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## CUSTODY OFFICERS, CODE C AND CONSTRUCTING VULNERABILITY: IMPLICATIONS FOR POLICY AND PRACTICE

**Abstract:** This article addresses one of the issues with Code C to the Police and Criminal Evidence Act (PACE) 1984—how vulnerability is defined for the purposes of implementing the appropriate adult safeguard. The article draws upon qualitative data (observation of and semi-structured interviews with custody officers) to assess how custody officers define vulnerability. It illustrates why custody officers may experience difficulty in identifying vulnerability, drawing upon a problem that I have previously identified. Yet, it goes further than previous discussion by also offering suggestions for policymakers and practitioners.

**Keywords:** vulnerability, custody, PACE, appropriate adult

### **Introduction**

This article explores the definitional issues with the (adult) vulnerability provisions under Code C to the Police and Criminal Evidence Act (PACE) 1984. PACE was introduced in England and Wales as a legislative framework in order to regulate police powers and the rights of suspects. Prior to its implementation, the Judges' Rules and the accompanying Administrative Directions governed police practice for the treatment of suspects during police investigation. However, the Confait case drew attention to the failings of the Judges' Rules – the defendants alleged that they had been coerced by police officers into providing a confession (Price and Caplan 1977) yet were convicted of various offences connected with the death of Maxwell Confait.<sup>i</sup> The Fisher Report, released in 1977 and investigating the Confait miscarriage of justice, in combination with the findings from the Criminal Law Revision Committee of 1971, led to the establishment of the Royal Commission for Criminal Procedure (RCCP). The RCCP produced its report in 1981, and it was this report that formed the basis of PACE and the Codes of Practice. The Act and Codes introduced the appropriate adult (AA) safeguard and the role of custody officer. The custody officer is a police officer of at least rank sergeant (s. 36 (3) PACE) who assumes responsibility for the suspect's rights and welfare whilst the suspect is kept in police custody.

The custody officer is also responsible for implementing the AA safeguard, which requires that he or she also identify that the suspect requires an AA (Code C 2014, para 3.5). However, neither PACE nor Code C provide custody officers with information on how vulnerability should, or can, be identified.

Such guidance is provided within the College of Policing Authorised Professional Practice (APP) on Detention and Custody (College of Policing: Detainee Care 2015). The College is also in the process of developing additional guidance on mental health, due for release in 2016 (College of Policing: Mental ill health 2015). As will be clear in this paper, however, some of the wording regarding vulnerability, particularly within Code C, is problematic. Moreover, the College of Policing guidance may not always be consulted (see later in this paper). Practical problems may also arise in the identification of vulnerability. For example, previous research has highlighted the difficulties that custody officers face when identifying vulnerability and have concluded that the safeguard was not implemented where it could have been (Bean and Nemitz 1995; Bradley 2009; Brown, Ellis, and Larcombe 1992; Bucke & Brown 1997; Gudjonsson, Clare, Rutter and Pearse 1993; Irving and McKenzie 1989; Medford, Gudjonsson and Pearse 2003; National Appropriate Adult Network 2015; Palmer and Hart 1996; Phillips and Brown 1998).<sup>ii</sup>

Within this paper I explore how the *definition* of vulnerability may pose problems for custody officers, perhaps more so than that of identification. This paper therefore builds upon my arguments contained elsewhere, where I have contended that how vulnerability is defined, more so than identified, can explain why AAs are often not called for vulnerable adult suspects (see XXXX (forthcoming)).<sup>iii</sup> I previously explored three various explanations for the custody officer approach. Here I take one of these explanations (the legalistic-bureaucratic conception) and examine the potential reforms that may be made on the basis of this. The legalistic-bureaucratic conception views police institutions as efficient bureaucracies (Dixon 1997, p.1) whereby decisions are directed by 'training, policy statements and internal regulation' (Dixon,

1997 p. 1). Thus, the focus of the legalistic-bureaucratic conception is ‘only or primarily... [on] the law governing’ (Dixon, 1997, p. 1) the police. The focus of this paper is the question of how the legislature may improve the provision of AAs in police custody by providing improved guidance to custody officers. It also illustrates how an improvement in custody officer knowledge may facilitate the implementation of the AA safeguard. This paper will explore the definition of vulnerability in order to set the suggestions in context. It will therefore, in part, summarise some of the issues discussed elsewhere (see Dehaghani (forthcoming)). The purpose of this paper is not to suggest that we ignore the other explanations but aims to highlight the steps that policymakers and practitioners may take in ‘solving’ the AA problem. This paper therefore contributes to this somewhat neglected area by suggesting potentials for reform.

### **Code C: Constructing vulnerability**

Code C requires that ‘juveniles’<sup>iv</sup> (those under the age of eighteen), the mentally disordered, and the mentally vulnerable be provided with an AA for the purposes of interview (Code C 2014, para 11.15). This paper addresses vulnerability for adult suspects, the definition for which is contained within Notes for Guidance 1G of Code C:

*‘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 appropriate adult called.’*

Vulnerable suspects must be provided with an AA when interviewed with regard to their involvement or suspected involvement in a criminal offence or offences, or when they are asked to provide or sign a written statement under caution or record of interview (Code C para 11.15). In addition to their presence at interview, an AA should also be present at other stages of the process such as charging (Code C para 16.1), when cautions are given (Code C paras 7 & 10.12), when warnings in relation to adverse inferences are given (Code C para 10.11, para 10.11A),

where samples are to be taken (such as fingerprints, photographs and DNA), and where the suspect is subject to an intimate search (See Code C Annex A para 2B).

The AA is someone independent from the police inquiry, i.e. they must not be a police officer nor someone employed for, or engaged in, police work. They are required to facilitate communication, support, assist and advise the suspect, as well as ensure that the police are acting fairly (Code C 2014, para 11.17; see also Home Office Guide for Appropriate Adults 2011). The AA's role is, of course, not without its problems. For example, Hodgson has highlighted how AAs lack training, neglect to show empathy or may fail to understand their own role (Hodgson 1997, p.786-7). Moreover, as Medford, Gudjonsson and Pearse have highlighted, the AA may add little to the police interview (2003, p.253). The AA may therefore be anything but appropriate (see Hodgson 1997, p.786-7). Further, as Pierpoint has indicated, there are issues with the social construction of the role of the AA (2006). Nevertheless, as Medford, Gudjonsson and Pearse have indicated, the presence of the AA may have some benefit to the suspect – for example, their presence may ensure that a legal representative is present and that the legal representative takes a more active role (2003, p.253).

Whilst Code C provides definitions of 'juvenile', 'mentally vulnerable' and 'mentally disordered', the definitions of the latter two not provided until much later, tucked away in a Note for Guidance (as given above). The importance of this will be explored later.

On the basis of Code C vulnerability for adult suspect is ostensibly (1) a difficulty with or limitations in comprehension or understanding due to mental state or capacity (mental vulnerability); or (2) any disorder or disability of the mind (mental disorder)<sup>v</sup>. As will be illustrated later, vulnerability can encompass many illnesses and conditions, in addition to being a temporary issue affecting the suspect's mental state. However, Code C lacks consistency when utilising these terms and is, moreover, somewhat inaccessible. Whilst the College of Policing APP may prove helpful, the terms are not always consistent with Code C. For example, the APP uses terms such as 'mental ill health', 'learning difficulties' and 'mentally vulnerable' (College of

Policing: Mental ill health 2015). It does not however use the term 'mental disorder' in its headings (a term which may, of itself, be considered troublesome). This lack of consistency may prove problematic, as will be discussed further below.

## **Methods**

Between early November 2014 and mid-January 2015 I observed the booking-in procedure at a large custody suite in England as a non-participant observer. This custody suite was chosen on the basis of size (thus yielding sufficient data) and access. Access was arranged through an acquaintance (the Assistant Chief Constable) and was facilitated by those in charge of the suite. Two of the officers approached declined the offer to take part, however, a total of 20 officers agreed. Of these 20, 15 were interviewed (from late January 2015 to early February 2015). Signage to advise suspects (and indeed anyone other than the custody officers) of my presence was placed at various points throughout the custody suite. The observations, whilst also used as data in their own merit, guided the interview schedule. The analysis and results in this paper derive solely from interview data. Interviews lasted an average of 41 minutes and were recorded and transcribed the same day. I asked custody officers the following questions:

*What does mental vulnerability mean to you?*

*The term 'mentally disordered', what does that mean to you?*

*What do you think the purpose of the appropriate adult is?*

*What is it you look for when deciding whether an appropriate adult is needed?*<sup>vi</sup>

Observation and interview data were subject to coding and analysis in line with the grounded theory approach (Charmaz, 2006; see also Gibson and Hartman, 2014). It could also be suggested that the approach was 'grounded theory lite' or thematic analysis (see Dehaghani (forthcoming)). This paper does not explore the resulting theory, but instead deals with how vulnerability was defined, drawing upon interview data.

## **Custody officers: Constructing vulnerability<sup>vii</sup>**

In this section I will explore custody officers' responses when asked to define vulnerability.<sup>viii</sup> The questions asked at interview were used to ascertain how custody officers interpret Code C and how far they understand or make use of the definitions contained therein. When asked at interview to define 'mentally vulnerable' not one of the 15 custody officers interviewed gave the Code C definition nor was this definition mentioned or paraphrased. Instead, custody officers gave their own interpretation of what it meant for a suspect to be vulnerable. The most common response was that a vulnerable suspect was someone with learning difficulties/disabilities<sup>ix</sup> or of significantly low intelligence. Upon reading the transcripts it was clear that custody officers had a vague idea of the terms 'mentally vulnerable' and 'mentally disordered'. These quotes illustrate the typical approach:

*Could include people suffering from mental illness or it could include people with learning difficulties.<sup>x</sup>*

*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>xi</sup>*

When asked at interview to define 'mentally disordered', custody officers appeared bewildered – this definition caused even greater difficulty than 'mentally vulnerable'. Moreover, the term 'mentally vulnerable' was more readily used. Some custody officers were aware that mental health problems or learning difficulties could constitute a mental disorder yet appeared uncertain in their response.<sup>xii</sup> Responses also included references to medication and diagnosis as well as behavioural problems and cognitive impairments.<sup>xiii</sup> Whilst it was typically recognised that someone with a mental health problem or personality disorder could be 'mentally disordered', it did not necessarily follow that this person required an AA at interview or during any other time whilst in custody. Thus, not only was there confusion with regard to the meaning of the terms, even where a condition was recognised as a mental disorder it did not necessarily result in the implementation of the AA safeguard. This will be discussed in further detail below.

From the data there was overwhelming evidence to suggest that custody officers attempt to assess the suspect's mental capacity and his or her ability to communicate effectively in addition to his or her understanding of the criminal process.<sup>xiv</sup> It did not seem to matter that the detainee had a mental health problem or other mental disorder unless this was also accompanied by problems with capacity and understanding. This following quote illustrates this point:

*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 appropriate adult' if that's where you're running to.<sup>xv</sup>*

Through analysis it transpired that the main focus for custody officers when deciding whether a suspect required an AA was his or her capacity, knowledge and understanding.<sup>xvi</sup> The suspect's understanding can be linked to a range of factors and can be ascertained in a number of ways. The custody officer will investigate whether the suspect has any issues that may produce an obstacle to his or her general understanding. Moreover, the custody officer may also seek to determine the suspect's mental capacity or abilities. This can initially be done through the answers given to the risk assessment (see College of Policing: Risk Assessment 2015) and manner in which in the suspect answers the questions. The custody officer may also attempt to establish whether the suspect understands his or her actions, the reason(s) for arrest and his or her rights (which are given upon booking-in). How the suspect understands the world around him or her, arguably in reference to what occurs within the custody suite, may also indicate to the custody officer that the suspect is vulnerable.

This can be seen from the following excerpts, taken from interview transcript:

*The risk assessment and other questions that you ask while you're booking people in allows you to gauge a level of intelligence or whether there's other issues, as to whether [the AA safeguard] would be required or not.<sup>xvii</sup>*

The central premise here is that if the suspect fails to understand the risk assessment, the world around him or her, and the reasons surrounding his or her arrest, he or she will also fail to understand the long-term implications of his or her arrest, the meaning of his or her rights and



entitlements and, most importantly for the purposes of custody, the questions asked at interview, and, more broadly, the interview process. This may then jeopardise the reliability of evidence (see s 76 PACE 1984).

*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, in terms of what's going on. 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>xviii</sup>*

*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 appropriate adult 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>xix</sup>*

Interestingly, and as the quote above indicates, custody officers are also looking for information on whether the suspect understands the criminal process. For example, regular offenders or those who have exposure to the criminal process may possess sufficient understanding of the criminal justice system in order to comprehend the police interview and wider criminal justice processes.<sup>xx</sup> When explaining why a suspect with schizophrenia wasn't provided with an AA, CO2 gave this explanation:

*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 appropriate adult. But that would be purely because I would be concerned about their level of understanding of what was going on.*

This rationale may result in differential treatment between regular suspects and those new, or newer, to the criminal process.<sup>xxi</sup> As a result the former may not always avail of the same protection as the latter. The above discussion may, ostensibly, indicate that custody officers are focusing largely, if not solely, on the 'mental vulnerability' element of Code C, however, the problem does not end there. Through further analysis it transpired that custody officers were developing their own construction of vulnerability, upon which to implement the appropriate adult safeguard. This will be explored in greater detail below.<sup>xxii</sup>

Before addressing the 'Code C complication', it should be noted that custody officers often expressed negative sentiments regarding Code C. When asked at interview to explain the term 'mentally vulnerable', CO9 stated that they '*don't have guidance as to what mentally vulnerable means*'.<sup>xxiii</sup> Whilst this may, superficially, suggest that CO9 isn't aware of the guidance under Code C, it may also be suggested that he is aware of the term but feels that guidance is insufficient in that it doesn't explicate the term 'mentally vulnerable'. Moreover, other officers stated that they lacked knowledge of the vulnerability provisions under Code C. Whether custody officers are not aware that the guidance exists, are reluctant to read and digest it or, upon reading and digesting it, still don't understand what it means, is largely unimportant. What is overwhelmingly important is that custody officers, for whatever reason, do not feel they have sufficient knowledge or understanding to operationalise the Code C.<sup>xxiv</sup>

The foregoing section has set out that custody officers may be unable to operationalise the terms 'mental vulnerability' and 'mental disorder', they exhibit difficulty when asked to articulate these terms, and they are developing their own benchmark upon which to assess whether the suspect is vulnerable. In the following section I will explain how Code C fails to adequately protect suspects by utilising elusive and ill-defined terms through which to explain vulnerability.

### **The Code C complication**

As I have argued elsewhere (XXXX (forthcoming)), there is a large degree of ambiguity in relation to definitions contained within Code C. Thus, whilst Code C contains the definition of the term 'juvenile' at the beginning of the Code (para 1.5), the definitions of mental vulnerability and mental disorder are mentioned much later, and in the Notes for Guidance. This result of this is two-fold. The first problem is practical – by not providing the definition from the outset, custody officers are required to leaf through the Code in order to find the definition. This is, of course, time-consuming and inconveniencing. As has been established in earlier research (Coppin 2008) custody officers are often under immense pressure – booking-in is time

consuming and can take up to 50 minutes (p. 85) and CPS Charging Guidance and the Mental Health Act 1983 have impacted negatively upon the custody officer's role (pp. 85-88). The second issue is symbolic – as discussed in another paper (Dehaghani (forthcoming)), the Notes for Guidance assume an even lower status than the Codes 'in terms of their authority' (Zander 2013, p. 369). This may have the effect of suggesting that the protections for young suspects are more authoritative than that for adults.<sup>xxv</sup> Whilst, as Zander notes, there is very little practical difference between the Notes for Guidance and the Code (2013, p.369), this may not translate into custody officer practice. As I have previously argued, this issue may be further compounded by the fact that the Crime and Disorder Act 1998 s 38 (4) (a) established a statutory duty for the Youth Offending Teams to provide young suspects with an AA. A similar duty does not exist in relation to adults. This again may suggest that vulnerable adult suspects may be of lesser importance than young suspects (see Dehaghani (forthcoming)). It also provides a resource for young suspects, the equivalent of which is not available for adults. Given the pressures within custody, this may also impact upon custody officer practices.

As I have also previously argued (Dehaghani (forthcoming)), there seems to be a degree of confusion with regard to the definitions – in the Notes for Guidance mental vulnerability and mental disorder are defined. The definition is sufficiently broad so as to encompass a whole range of conditions. There is however inconsistency with regard to the terms used – Note for Guidance 1G makes it clear that the custody officer should treat the detainee as mentally vulnerable should there be any doubt as to the detainee's mental state or capacity, however, para 1.4 refers to suspicion or doubt utilised for both mental disorder and mental vulnerability. Whilst this is further reiterated in Annex E, the term 'mentally incapable' is also introduced, further complicating the matter. The use of the term 'any doubt' may also be impractical as a custody officer may be unable to say with absolute conviction that he has no doubt as to the detainee's state or capacity. As also noted above, the College of Policing Guidance uses the headings 'mental ill health', 'mentally vulnerable' and 'learning disabilities or difficulties', with the term 'mental disorder' appearing under the umbrella term 'mental ill health' (College of

Policing: Mental ill health 2015). Whilst this may not be wholly factually incorrect, it may result in further disarray. As such, these multi-various terms may be confusing to custody officers and may, moreover, have the effect of deterring the officers from using the guidance, or may reduce the practical use of all guidance. Moreover, in the custody suite studied, custody officers were still using 'Safer Detention' (ACPO 2012) – they did not seem to be aware of the College of Policing APP nor any other supplementary provisions (see College of Policing: Mental ill health 2015). Safer Detention (ACPO 2012) also seems somewhat confusing – it discusses mental disorder, mental illness, mental health needs and mental vulnerability under the heading of 'mental ill health definitions' (ACPO 2012, p. 138).

Reflecting upon the Notes for Guidance 1G, in combination with the empirical data, it appears that custody officers may be neglecting 'mental disorder' as a category, focusing instead on the suspect's level of understanding i.e. 'mental vulnerability'. It could thus be argued that by not providing this definition from the outset, Code C is insufficiently clear about what is expected of custody officers. Moreover, this term is not used in headings within the College of Policing guidance, as noted above. Upon perusal of the Note for Guidance 1G it is also apparent that the definitions are not provided in clear, unequivocal terms. This lack of clarity is demonstrated by the custody officers' responses at interview:

*There's no hard and fast rule and we're not given any hard and fast guidance. It just says, 'if a person needs an appropriate adult'. It doesn't say, 'apart from if they are a juvenile, they have to have an appropriate adult' because there are different degrees of mental illness.<sup>xxvi</sup>*

This is further compounded by how Code C approaches vulnerability – it explains that vulnerable suspects may be those who may provide unreliable, misleading or self-incriminating information (Notes for Guidance 11C). It is therefore little wonder that for custody officers this pragmatically translates to issues with comprehension.

As argued elsewhere (Dehaghani (forthcoming)), where the rules are clear, the safeguard may be implemented regardless of any additional factors, yet where the rules are ambiguous the

custody officer may consider other factors when making a decision. The impact of insufficient guidance is exemplified in the following excerpt taken from the interview with C09:

*Anyone that is on the autistic spectrum, our rulebook says, 'They will have an appropriate adult' so... no matter how serious or mild you would get an appropriate adult.*

*If somebody booked into custody said that they suffered from schizophrenia, I wouldn't automatically say, 'Right appropriate adult 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>xxvii</sup>*

This clearly illustrates that an AA may be obtained, at the very least by C09, where guidance is clear about the categories of adult suspect vulnerability. That said, not every custody officer was aware of this guidance. There were, moreover, many discrepancies in knowledge between each of the custody officers. This is alarming given the fact that they work together and should be privy to the same information and guidance. This is also something that should be addressed by those responsible for providing guidance to custody officers.

Further, whilst the vulnerability definitions under Code C are sufficiently broad, they can be misconstrued as Code C fails to provide well-defined, specific definitions of what 'mental disorder' and 'mental vulnerability' mean in relation to recognised conditions or situational issues. Whilst terms such as mental illness, low IQ, learning difficulty, learning disability, and difficulties reading and writing may be used to denote adult suspect vulnerability, these terms are absent from Code C. Moreover, not all of these terms are used in the College of Policing guidance (College of Policing: Mental ill health 2015), and as noted above, custody officers may not be aware of the updated guidance. It is therefore largely left to the custody officer to decide what the terms 'mental vulnerability' and 'mental disorder' actually mean and then to equate these with the information available to them. As noted, the Notes for Guidance 1G refer to mental disorder and state that this term should be understood as 'any disorder or disability of the mind', as is defined under the MHA 1983 s1 (2). However, Code C fails to elaborate any further. The definition is no real definition at all – it would require that custody officers consult

the MHA 1983 Code of Practice in order to establish what the definition means in real terms.<sup>xxviii</sup> On this point custody officers are neither advised nor obliged to consult the MHA 1983 Code of Practice. Moreover, the practicalities of custody<sup>xxix</sup> may be such that custody officers are under immense pressure and, as a result, may be too busy to consult additional guidance (see also Coppen 2008). In addition, I neither saw a copy of the MHA Code nor heard the Code mentioned on any occasion in custody.

### **Clarifying Code C: changing the law to change practice?**

Building upon one of the arguments set out elsewhere (Dehaghani (forthcoming)) this paper has addressed how problems with the law and guidance may be impacting upon how custody officers construct vulnerability and, relatedly, whether they obtain an AA. The preceding section has explored how, on the basis of the legalistic-bureaucratic conception of law in policing (see Dixon 1997) that the law is to blame for any 'gap' between the rhetoric of the law and the reality of police decision-making. Within the following section I will discuss the potential reforms which could be considered by police practitioners and policy makers.

One potential adjustment would be to contain explicit guidance, within Code C, on how the terms 'mental vulnerability' and 'mental disorder' link-up with recognised conditions. As aforementioned, mental disorder is defined as 'any disorder or disability of the mind' – this includes a wide array of conditions, including but not limited to:<sup>xxx</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*

Mental Health Act 1983: Code of Practice, p.26

The term 'mental vulnerability' is perhaps more difficult to explain in relation to recognised conditions. It could be situational (for example as a result of simply being brought into custody)<sup>xxxix</sup> or could be something innate<sup>xxxix</sup> (such as a cognitive impairment or learning difficulty, which is not classed as a mental disorder). Following on from that, it could be a learning difficulty, i.e. a substantial impairment or obstacle, or learning disability, i.e. something that incapacitates, (Mindroom), a cognitive impairment, a special educational need or a temporary issue with understanding and communication.<sup>xxxix</sup>

A lack of awareness as to the meanings of these terms is not necessarily something unique to custody officers. Indeed, in his review of mental health and learning disabilities in the criminal justice system, Lord Bradley found that, 'even when talking to professionals in this field... there was a lack of consensus in defining the boundaries between learning disability, borderline learning disability and learning difficulty' (Bradley, 2009, p. 19). By analogy, if professionals find these terms difficult, how can custody officers be expected to understand them? In this sense it is indeed true that, reiterating what C09 stated at interview, custody officers really don't have any guidance with regard to what these terms mean. The College of Policing guidance ostensibly makes an attempt to explain these terms in greater detail but fails to link-up with Code C. Moreover, in the custody suite studied, custody officers were still using 'Safer Detention' (ACPO 2012) – they did not seem to be aware of the College of Policing APP nor any other supplementary provisions (see College of Policing: Mental ill health 2015).<sup>xxxix</sup>

As also stated above, it may be unrealistic to expect custody officers to consult numerous texts, given the practical demands of custody.<sup>xxxv</sup> This may be further compounded by a lack of training – as Coppen noted, training for custody officers is a 'postcode lottery' (2008, p. 82) with

some officers receiving no training (pp. 82-83). For example, in the force studied mental health training was provided but focused more on risk (i.e. self-harm and suicide) than vulnerability for the AA safeguard.

A 'gap' between the law in books and the law in action exists, at least in part, because of misunderstanding or inadequate understanding; in addition to consulting one piece of guidance to the exclusion of the other. Thus, on the basis of the preceding discussion, one potential step forward would be to improve the clarity of guidance and ensure consistency across the different pieces of guidance.

### **Conclusion – bringing clarity and consistency?**

Unlike some other areas of PACE, the vulnerability provisions *have not* necessarily brought 'much needed clarity where there had previously been no clear rules' (Maguire 2002, p.92 in McConville and Wilson). Whilst it is clear from the discussion on custody officer's responses that they have a fair understanding of what vulnerable could mean, they are nevertheless applying their own (arguably practical and workable) construction to this definition (i.e. whether the suspect has previous knowledge of the criminal process or whether the suspect understands the basic risk assessment questions). This article has illustrated, as outlined elsewhere (Dehaghani (forthcoming)), that the 'vulnerability' definitions may explain why the AA safeguard is often left unimplemented. Within this article I have drawn attention to the lack of clarity and consistency both within C and between Code C and other pieces of guidance. This lack of clarity makes it difficult for custody officers to appreciate what 'vulnerability' means and thereby implement the AA safeguard. So what can be done?

As mentioned above, the MHA 1983 Code of Practice may hold some of the answers, particularly in reference to mental disorder. Firstly, it contains a comprehensive (although not exhaustive) list of what constitutes a mental disorder. This list is neither long nor complicated, yet it



provides custody officers with more information by which to understand and thereby identify vulnerability.<sup>xxxvi</sup> This may enable custody officers to understand what is meant by mental disorder in relation to recognised medical conditions. In addition, the MHA also provides a definition of learning disability (MHA 1983 Code of Practice, p.206). Additional definitions such as learning difficulty, special educational need or cognitive impairment may also be provided. Mental vulnerability (or at least some elements thereof) may nevertheless remain an elusive category, particularly where situational or contextual. Perhaps then too should Code C explicate that vulnerability can be situational (such as simply being brought into custody), in addition to being something innate (see Brown 2015). Moreover, it is imperative that custody officers are made aware of these texts and encouraged to consult them. Further still, greater consistency should be ensured between the definitions contained within the MHA, and within PACE and Code C, to the effect that clinical definitions correspond with legal definitions.

This paper has sought to draw attention to the problems with the law and guidance, as also argued elsewhere (Dehaghani (forthcoming)), yet this paper has gone further by suggesting ways in which policymakers and practitioners may help rectify the problems herewith outlined. It is perhaps naïve to think that a change in the guidance may encourage rule-adherence (see Ericson 2007, p.371-2). Indeed, as Ericson suggests, police officers may present their actions in 'rule-following terms' but 'when actually engaged in police work', they may be 'variously ignorant of potentially applicable rules, sidestep troublesome rules they think may be applicable, break rules if such action is deemed necessary to get the job done and use rules creatively to accomplish desired outcomes' (2007, p. 394). Custody officer construction of vulnerability may be an inescapable reality reflecting the practicalities of police work. But improving clarity and consistency may at least encourage custody officers to consult, and consider, the guidance. Custody officers may, of course, wish to continue using their own construction. Moreover, there is also a danger of rendering Code C an overwhelmingly long and tedious document (if it isn't so already). After 30 years of unclear guidance, perhaps it is time to call for a reformulation of the Code C provisions, coupled with additional training, to bring

clarity and consistency to an otherwise largely incomprehensible area.<sup>xxxvii</sup> As I have argued elsewhere (Dehaghani (forthcoming)) the issue is multi-faceted – a change in guidance and improved training could be a step in the right direction.

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<sup>i</sup> These convictions were later quashed.

<sup>ii</sup> A large surge of this research occurred shortly after PACE was implemented and shortly after the Royal Commission on Criminal Procedure in 1992, however there has been little research since then, particularly within the socio-legal sphere (perhaps with the exception of Pierpoint 2006, 2008). Some work has been conducted within the forensic or social care context (see NAAN 2015; see also Bradley 2009).

<sup>iii</sup> This paper also uses the same data set as the previous paper.

<sup>iv</sup> I prefer the term ‘young suspects’ – although this term is not, of itself, unproblematic.

<sup>v</sup> This definition will be elaborated upon later in this paper.

<sup>vi</sup> There was some variation in the wording of the questions (in line with the semi-structured nature) but they largely followed the wording stated.

<sup>vii</sup> It should be noted from the outset that I neither agree nor disagree with the views of the custody officers expressed at interview.

<sup>viii</sup> I have explored some of the themes or characteristics discussed within the following section elsewhere (Dehaghani (in forthcoming)) yet my intention within this section, and indeed within this paper, is to ensure that discussion is relevant for practitioners and policymakers. I have therefore attempted to discuss the most relevant elements of how vulnerability is defined.

<sup>ix</sup> These words were often used interchangeably.

<sup>x</sup> C020 Interview.

<sup>xi</sup> C09 Interview.

<sup>xii</sup> The typical response referred to mental health or learning difficulties.

<sup>xiii</sup> These references appear in the College of Policing guidance (College of Policing: Mental ill health 2015).

<sup>xiv</sup> The ability to communicate is essential, as the interview may be fruitless without effective communication between the police and the suspect.

<sup>xv</sup> C03 Interview.

<sup>xvi</sup> This may well be the intention of Code C, however, research has shown that even those who appear to have sufficient knowledge and understanding my experience difficulty when reading alone (Rock 2007). Moreover, those with capacity may nevertheless be ‘unduly influenced by short-term gains (e.g. being allowed to go home) and by the interviewer’s suggestions’ (Gudjonsson, 1993 p.121 as cited in Gudjonsson, Hayes and Rowlands 2001, p.75).

<sup>xvii</sup> C02 Interview.

<sup>xviii</sup> C014 Interview.

<sup>xix</sup> C09 Interview.

<sup>xx</sup> There is some variation with regard to the ‘usual suspects’. For example, there are occasions where the use of an appropriate adult on a previous occasion will result in the use of the appropriate adult in the present. Thus, someone who is alleged to (or may) have previously offended may be given an appropriate adult. The decisions made herein are not straightforward and unfortunately there is no room for discussion within this paper.

<sup>xxi</sup> See also Kemp and Hodgson (2015) in relation to young suspects.

<sup>xxii</sup> The identification of vulnerability is explored in greater detail (Dehaghani (forthcoming)).

<sup>xxiii</sup> C018 Interview. This was also implicit in many interview transcripts.

<sup>xxiv</sup> Upon further discussion custody officers seemed to feel that more in-depth knowledge would not necessarily be useful as they were relying on their own judgement anyway. I

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nevertheless think that clarification would ultimately aid custody officers when identifying vulnerability in adult suspects.

<sup>xxv</sup> See PSI Report (1983) on the function of legal rules.

<sup>xxvi</sup> CO4 Interview.

<sup>xxvii</sup> These two examples have also been provided in other works (see Dehaghani (forthcoming)).

<sup>xxviii</sup> It should be noted, however, that custody officers were often aware that depression, for example, was a mental disorder. Yet, if depression did not result in issues with comprehension then it was an insufficient basis upon which to implement to AA safeguard. Perhaps if the guidance was more explicit then custody officers would recognise why a suspect with depression should be provided with an AA.

<sup>xxix</sup> These practicalities include, but are not limited to, booking-in procedures (which may also require the use of Language Line), arranging informal and formal mental health assessments, and responsibilities towards those who have been brought into custody as a place of safety under the Mental Health Act 1983.

<sup>xxx</sup> The Code of Practice for the MHA notes that this is not an exhaustive list.

<sup>xxxi</sup> The guidance does make it clear that someone who is mentally vulnerable may not be suffering from a mental illness – see ACPO 2012, p. 138; and College of Policing APP: Mental Ill Health 2015.

<sup>xxxii</sup> These terms have been borrowed from Brown 2015.

<sup>xxxiii</sup> Again, this may raise issues with identification.

<sup>xxxiv</sup> Note - first published: 23 October 2013; last modified: 28 July 2015.

<sup>xxxv</sup> It could, moreover, be unrealistic to expect custody officers to identify vulnerability, given their lack of expertise. This was a sentiment shared by all custody officers at the custody suite studied.

<sup>xxxvi</sup> Although one could argue that, on the basis of the list, that most, if not all, suspects would be considered ‘vulnerable’. This may make Code C impractical.

<sup>xxxvii</sup> Perhaps, more radically, the vulnerability definitions could be broadened to include every suspect in police custody (see Dehaghani (in progress)).

## References

Association of Chief Police Officers, Safer Detention for the Detention and Handling of Persons in Custody. London: ACPO NPJA; 2012.

Bean, P., and Nemitz, T. Out of depth and out of sight. Loughborough: University of Loughborough; 1995.

Bradley, K.J.C. Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System. London: Department of Health; 2009.

Brown, D., Ellis, T., and Larcombe, K. Changing the Code: Police Detention Under the Revised PACE codes of Practice (Home Office Research Study No 129). London: Home Office; 1992.

Brown, D. PACE Ten Years On, A Review of the Research (Home Office Research Study No 155). London: Home Office; 1997.

Brown, K. Vulnerability and young people: care and social control in policy and practice. Bristol: Policy Press; 2015.

Bucke, T., and Brown, D. In Police Custody: Police Powers and Suspects’ Rights under the Revised PACE codes of practice (Home Office Research Study No 174). London: Home Office; 1997.

---

Charmaz, K. Constructing grounded theory. A practical guide through qualitative analysis. London: SAGE; 2006.

College of Policing (2015) : *Detainee care* [Internet]. <https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/> [Accessed 29 December 2015]

College of Policing (2015): *Mental ill health and learning disabilities* [Internet]. <https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/mental-ill-health-and-learning-disabilities/> [Accessed 29 December 2015]

College of Policing (2015) : *Risk assessment* [Internet]. <https://www.app.college.police.uk/app-content/detention-and-custody-2/risk-assessment/> [Accessed 29 December 2015]

Coppen, J. PACE: A View From the Custody Suite in Cape, E. and Young, R. (eds) *Regulating Policing: the Police and Criminal Evidence Act 1984 – Past, Present and Future*. Oxford and Portland:Hart; 2008.

Crime and Disorder Act 1998.

Department of Health. *Mental Health Act 1983: Code of Practice*. Norwich: Crown TSO; 2015.

Dehaghani, R. He's just not that vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (forthcoming at *Howard Journal of Crime and Justice*).

Dehaghani, R. Interrogating Vulnerability: a critical analysis of vulnerability under Code C to the Police and Criminal Evidence Act 1984 (in progress).

Ericson, R.V. Rules in Policing: Five Perspectives', *Theoretical Criminology* 2007; 11(3), 367-401.

Gibson, B. and Hartman, J. *Rediscovering Grounded Theory*. London: SAGE; 2014.

Gudjonsson, G., Clare, I., Rutter, S. and Pearse, J. *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Procedure Research Study No 12). London: Home Office; 1993.

Gudjonsson, G.H., Hayes, G.D. and Rowlands, P. Fitness to be Interviewed and Psychological Vulnerability: The Views of Doctors, Lawyers and Police Officers, *Journal of Forensic Psychiatry* 2001; 11, 74-92.

Hodgson, J. Vulnerable Suspects and the Appropriate Adult. *Criminal Law Review* 1997; 785-795.

Home Office. *Royal Commission on Criminal Procedure, The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-1). London: Home Office; 1981.

Home Office. *Guide for Appropriate Adults*. Home Office; 2011  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117682/appropriate-adults-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117682/appropriate-adults-guide.pdf) [accessed 29 December 2015]

---

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. London: Crown; 2014.

Irving, B., and McKenzie, I. Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984. London: Police Foundation; 1989.

Maguire, M., Regulating the Police Station: The Case of the Police and Criminal Evidence Act 1984 in McConville, M. and Wilson, G. (eds) Handbook of the Criminal Justice Process. Oxford: OUP; 2002.

Medford, S., Gudjonsson, G.H. and Pearse, J. The efficacy of the appropriate adult safeguard during police interviewing, Legal and Criminological Psychology 2003; 8(2), 253-266.

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[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 29 December 2015]

National Appropriate Adult Network. There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police. National Appropriate Adult Network; 2015.

Palmer, C. and Hart, M. 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. Sheffield: University of Sheffield; 1996.

Pierpoint, H. Reconstructing the Role of the Appropriate Adult in England and Wales, Criminology and Criminal Justice 2006; 6(2), 219-238.

Pierpoint, H. Quickening the PACE: The Use of Volunteers as Appropriate Adults', Policing and Society 2008; 18(4), 397-410.

Phillips, C. and Brown, D. Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes (Home Office Research Study No 185). London: Home Office; 1998.

Police and Criminal Evidence Act 1984

Policy Studies Institute, Police and people in London; iv, Smith, D.J. and Gray J., The police in action. London: Policy Studies Institute; 1983.

Price, C., and Caplan, J. The Confait confessions. London: Marion Boyars; 1977.

Zander, M. The Police and Criminal Evidence Act 1984. 6<sup>th</sup> edn. London: Sweet and Maxwell; 2013.