “reason to believe” would result in no AA even where an officer strongly suspected that the individual met the threshold but was unable to say that it was probable. As Gudjonsson et al have previously argued, it would take a forensic psychologist approximately one hour and a detailed psychological assessment to make such a judgment.⁶⁶ It would therefore be unreasonable and unrealistic to expect this of a police officer. Officers cannot be expected to diagnose vulnerability and cannot be expected to assess whether an individual is probably vulnerable. The reality is that officers already struggle to gain an accurate picture of an individual’s vulnerability with the time, resources and training available to them.⁶⁷ Requiring them to establish this with “reason to believe” was an entirely unrealistic expectation. The move to a purely functional test heightens the importance of maintaining the threshold at the level of suspicion. If “reason to believe” were introduced alongside a functional test, the police would be required to conduct a full functional assessment, something that they would not be equipped to do. One can also not escape the fact that knowledge and culture inform decisions and can impact upon how decisions are made in relation to conditions such as depression, Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder (ADHD), for example.⁶⁸

The removal of the element of “good faith” was also viewed as potentially detrimental to the implementation of the AA safeguard. As noted above, custody officers are often suspicious or wary of suspects. Moreover, custody officers may not necessarily suspect vulnerability when the suspect is indeed vulnerable.⁶⁹ Much value therefore rests on the information provided by the suspect or someone known personally to them. The pre-2018 provisions required officers to rely on information when it was given in “good faith” unless there was evidence to the contrary. The statement therefore created the explicit expectation that information provided by the suspect, and those known personally to them, would benefit from a presumption of truth. These concerns were raised in response to the consultation. In the section below, the actual changes will be explored and discussed. The discussion below will detail developments within Code C in terms of both positive and negative potential. Thereafter consideration will be given to possible interpretations and further steps required.

⁶⁵ College of Policing, ND—Police National Database. Available at <http://www.college.police.uk/What-we-do/Learning/Professional-Training/Information-communication-technology/Pages/PND-Police-National-Database.aspx> [Accessed 21 December 2018].

⁶⁶ Gudjonsson et al, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities*. Royal Commission on Criminal Procedure Research Study No. 12 (HMSO, 1993).

⁶⁷ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁶⁸ For greater discussion see Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁶⁹ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press). See also Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009).

Code C in 2018: the final publication—the new law

As noted above, the public consultation proposed a change to the definition of vulnerability. This involved the removal of the terms “mentally vulnerable” and “mentally disordered” and their replacement with the term “vulnerable adult”, itself defined by an expanded functional test. However, in the final version passed by Parliament, the term “vulnerable adult” is replaced with “vulnerable person”.⁷⁰ A “vulnerable person” is defined in new para.1.13(d) as anyone who, because of a mental health condition or mental disorder:

- (i) may have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with:
 - their arrest and detention; or (as the case may be)
 - their voluntary attendance at a police station or their presence elsewhere
 - the exercise of their rights and entitlements.
- (ii) does not appear to understand the significance of what they are told, of questions they are asked or of their replies:
- (iii) appears to be particularly prone to:
 - becoming confused and unclear about their position;
 - providing unreliable, misleading or incriminating information without knowing or wishing to do so;
 - accepting or acting on suggestions from others without consciously knowing or wishing to do so; or
 - readily agreeing to suggestions or proposals without any protest or question.⁷¹

The functional test, in essence, provides a more comprehensive definition of the old term “otherwise mentally vulnerable”. It sets out a list of specific risks to justice, going far beyond the question of whether a suspect can understand the significance and implications of what is being said to them (as was the previous definition of “mentally vulnerable”) or because they may provide unreliable evidence (as existed under the previous Code).⁷² Suspects may be vulnerable due to difficulties with communication and/or the exercise of rights, being prone to suggestibility, compliance, confusion and/or having a lack of clarity. A person who has a mental disorder no longer automatically meets the definition of vulnerability as a result of having a mental disorder. However, a reference to “mental disorder” is included in the Code C definition of vulnerability and a link to the MHA 1983 Code of Practice’s list of conditions added. In addition, the new term “mental health condition” has been introduced. As with the old “otherwise mentally vulnerable” test, there is no requirement for a suspect to have a mental disorder or mental health condition in order to meet the definition. This is clarified

⁷⁰ There was a concern that the pre-2018 version covered children whereas the consultation version did not. This was addressed by the change in wording.

⁷¹ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018), 1.13d.

⁷² 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).

by a significantly amended Note for Guidance 1G which provides guidance on interpreting the definition:

“A person may be vulnerable as a result of a having a mental health condition or mental disorder. Similarly, simply because an individual does not have, or is not known to have, any such condition or disorder, does not mean that they are not vulnerable for the purposes of this Code. It is therefore important that the custody officer in the case of a detained person or the officer investigating the offence in the case of a person who has not been arrested or detained, as appropriate, considers on a case by case basis, whether any of the factors described in paragraph 1.13(d) might apply to the person in question. In doing so, the officer must take into account the particular circumstances of the individual and how the nature of the investigation might affect them...”⁷³

This (i.e. 1G) arguably renders the first clause of para. 1.13(d) irrelevant, leaving behind a purely functional test. It states that officers are expected to apply the test in para. 1.13(d) even where there is no reason to suspect a mental disorder on mental health condition. This implies that, for example, those suffering from temporary states such as bereavement and/or extreme stress are not excluded. It could also potentially include those with purely physical conditions, which were implicitly excluded under previous versions of the Code.⁷⁴ Officers must also take into account the particular circumstances of the individual and how the nature of the investigation might affect them. This is an interesting development, particularly in light of research from psychology and law, which suggests that vulnerability may be created or exacerbated by the nature of the investigation.⁷⁵ The provision also allows for explicit recognition of such situational vulnerability.⁷⁶

2017 test: <i>May not understand the significance of what is said, of questions or of their replies</i>	<i>Mental disorder</i>	<i>No mental disorder</i>
<i>Yes</i>	AA	AA
<i>No</i>	AA	No AA
2018 test: <i>One or more risk factor(s) appear to apply</i>	<i>Mental health condition or mental disorder</i>	<i>No mental health condition or mental disorder</i>
<i>Yes</i>	AA (1.13(d))	AA (1G)
<i>No</i>	No AA	No AA

⁷³ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018), Note for Guidance 1g. It should be noted that the caveat—“Similarly, simply because an individual does not have, or is not known to have, any such condition or disorder, does not mean that they are not vulnerable for the purposes of this Code”—was added into the Code after the suggestion by Dehaghani that information regarding mental health condition or mental disorder may not be available to the officer and this should not preclude the implementation of the AA safeguard. In hindsight, however, it would have been better, alongside the functional test, and as suggested by the authors in their response to the consultation, that the risk factors, as per the research of Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, 2003), be identified.

⁷⁴ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁷⁵ Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, 2003).

⁷⁶ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

The result of the change is the scheme above.⁷⁷

Critique of Code C

In practice, the typical concern of custody officers when deciding on vulnerability is limited to whether a suspect understands what is being said to them (which notably does not extend to its *implications*).⁷⁸ A positive aspect of the expanded functional test is that it reflects much of the learning from academic literature on the risk to both evidence and suspects. However, the definition can be seen to have been significantly narrowed in an important respect. Whilst a suspect with a mental disorder (e.g. mental illness, learning disability and/or brain injury) would have been afforded the safeguard of an AA on that basis, the safeguard is now contingent on whether one or more of the criteria under the functional test are also met “because” of that disorder. It remains unclear which people, and how many, have a mental disorder but do not, in fact, meet the functional test and so are excluded from the safeguard. If this number is very small, the change is likely to bring about a net loss of efficiency as the avoidance of a few false positives is offset by a significant reduction in clarity for police officers. There is a risk that apparent efficiency gains from “improved targeting” are in fact driven by cases in which there is failure to recognise how a given mental disorder might generate the risks specified in para.1.13(d).

It had been recommended at the consultation stage that, were the functional approach were to be adopted, Gudjonsson’s four categories (mental disorder, abnormal mental states, intellectual functioning, personality/natural traits) should be included in the first clause of the new definition. Other submissions suggested removing the first clause entirely, leaving an unconstrained functional test. However, neither approach was adopted; the clause was limited to “mental disorder” and “mental health condition”. Of course, the interpretation provided by 1G addresses much of the concern about conditions and circumstances (e.g. learning difficulty, temporary mental states, some physical states) that might “slip through the net” of the constraining effect of the first clause. In this sense, the definition can be seen to have been significantly broadened. There is perhaps some space to contest the interpretation of the definition provided by 1G, despite its explicit inclusion in Code C. As a Note for Guidance, it does not technically form part of the Codes and consequently has a lower status in law than the main provisions and annexes.⁷⁹ Read in isolation, para.1.13(d) could be interpreted as saying that a suspect is not a vulnerable person unless they meet one or more of the “functional risks” *because* of a mental health condition or mental disorder, therefore the absence of such a condition or disorder means they cannot be a vulnerable person. Under this interpretation the impact of temporary states such as bereavement and/or extreme stress, physical conditions and learning difficulties (as distinct from learning disabilities) is unclear. Such an argument may well play out in case law if 1G is not followed by the police. Courts have consistently taken account of the

⁷⁷ Bath, “NAAN: PACE Consultation 2017: Consultation Response December 2017”. Available at: http://www.appropriateadult.org.uk/images/pdf/2017_CodeC_NAAN_final.pdf [Accessed 21 December 2018].

⁷⁸ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁷⁹ See 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.

Notes for Guidance, which is guidance for them as much as for the police, but are not bound to do so. Finally, with the exception for the new requirement to take reasonable steps to find out relevant information, the test continues to rely largely on what appears to be the case to the police officer. While the inclusion and exclusion of certain conditions can be analysed from a legal academic perspective, the impact of the revisions in the real world will largely be a matter of how the functional test is applied in practice.

In addition to a change to the definition of vulnerability, the Home Office had proposed revising the threshold from an officer having “any suspicion” to a “reason to believe”. Following the consultation, the final revised Code introduced a threshold of “reason to suspect”:

“If at any time an officer has any reason to suspect that a person of any age may be vulnerable (see paragraph 1.13(d)), in the absence of clear evidence to dispel that suspicion, that person shall be treated as such for the purposes of this Code...”⁸⁰

This provision still allows for clear evidence to dispel the notion of vulnerability which could be interpreted either narrowly or broadly. There is an evident risk that “reason to suspect” could still be construed as a higher threshold since suspicion must now be justified. It certainly requires more than mere suspicion. However, the revised threshold does not require police officers to form a *belief*. It is undoubtedly more objective. Previously, for an officer to have been found to breach the Code (in not calling for an AA), there would need to be evidence that they had “any suspicion” and did not act accordingly. Whether a reasonable person would have had a suspicion, or a police officer ought to have had, was not tested. Under the revised Code, it would seem to be a breach if an officer takes no action when there was a *reason* for him or her to have had a suspicion—something more easily tested evidentially. The revised threshold is certainly less problematic than that proposed in the consultation. Its impact on police decision-making and resulting case law remains to be seen but could be very significant—particularly when paired with the new requirement to take “reasonable steps”.

Potential issues with implementation

As with any changes to the law, consequent changes to practice may be intended or unintended. Within this section we speculate on the possible changes to practice. It remains to be seen how these changes will result to micro and meso changes to practice, if there is indeed any change at all.

The definition of vulnerability presents perhaps the greatest challenge. It is important that any definition is as clear as possible. However, clarity does not by definition lead to compliance. In practice, the relatively unambiguous “any mental disorder” was subject to interpretation by officers, even though there was technically no such flexibility. The Code required that an AA was called when a suspect had any mental disorder, yet the police exercised discretion or “interpretative

⁸⁰ Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2018), para.1.4.

judgment⁸¹ in such instances.⁸² Some conditions (such as depression, ASD and ADHD) were often considered by some officers to be irrelevant for the purposes of the AA safeguard.⁸³ The revised functional test is clearly going to be subject to the officer's own interpretative frame and, as such, outcomes will vary. This is especially so with the absence currently of tools designed to support decision-making. The MHA Code of Practice, as Dehaghani has argued, could provide easily and readily accessible information upon which to improve custody officer knowledge on what the term "mental disorder" means.⁸⁴ The Code of Practice list could also facilitate the identification of vulnerability and could lessen the issues with the interpretation of vulnerability.⁸⁵ These are aspects of the decision-making process that could, as Dehaghani has highlighted, produce an obstacle to the implementation of the AA safeguard.⁸⁶

The introduction of a more explicit functional test is potentially a positive step in that it provides a clearer framework for interpretation based on the evidence of risk presented by various conditions, traits, characteristics and circumstances.⁸⁷ However, in seeking to increase precision, it could be said that the changes also decrease clarity. Therein lies a clear risk that this will be interpreted by some so as to have no effect or even act to reduce the application of the AA safeguard. The revised definition is considerably more complex than the previous one and may, as such, require officers to form a view about whether the risk factors apply to an individual, in addition to considering whether the context of detention or investigation may affect them. They must also consider whether or not this occurs as a result of a mental health condition or mental disorder, or for any other reason. This may be difficult to fully and properly implement in practice given the already clear difficulties experienced by officers when attempting to identify vulnerability—such as a lack of knowledge of vulnerability, the lack of training provided to officers on the vulnerability of suspects (and, in particular, adult suspects), and time pressures when booking-in and otherwise dealing with suspects and other detainees.⁸⁸ Added to these issues are individual differences in how officers construct vulnerability and the specific context within which the suspect finds him or herself. An officer cannot and should not be expected to understand how different disorders and conditions might map across these different risk factors. For example, how will an officer interpret whether the suspect understands the "full implications" or the "significance" of what is being said? And how will an

⁸¹ S. Bronnitt and P. Stenning, "Understanding Discretion in Policing" (2011) 35 *Criminal Law Journal* 319, 321.

⁸² Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁸³ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁸⁴ Dehaghani, "Custody Officers, Code C and Constructing Vulnerability: Implications for Policy and Practice" (2017) 11(1) *Policing* 74.

⁸⁵ 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; Dehaghani, "Custody Officers, Code C and Constructing Vulnerability: Implications for Policy and Practice" (2017) 11(1) *Policing* 74.

⁸⁶ 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; Dehaghani, "Custody Officers, Code C and Constructing Vulnerability: Implications for Policy and Practice" (2017) 11(1) *Policing* 74. See also National Appropriate Adult Network, *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).

⁸⁷ See G. Gudjonsson, "Psychological vulnerabilities during police interviews: Why are they important?" (2010) 15 *Legal and Criminological Psychology* 161.

⁸⁸ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

officer assess whether a suspect is “particularly prone” to being suggestible or compliant? Further, how is the officer to assess whether a suspect is being compliant or simply being helpful with the investigation? This results in a situation where it may be sensible to introduce, particularly into custody suites, specialists in psychology who also understand the Codes. However, problems would nevertheless remain in the case of voluntary interviews (to which the AA safeguard also applies).

In relation to Note for Guidance 1G, whilst it has been suggested by the Home Office that the note takes primacy over the 1.13(d) (i.e. the main body of the Code), it remains to be seen how the police will approach this. They could, for example, decide that the 1G sits beneath 1.13(d) and should therefore be ignored. Alternatively, they could decide to disregard 1.13(d) and to implement the functional test on its own. It also remains to be seen how the courts will interpret these provisions: this is perhaps the “real” test in that the courts’ interpretation will perhaps clarify the inherent tension between 1G and 1.13(d). Regardless of that, it is likely that many adults with mental disorder or a mental health condition will meet the functional test and therefore there will be little to no practical implications resulting from this tension. Alternatively, 1G along with 1.13(d) could act to reduce the implementation of the AA safeguard and thereby call-outs of AAs.

A potential positive development introduced by virtue of 1G is that officers are required to take into account the particular circumstances of the individual and how the nature of the investigation may affect the individual. This suggests that the task of the officer is not necessarily to identify a “vulnerable person” (which locates the vulnerability within the person) but, rather, that they are identifying the vulnerability of that individual (thus locating vulnerability, at least in part, within the situational context). This further suggests that, whilst an individual may not be vulnerable within a day-to-day context, the nature of the investigation may create or exacerbate that vulnerability, and thereby draws attention to the fact that even those who are, for example, intelligent, articulate, and confident may be vulnerable when facing police investigation.⁸⁹

Finally, replacing the language of “suspicion or told in good faith” with “reason to suspect” may be interpreted to reduce or increase demand for AA services. Firstly, it may reduce demand because mere suspicion is no longer a sufficient condition upon which to implement the AA safeguard. Rather, there must now be a reason to suspect that the individual is vulnerable. This may exclude situations where an officer has suspicion but does not have a reason for, or is unable to locate that suspicion (which is often the case).⁹⁰ The removal of “any doubt” may also suggest a heightened threshold and therefore a potential resulting decrease in AA call-outs. However, it is difficult to imagine a situation where an officer had suspicion for no reason: for example, in Dehaghani’s study, officers often cited the way in which someone was acting, i.e. unusually, as their reason.⁹¹ Unusual behaviour or strange comments from the individual may suffice when an officer

⁸⁹ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁹⁰ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁹¹ Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

has to provide a “reason”. Further, where cases are to reach the courts, the question will not be whether the officer had a “reason to suspect” that an individual was vulnerable (as cases where the AA safeguard was implemented are unlikely to be challenged) but, rather, whether the officer can illustrate that he had no (objective) reason to suspect that an individual was vulnerable (as in cases where the AA safeguard was not implemented and the defence are arguing that it should have been). A lack of suspicion is no longer enough; the courts may be inclined to ask whether there it was reasonable to suspect that the individual was vulnerable. This renders more difficult the non-implementation of the AA safeguard and may, in turn, increase demand for AA services.

Conclusion

This paper has outlined the two most substantial changes, both proposed and actual, to Code C to PACE. It has also assessed the proposed and actual changes and suggested the ways in which these may be implemented in practice. The aim of combining these various elements of discussion is to illustrate what the changes may have looked like and how these proposals actually changed prior to enactment. It is hoped that the discussion, taken in its entirety, illustrates some of the positive developments resulting from public and further consultation.

While police officers can of course “screen” for vulnerability, they are not mental health or learning disability experts and are not in a position to diagnose or assess need. On this basis, the pre-2018 vulnerability provisions at least enjoyed a relative simplicity: *any* suspicion, *any* mental disorder or *may* have difficulty understanding the significance what was said, questions or their replies. This simplicity may have given rise to imperfection in targeting, though the evidence to that effect is not clear. There is, however, clear evidence that, despite the realistic expectations and the fact that the provisions had existed for decades,⁹² officers still failed to understand and implement the provisions accurately.⁹³ The new provisions are a significant development, giving greater emphasis to the social model over the medical model. It remains to be seen how these changes will impact on practice, if at all. As Dehaghani has argued, changes to law do not necessarily result in the desired or any change to practice.⁹⁴ Indeed, the Code C provisions rarely form part of the officer’s decision-making process when considering vulnerability and the AA safeguard. To the extent that the changes are operationalised, it seems likely that they will result in some difficulties, complexities and potentially wide variations, in practice.

However, perhaps the more significant issue is that there still exists no statutory duty on any agency to provide AA services for vulnerable suspects once they reach

⁹² Although see Bean and Nemitz, *Out of depth and out of sight* (University of Loughborough, 1995); K. Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009).

⁹³ See Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

⁹⁴ 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; Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (Routledge: in press).

18.⁹⁵ Further, national provision remains patchy.⁹⁶ It would perhaps have been more beneficial to vulnerable suspects for there to be positive initiatives that could result in changes to AA availability, police culture or for a change to the admissibility rules. Improved training on vulnerability, more time for officers to become familiarised with the Codes, and a commitment to a workable system (whereby appropriate adult services are adequately funded) may have better addressed the issue (that is, low uptake of the AA safeguard for adult suspects). Now that the changes have been introduced, positive impacts produced through implementation will depend largely on clear leadership, investment in training, guidance and identification tools, and support from other agencies.

⁹⁵ Such a duty exists in relation to young suspects—see Crime and Disorder Act 1998 s.38(4)(a).

⁹⁶ See National Appropriate Adult Network, *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).