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Written evidence on neurodivergence, vulnerability and criminal courts

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Thank you to Prof David Ormerod for the invitation to contribute to this review. In doing so, we draw principally from our ongoing research project on criminal defence for autistic suspects and defendants, in addition to our collective experience of over 20 years researching criminal justice processes, with a specific focus on criminal defence and (safeguards for) vulnerable people.

We are grateful to the British Academy/Leverhulme for funding the research project, to the lawyers who participated, to the autistic people who provided important input on research design, and to Chloe Macdonald who has provided invaluable research assistance.

The below review focuses principally on vulnerable, and specifically neurodivergent, defendants, as requested by Prof Ormerod. It is divided into three sections:

- Section 1 discusses the challenges which exist for neurodivergent individuals in the context of criminal courts, relating this to the terms of reference of this review
- Section 2 provides evidence from an ongoing project exploring criminal defence representation for autistic defendants in criminal courts
- Section 3 proposes suggested changes which should be considered as part of the review, based on the discussions in Sections 1 and 2

Section 1: Challenges related to Neurodivergence in Criminal Courts

1. Neurodivergence in the Criminal Justice System (CJS)

Recent years have seen increased attention to both neurodiversity as a general concept and social concern, and specifically to the way in which the CJS engages with individuals who are neurodivergent. Interest (and, to some extent, action) in this area has been catalysed by an exponential increase in inter-disciplinary scholarship and policy-level engagement, not least because of the landmark evidence review by the Criminal Justice Joint Inspectorate (hereafter, CJJI) in 2021.[1] While often used interchangeably, 'neurodiversity' refers to the natural variation in the neurodevelopmental profiles of the general population; that is, the variations in types of human brain. In contrast, 'neurodivergence' commonly describes cognitive development which varies or diverges from the typical, related primarily to differences in learning, memory and attention, language and communication, sensory processing, and mood regulation. Neurodivergence includes (but is not limited to) Autism, Attention Deficit and

[1] Criminal Justice Joint Inspection (CJJI), Neurodiversity in the criminal justice system: A review of evidence (HM Inspectorate of Prisons and HM Inspectorate of Constabulary, Fire and Rescue Services, July 2021).

Hyperactivity Disorder (ADHD), Learning Disabilities, and Dyslexia, with types of neurodivergence often overlapping and intersecting. Whilst distinct, mental health conditions – such as anxiety disorders and depression – often co-occur, generally due to failures to meet the needs of neurodivergent individuals.[2] As such, many of the issues in criminal courts relating to neurodivergence are also applicable to mental health in this context.

Individuals drawn into the CJS – as suspects, defendants, victims or witnesses – generally face significant challenges due to the stressful, complex and specialised nature of criminal proceedings. Neurodivergent individuals have inherent differences in the way they engage with the world around them – for example, differences in social communication and sensory processing. Combined with the, arguably, neurotypical design bias of the CJS, this can create barriers to fair and effective criminal proceedings (as will be highlighted in this paper and the research project). Whilst prevalence is difficult to estimate, it is generally accepted that neurodivergent individuals are both overrepresented within and under-served by the CJS, experiencing poorer justice outcomes than their neurotypical counterparts.[3] It has been suggested that approximately 16% of defendants have ADHD and 10% are Autistic;[4] the CJJI suggested that 'perhaps half of those entering prison could reasonably be expected to have some form of neurodivergent condition which impacts their ability to engage.'[5] Though there is currently no consensus, it can be stated with reasonable confidence that a significantly higher proportion of individuals in the CJS than in the general population are neurodivergent.

However, the criminal justice system appears to offer 'patchy and inconsistent provision' for neurodivergent individuals, with 'serious gaps, failings, and missed opportunities at every stage'.[6] As such, it is essential that neurodivergence – alongside the wider context of mental health – is carefully considered in any reform programme for the criminal courts. Indeed, this would align with the prevailing agenda of the Ministry of Justice, who produced a Neurodiversity action plan in 2022 in response the CJJI evidence review.[7] As will be argued, more efficient and effective outcomes (for the system, the individuals subject to it, legal professionals, and the wider public) are more likely to result from a considered approach which is more adaptable to this cohort. In contrast, reform with a narrow a focus on speed and resource minimisation is likely to not only ultimately defeat efficiency objectives but result in unfair procedures and outcomes. This is exemplified by the status quo; notwithstanding two decades of focus on efficient court processes,[8] delay and uncertainty are rife, procedures are poorly adapted to neurodivergent individuals, and the stresses of engaging in the system

[2] See Kroll E, Lederman M, Kohlmeier J, et al, 'The positive impact of identity-affirming mental health treatment for neurodivergent individuals' (2024) *Front. Psychol*. 15:1403129; Lai, MC. Mental health challenges faced by autistic people. *Nat Hum Behav* 7, 1620–1637 (2023)

[3] CJJI (n 1); Woodhouse E, Hollingdale J, Davies L et al, 'Identification and support of autistic individuals within the UK Criminal Justice System: a practical approach based upon professional consensus with input from lived experience' (2024) *BMC Med* 22, 157; Brown P, Bakolis I, Appiah-Kusi, et al, 'Prevalence of mental disorders in defendants at criminal court' (2022) *BJ Psych open*, 8(3)

[4] Brown et al (Ibid).

[5] CJJI (n 1).

[6] Ibid.

[7] Ministry of Justice, A Response to the Criminal Justice Joint Inspection: Neurodiversity in the Criminal Justice System, A Review of Evidence (June 2022).

[8] For example, Ministry of Justice, 'Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System' (July 2012, CM 8388); Leveson B, 'Review of Efficiency in Criminal Proceedings (Judiciary of England and Wales, January 2015).

– for defendants and witnesses – raise the likelihood of disengagement and/or poor outcomes. As such, any reform programme should seriously consider whether courts are the right space for engaging neurodivergent individuals; and if they are, should be willing to embrace significant deviations from long-established 'standard' ways of doing justice.

2. Overview: Neurodivergence in Criminal Courts

Evidence suggests that 'prevalence of mental illness and neurodevelopmental disorders in defendants is high' with '[m]any …at risk of being unfit to plead and require additional support at court, yet are not identified by existing services'.[9] Courtrooms can be spaces of heightened emotional and cognitive challenge for any participant, but for those who are neurodivergent, this can be magnified immensely. The court process is rigid and formulaic, with pre-determined procedures required by law and policy. These are familiar to those working within the system, but are often unknown – and seemingly inflexible and alienating – to those external to it. Court procedures are very likely to be cognitively demanding (if not overwhelming) for neurodivergent individuals. As Chaplin et al argue:

> *'People with [neurodevelopmental disorders] are more likely to have difficulties with working memory, maintaining attention in social situations, understanding abstract information such as timelines and dates and difficulties with comprehension and retention of information (written and verbal).'*[10]

2.1 Sensory Stress

The court environment – including court rooms and court buildings – are likely to create prolonged sensory stress for neurodivergent individuals, who commonly have a variety of sensory processing differences, such as hyper-reactivity (increased sensitivity) and hypo-reactivity (reduced sensitivity) to sensory stimuli such as light, noise, temperature and touch.[11] Harsh lighting, excessive noise (particularly whilst waiting for proceedings), and physical contact – for example, if defendants are escorted into court – are likely to be more challenging for neurodivergent individuals. As argued by Woodhouse et al (in relation to Autistic individuals):

> *'[T]he sensory aspects of the courtroom… can cause significant sensory overload and distress for autistic individuals which may lead to negative experiences and/or difficulties with engagement.'*[12]

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[9] Brown et al (n 3).

[10] Chaplin E, McCarthy J, Marshall-Tate K, et al. 'A realist evaluation of an enhanced court-based liaison and diversion service for defendants with neurodevelopmental disorders (2024) *Crim Behav Ment Health*, 34(2), 117–133.

[11] L. Crane, L. Goddard, L. Pring, "Sensory processing in adults with autism spectrum disorders" (2009) 13(3) Autism 215; Keating J, Purcell C, Gerson SA, et al. 'Exploring the presence and impact of sensory differences in children with Developmental Coordination Disorder' (2024) *Res Devel Dis* 148; Lazerwitz MC, Rowe MA, Trimarchi KJ et al, 'Brief Report: Characterization of Sensory Over-Responsivity in a Broad Neurodevelopmental Concern Cohort Using the Sensory Processing Three Dimensions (SP3D) Assessment' (2024) *J Autism Dev Disord* 54.

[12] Woodhouse et al (n 3).

Moreover, considering the high likelihood that neurodivergent individuals may mask such differences,[13] this under-recognised issue should be an important consideration for courts (not simply within formal criminal proceedings but in relation to court centres generally).

2.2 Communication

Court rooms inherently involve expectations around social communication and behaviour, which are – arguably – neurotypically oriented. Proceedings are conducted orally, with legal argument, evidence and judicial communications conveyed in this manner. Trials emphasise oral presentation of evidence by witnesses, the defendant and experts. There may be lengthy periods of questioning (including cross-examination), using legal and procedural language which is specific and often technical.[14] The tone and nature of a trial is accusatorial, formal, intimidating, and alien to most outside of the legal profession.[15] For a neurodivergent individual, this experience may be extremely difficult to cope with in terms of understanding what is happening and why, and communicating effectively with the different parties involved (particularly when being questioned directly). Combined, these challenges – without adaptation and support – are likely to not only cause distress (which may or may not be obvious) but impact on the fairness of decision-making. This can, ultimately, affect the quality of evidence and engagement, the progression of proceedings, and the ability of neurodivergent individuals to effectively participate, as well as causing emotional exhaustion and burnout.[16] As mentioned above, there is a higher likelihood of co-occurring mental health conditions for neurodivergent individual; such stresses are therefore likely to increase disengagement, disruption and poorer wellbeing.

2.3 Coping with speed, delay and uncertainty

Neurodivergent individuals may have difficulties in mentally processing information due to differences in memory, learning, attention and executive function. Understanding, assessing and providing information – particularly when conveyed orally - can take more time than for neurotypical individuals.[17] As such, court processes which emphasise speed are likely to place neurodivergent individuals at a significant disadvantage; in worst case scenarios neurodivergent individuals may simply comply with directions or suggestions when given insufficient processing time. This may not be detected if there is no clear indication (from the individual or legal professionals, such as lawyers) that they have not fully grasped what is

[13] Lazerwitz et al (n 11).

[14] For more on these challenges, see Morrison J, Bradshaw J, and Murphy G, 'Reported communication challenges for adult witnesses with intellectual disabilities giving evidence in court' (2021) 25(4) *E&P* 243; and Equality and Human Rights Commission, *Inclusive justice: A system designed for all* (April 2020).

[15] Fairclough S, 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment' (2021) 41(4) *OJLS* 1066; Smith O, 'Narratives, Credibility and Adversarial Justice in English and Welsh Rape Trials' in Andresson U, Edgren M, Karlsson L, and Nilsson G (eds), *Rape Narratives in Motion* (Cam: Palgrave: 2019).

[16] Chaplin et al (n 10); CJJI (n 1); Woodhouse et al (n 3); Attwood T, *The Complete Guide to Asperger's Syndrome* (2007, Jessica Kingsley).

[17] This can include aspects of executive function, such as working memory and processing speed. See Rubia, K, 'Cognitive Neuroscience of Attention Deficit Hyperactivity Disorder (ADHD) and Its Clinical Translation" (2018) *Front Hum Neurosci* 12.

happening or have not had appropriate time to process information.[18] Furthermore, the variable and unpredictable nature of court processes—which often involve delays and unexpected changes—are a potent source of stress for neurodivergent individuals. Uncertainty and unpredictability are particularly challenging for Autistic individuals, who are likely to find delayed, disordered or postponed proceedings particularly difficult to manage.[19] Again, this increases the likelihood of disengagement or behaviour regarded as challenging (which is in fact an expression of distress and/or overwhelm).[20]

2.5 Gaps in identification, training and understanding

As recognised by the CJJI, there is currently poor information about and no systematic identification of neurodivergence in criminal courts (or other stages of the CJS).[21] Whilst it recommended the development of a universal tool for screening/assessment across the CJS, this has yet to be developed (at the time of writing), with acknowledgement that doing so is complex.[22] Examples of effective screening processes in the context of court do exist in isolation; for example, Chaplin et al recently reported on a specialist Liaison and Diversion service for identifying neurodivergent defendants and advising courts on matters such as risk and sentencing.[23] However, such practices are not widespread, and are 'diagnosis driven' – that is, they are designed around identifying clinical diagnoses of neurodivergence (such as Autism or ADHD). Arguably, it would be both more effective and fairer to adopt a 'needs-led' or non-categorical approach to screening, focused on common functional differences experienced by neurodivergent people (such as memory, sensory regulation, or communication).[24] Currently, no such universal screening tool exists, leaving courts blind to the extent of neurodivergence before them.

Unsurprisingly, existing research indicates that judges, lawyers and other legal professionals do not always recognise and effectively respond to the needs of neurodivergent individuals in court proceedings.[25] This may, in part, be explained by participants in proceedings 'camouflaging' their differences in an effort to avoid stigmatisation;[26] and a lack of appropriate

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[18] This is heightened by a lack of systematic identification/screening pre-court (or in the CJS generally). See 2.5.
[19] Difficulty coping with change is a prominent feature of autism. See National Autistic Society, 'Dealing with change – a guide for all audiences' (August 2020).
[20] Dickie I, Reveley S, and Dorrity A, 'Adults with a diagnosis of autism: personal experiences of engaging with regional criminal justice services" (2019) 4(2) *Journal of Applied Psychology and Social Science* 52.
[21] CJJI (n 1).
[22] Ministry of Justice (n 7)
[23] Chaplin et al (n 10).
[24] See Miller, A.R., Gardiner, E., Rosenbaum, P.L. 'A Non-Categorical Approach to Childhood Neurodisability: Concepts, Evidence, and Implications for Clinical Practice, Organization of Services, Teaching, and Research' in: Eisenstat, D.D., Goldowitz, D., Oberlander, T.F., Yager, J.Y. (eds) *Neurodevelopmental Pediatrics* (2023, Springer: Cham); Kirby A, 'Neurodiversity 101: Diagnosis or not in 2024': https://www.linkedin.com/pulse/neurodiversity-101-diagnosis-2024-kirby-mbbs-mrcgp-phd-fcgi-pkmhe/?trackingId=DUnx9UgYD%2Bza2J%2FhHu5S%2Bw%3D%3D
[25] Maras et al, "Brief report: Autism in the courtroom: Experiences of legal professionals and the autism community" (2017) 47(8) *J Aut Devel Dis* 2610; Cooper P and Allely C, 'You can't judge a book by its cover: evolving professional responsibilities, liabilities and 'judgecraft' when a party has Asperger's Syndrome' (2017) *NILQ* 68.1; Smith T, 'Autistic and accused: A critical discussion of contemporary challenges to fair and effective criminal proceedings for autistic suspects and defendants' (2024) *Crim LR* 43–64.
[26] M.C., Lai, M.V. Lombardo, A.N.V. Ruigrok, et al 'Quantifying and exploring camouflaging with men and women with Autism' (2017) 21(6) *Autism* 690

training for legal professionals.[27] Since neurodivergent individuals are likely to have different ways of communicating, behaving, and coping with stress which may not be recognised or understood, there is significant potential for this to be misinterpreted or misconstrued by decision-makers such as judges and juries.[28] This can adversely affect the way in which court processes are managed as well as outcomes such as remand, verdict and sentence.[29]

For example, we might consider decisions regarding remands in custody. When making decisions under the Bail Act 1976, a court must weigh the risks of release against the proportionality of detention, including the possible risks to the defendant of doing so. The fact a defendant is neurodivergent may or may not be a relevant factor when considering the appropriateness (or necessity) of pre-trial detention.[30] Based on current evidence, it is very possible that a neurodivergent defendant may present (that is, externally display their neurodivergence) in a manner that is not fully understood or appreciated by a court. A poorly informed court may overestimate the risk posed by a neurodivergent defendant, particularly if they regard their presentation to be odd, erratic or unpredictable – rather than a coping or regulatory behaviour in a stressful context.[31] Equally, when a court is unaware of or does not understand neurodivergence, it cannot recognise the possible risks of detention.[32] Ultimately, if a remand in custody is ordered, the negative consequences may be extreme (see, for example, the recent case of Kay Melhuish).[33]

Research suggests that misinterpretations and biases are dissipated if professionals and decision-makers are appropriately informed (for example, of a relevant diagnosis).[34] However, it has also been found that stereotypical or generic information about a particular type of neurodivergence – rather than individualised information – is likely to be unhelpful if not

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[27] Slavny-Cross R, Allison C, Griffiths S, and Baron-Cohen S, Autism and the criminal justice system: An analysis of 93 cases (2022) *Autism Research*, 15, 904-914.

[28] Cooper and Allely (n 25); Sturges H, Nuñez N, 'Autism spectrum disorder in adult defendants: the impact of information type on juror decision-making' (2021) *Psych Crime Law*. 29. 1-17; Tidball M, *Disabling Criminal Justice: The Governance of Autistic Adult Defendants in the English Criminal Justice System* (London, Bloomsbury: 2024).

[29] CJJI (n 1); Smith (n 25).

[30] This may be particularly the case if the court is considering a remand in custody for the defendant's own protection under Schedule 1 of the legislation – a heavily criticised mechanism (see House of Commons Justice Committee, 'The role of adult custodial remand in the criminal justice system: Seventh Report of Session 2022–23' (17 January 2023, HC 264). The Mental Health Bill 2025 (under Clause 47) proposes to remove this power entirely.

[31] Cooper and Allely (n 25); Smith (n 25). An example for, primarily, autistic individuals is 'stimming' – self-stimulatory behaviours such as hand flapping or repetition of phrases. For more, see Kapp S, Steward R, Crane L, et al, '"People should be allowed to do what they like": Autistic adults' views and experiences of stimming' (2019) 23(7) *Autism* 1782.

[32] There is a significant body of research on the challenges presented by custody for autistic individuals. See Vinter L, Dillon G, "Autism in Prisons: An Overview of Experiences of Custody and Implications for Custodial Rehabilitation for Autistic Prisoners", in Smith T (ed.), *Autism and Criminal Justice: The Experience of Suspects, Defendants and Offenders in England and Wales* (Abingdon: Routledge, 2023).

[33] Dugan E, 'Mum was ill, not bad': family call for reform of England's justice system after prison suicide, *The Guardian*, 26 October 2024: https://www.theguardian.com/society/2024/oct/26/kay-melhuish-family-uk-justice-system-reform-prison-suicide

[34] Maras K, Marshall I and Sands C, 'Mock juror perceptions of credibility and culpability in an autistic defendant' (2019) *J Autism Devel Dis* 49(3), 996–1010; Sturges and Nuñez (n 28).

harmful.[35] Providing tailored information to courts (for example, through pre-sentence reports or presenting mitigation), can therefore take time and expertise. If courts are unwilling to order reports, engage experts, grant sufficient time for such activities or adapt their approach on the basis of such information, the likelihood of unfair and ineffective decision-making (such as an inappropriate custodial or community sentence) increases.[36] This is likely to negatively contribute to efforts to rehabilitate and reintegrate convicted individuals, and ultimately lead to their return to court in the future (with implications for efficiency).[37] Reducing prejudicial and inaccurate interpretations of neurodivergent presentation during the court process therefore requires systemically-embedded awareness and understanding of its variability and meaning, which is currently lacking; as well as a willingness on the part of courts to be innovative in their approach to neurodivergent individuals.

2.6 Use of Special Measures

Access to special measures (such as an intermediary) may be crucial to addressing such issues, when recognised, but there is currently limited empirical research to support this.[38] Neurodivergent witnesses are likely to be eligible under statutory provisions, though implementation has significant challenges in practice.[39] Defendants do not have equivalent statutory rights, potentially leaving them without critical support.[40] Whilst courts can exercise their discretion to grant non-statutory equivalent measures for defendants, research suggests a generally 'unenthusiastic' approach to parity for the accused in this context.[41] Furthermore, concerns have been expressed about under-use of special measures in magistrates' courts, which is crucial to highlight considering the review's focus on shifting emphasis to lower court resolution of cases.[42] Implementation of such adjustments is hindered by the realities of legal practice. The working conditions of criminal courts have arguably deteriorated in recent years, with large caseloads; shortages of personnel and court spaces; and fragmented representation for the accused across the life of a case.[43] Such conditions are not conducive to consistent and effective support. Legal professionals report that adjustments 'often

[35] Ibid.
[36] Chaplin et al (n 10); Chester V, Tharian P, Slinger M, et al, 'Overview of offenders with intellectual disability', in McCarthy JM, Alexander RT and Chaplin E (eds.), *Forensic aspects of neurodevelopmental disorders: A clinician's guide* (Cambridge: Cambridge University Press, 2023).
[37] For example, there is compelling evidence that short custodial sentences have poor outcomes in terms reoffending. See Gormley J, Hamilton, M, Belton I, 'The Effectiveness of Sentencing Options on Reoffending' (Sentencing Council, 2022).
[38] See ongoing research of Maras K, Bagnall R, Crane L, Mattison M, 'Autism in court: Measuring special measures': https://www.bath.ac.uk/projects/autism-in-court-measuring-special-measures/
[39] Under s.16 Youth Justice and Criminal Evidence Act (YJCEA) 1999; see Fairclough S, 'Special Measures Literature Review' (Victims' Commissioner. 2020); Baird V, 'Next steps for special measures: A review of the provision of special measures' to vulnerable and intimidated witnesses (Victims' Commissioner, 2021).
[40] YJCEA 1999 excludes the accused from access to special measures, with the exception of live links for adult defendants with capacity issues (s.33A).
[41] Fairclough, S. 'The consequences of unenthusiastic criminal justice reform: A special measures case study' (2021) *Criminol Crim J* 21(2) 151-168.
[42] Baird (n 39).
[43] See various parts of Bellamy C, Independent Review of Criminal Legal Aid, (November 2021); Newman D, Welsh L, 'The practices of modern criminal defence lawyers: Alienation and its implications for access to justice' (2019) *Com Law World Rev* 64, 42 (1-2). See also Newman, D, Dehaghani, R. *Experiences of Criminal Justice: Perspectives from Wales on a System in Crisis* (Bristol: Bristol University Press, 2022).

required a great deal of planning, which demand extra time... [which] is a limited resource'.[44] This reflects contemporary concerns about the effectiveness and fairness of the criminal justice process for defendants in various contexts,[45] including the issue of legally aided criminal defence services.[46]

Part 2: Evidence from defence lawyers on the impact for court processes for Autistic defendants

1. Project Overview

The present project aims to explore the effectiveness of criminal defence advice and representation for autistic suspects and defendants, exploring criminal defence lawyers' awareness, understanding and experience. Semi-structured interviews were undertaken with barristers (10), solicitors (11), and police station representatives (7) practicing in England and Wales, and were analysed via Nvivo14 using thematic analysis. For the purposes of this submission, we have focused on the aspects of interviews related to courts, which included the following: (i) the impact, whether positive or negative, of being autistic on an individual's experience at court; (ii) direct or indirect experience of advising and representing an autistic defendant at court and reflections on this experience; (iii) the experience of requesting adjustments or adaptations, including the nature and purpose of doing so, the efficacy of adaptations of court processes, and barriers to doing so; and (iv) use of other (informal) types of support at court.

2. The Court Environment and Professional Culture

Courtrooms are perceived as 'intimidating' for vulnerable defendants, according to the lawyers interviewed. Specific features such as the use of wigs and gowns in the Crown Court, the position of the defendant in the dock, and the general 'solemnity and formality' (B2CM) in court were highlighted as particularly challenging aspects for autistic defendants. B8CM thought that 'the dock [and] all of that formality', could 'be stripped out' and that it should still be possible to 'conduct a criminal trial without putting people into what are effectively… stages and cages.'

The courtroom environment, particularly the architectural design, was perceived as a barrier to effective participation for neurodivergent defendants – they must 'sit somewhere for… a long period of time and be quiet and not speak to people' (B9CM) and must wait for an appropriate break or pause to ask any questions, which 'can be quite intimidating.' This was viewed as problematic for all defendants, but for autistic defendants this challenge can be pronounced, particularly if the autistic defendant experiences greater difficulties 'reading

[44] Maras et al (n 25).
[45] See, e.g., Welsh L, *Access to Justice in Magistrates' Courts: A Study of Defendant Marginalisation* (Oxford: Hart, 2023); Newman and Dehaghani (n 43).
[46] Bellamy (n 43).

signals, communicating, [and being able] to process information' (B6CM). The positioning of the defendant was also problematic for defence counsel as 'most of the time you have your back to your vulnerable clients, so you can't read their facial cues, and it might not be you that first notice that they're becoming distressed' (B10CM). This means that lawyers are unable to 'check on [their] client's well-being', leaving this role – in practice – to the court.

The busy and chaotic nature of the magistrates' courts was also noted (particularly changes to rooms and scheduling), although B10CM considered the Crown Court to be similarly 'busy … with lots of people… loud', which can be 'pretty stressful for people without autism' and can 'cause overstimulation for people with autism.' This was contrasted with the 'calmer, more regulated' civil courts where 'hearings happen at the time they say they're going to happen' with 'smaller rooms that are slightly more akin to offices than traditional courtrooms' and with 'much fewer people in the courtroom' (B10CM) (see 2.1 above).

The courts were also viewed as '[un]sympathetic to defendants who didn't quite understand what was going on around them' (B2CM). The magistrates' and Youth Courts were viewed as more receptive to vulnerable defendants and to making adjustments; in the Crown Court, by contrast, 'the judges are bit standoffish' (B4CM). The criminal courts were contrasted with the Family Courts which were perceived as 'much more welcoming of intermediar[ies]' (B3CM) and to other adjustments such as breaks and fidget toys (B3CM) because they were 'oriented around protecting people from harm [and] welfare' and have a 'caring ethic' (B2CM). The criminal justice system was viewed as 'punitive' (B2CM) and 'demands that people respond in a particular way, and an autistic person isn't capable of doing that' (B5CM). It was therefore argued that the criminal process 'is designed for neurotypical people' (B5CM), rather than around the needs of neurodivergent people.

3. Knowledge of Vulnerability

Jury trials were perceived by lawyers as particularly 'overwhelming' (B9CM) for autistic defendants, highlighting the likelihood that juries 'don't understand autism as well [as judges might].' Juries may be made aware of a defendant's autism, supposing this is identified and/or disclosed, but may not understand how autism affects a defendant's experience of, for example, giving evidence at trial. District Judges or lay benches were viewed as 'perhaps … better equipped to understand… differences [between autistic and allistic defendants]' (B1TS) than juries. S11CM, however, thought that lay magistrates tend to be 'scared if you mention anything about neurodivergent or mental health' and may therefore 'adjourn… for whatever reason we can think. Or let's send it up to the Crown Court."'

4. Restrictions on Available Adjustments

Psychological reports, intermediary reports, and ground rules hearings were viewed as crucial for vulnerable defendants. Participants argued that they enabled lawyers and the courts to understand and establish the required adjustments to ensure fair and effective hearings, including, but not limited to, how lawyers and the court could adapt their language; ensure the defendant's understanding of (and therefore participation in) proceedings, and implement adequate breaks. S6CM explained that they 'have observed cases at court where [the autistic defendant hasn't] had an intermediary or … the psychological reports. And the autistic person

is simply … thrown in at the deep end.' Commissioning of such reports can be costly and time-consuming and, of course, requires funding. Yet, if the court will not agree to adjustments without them, such reports become a necessity. Ultimately, failing to support their production legitimises the refusal to adapt by courts, undermining fair trials and efficient proceedings.

The above-mentioned problems of courtroom design and culture for vulnerable defendants can, in part, be addressed through the implementation of adjustments, such as special measures. There are, of course, limits to the range of special measures available (as mentioned above, Sections 27 and 28 YJCEA 1998 do not apply to defendants; and most of the special measures provisions for defendants exist in soft law or are otherwise restrictive). The limited nature of special measures was highlighted by the lawyers in our research. Moreover, special measures, or other adjustments, are contingent on the approval of the court, which presented another barrier to the effective participation of autistic defendants (and vulnerable defendants more widely). As argued above, a failure to recognise the needs of such defendants and/or a resistance to implementing adaptations undermines efforts towards fair and effective proceedings.[47]

Lawyers considered breaks, fidget toys, and other sensory regulation or comfort items as important adjustments for autistic defendants. It appeared, however, that the approval of the court for the use of these adjustments was contingent on expert assessment and approval – that the court would not approve adjustments on the lawyer and client's word alone. These adjustments are, however, low- or -no cost. Requiring formal assessment processes to enable quite simple – but impactful – adaptations is arguably disproportionate and wasteful.

Intermediaries were perceived as particularly helpful by enabling defendants to follow proceedings, ask questions (and receive timely answers), and request breaks. Yet, lawyers highlighted the obstacles to intermediary involvement – a lack of funding and resourcing, a reluctance to intervene, and judicial hostility towards intermediaries (particularly when the intermediary requested breaks for the defendant). Crucially, intermediaries are typically only granted, if at all, during the duration of the defendant giving evidence, rather than for the duration of the entire trial.[48] This means that the defendant may be able to effectively participate whilst giving evidence but may not be able to follow the proceedings more broadly. For B6CM, this limited involvement was 'a messy thing to navigate, because that means there's large chunks of a trial when … this person isn't going to have an intermediary.' B4CM commented that they have 'been more unsuccessful in [obtaining] intermediaries [in the Crown Court than in the magistrates' and youth courts].'[49] They thought that it was 'maybe… budget and the money they [the Crown Court] spend.' Arguably, existing policy and case law emphasises that neurodivergent and otherwise vulnerable defendants will only be granted intermediaries infrequently and primarily for evidence-giving purposes.[50] It is therefore unsurprising that defence lawyers reported courts' general resistance to doing so.

[47] Fairclough (n 39). Fairclough S and Greenwood H, 'Vulnerable Defendants, Special Measures and Miscarriages of Justice in England and Wales' in Dehaghani R, Fairclough S, and Mergaerts L (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multi-jurisdictional Perspectives* (Abingdon: Routledge, 2023).
[48] See *R v Rashid [2017] EWCA Crim 2*, which states an intermediary for a full trial will be 'extremely rare'.
[49] Contrary to existing research literature, though obviously this will vary between geographical locations.
[50] See Criminal Practice Directions 2023, *R v Cox* [2012] EWCA Crim 549, *R v Rashid* (n 48), *R (OP) v Ministry of Justice* [2014] EWHC 1944 (Admin).

5. Pressures, Public Funding and Time Poverty

Adjustments are important, if not crucial, to a vulnerable defendant's participation at trial; as the policy and case law state, courts must 'take every reasonable step' to enable defendants to participate;[51] and adapt the trial process to address a defendant's communication needs.[52] Yet, they are not the only important factor: a well-prepared lawyer who understands and is able to advocate for appropriate adjustments is also crucial. The limited nature of legal aid funding requires that lawyers represent enough clients to remain financially viable, with a subsequent impact on what lawyers are able or willing to do for their clients.[53] This is not to suggest that they will not discharge their basic functions; rather there may be avenues left unexplored, and issues left unaddressed because of lawyers' time poverty. For neurodivergent clients, the impact of failing to consider alternative approaches to representation and advocating for the same in courts may be far-reaching. As Slavny-Cross et al have argued in relation to autistic clients:

> *'The impact for an autistic defendant of receiving legal counsel from an autism aware legal team may be far reaching. First, it may better enable effective communication between client and lawyer. Second, the defense [sic] team may be better placed to put forward a case for mitigating circumstances and to arrange reasonable adjustments on behalf of their client.'*[54]

In contrast to legally aided defence lawyers, the interviewed lawyers suggested that privately funded cases allowed them to expand the scope of their support. For example, they can 'meet with clients after [police interview] as you're trying to agree a strategy for the rest of the case'; 'find ways to make sure that client is engaged with all of the decision-making, … without … overload[ing] them with information when it goes to court'; and ensuring 'that [the client has] a good relationship [with] and confidence in their advocate, [and that the] advocate has a good understanding about the client and their needs' (S10CM). It may also mean that the lawyer has (or develops) specialist knowledge of their client's vulnerability and is therefore able to advise, assist and represent them accordingly; and adopt a similar role in relation to a court. Unfortunately, as is well-established, many vulnerable people do not have the financial means to fund their own defence, leaving them reliant on legal aid (and its limitations). Arguably, this compromises access to effective criminal defence, with an inevitable impact on the fairness and efficiency of criminal proceedings. As one lawyer stated, 'the criminal justice system is on its knees' (S8CM). In this context, it is unsurprising to hear of the strain on lawyers' ability to assist vulnerable defendants.

Part 3: Suggested Improvements

Based on the arguments and evidence presented in Parts 2 and 3, this Part presents suggested changes which should be considered as part of the review of criminal courts. Although we are

[51] CrimPR 3.8(3)(a) and (b); Criminal Practice Directions 2023, 6.1.1.
[52] *R v Cox* (n 50).
[53] See, for example, the work of Thornton J, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) *Journal of Law and Society*, 46(4)
[54] Slavny-Cross et al (n 27).

unable to comment on the monetary cost or time commitment that such changes could involve, and recognise the practical restrictions that currently exist for the CJS, we would urge the review – and by extension criminal courts – to consider reforming and adapting, as far as possible, its approach to better facilitate access to justice and effective proceedings when neurodivergent individuals are involved. Whilst some of these suggestions may be concluded to fall outside the scope of the review, we believe that they are too important to neglect and that they include underpinning principles of relevance to the courts review. We would also argue that the suggestions made have positive implications for many court users, not just neurodivergent ones.

1. Court environment and culture:
    a. There could be greater clarity and consistency regarding when court hearings will occur, and the information provided about them. Cases should be listed with clear projected timeframes for court users, so that they can anticipate when their hearing is likely to occur on the set date and how long it is likely to last. This information should also be readily available to individuals in court custody. It is recognised that timeframes need to be flexible for practical reasons and that unexpected issues can (and do) cause changes to proceedings. However, the provision of this projected information would make court appearances less daunting and more certain for vulnerable individuals, particularly autistic individuals. The current system of public listings (via CourtServe and XHIBIT, and court building screens) is inadequate in this regard.
    b. Traditionally, courtroom design should be deviated from when appropriate. For example, allowing neurodivergent defendants to leave secure docks when there is no evidence of risk would reduce unnecessary isolation and stress (compromising their engagement); and allow improved communication with their lawyer and other members of the Court. The removal of wigs and gowns in the Crown Court should be available without the need for a special measures direction or assessment of court user vulnerability.
    c. Vulnerable individuals, particularly those with sensory differences, should have access to separate, smaller spaces within court buildings. This would allow individuals to self-regulate prior to court hearings.
    d. Courts and staff in court buildings should consider adjusting sound and lighting levels for neurodivergent court users, when this is possible. Doing so is a simple and no-cost method of reducing sensory stress, which hampers engagement and affects the wellbeing of neurodivergent court users.
    e. Neurodivergent individuals should be more regularly given opportunities to understand what their court hearing will look like in advance, whether this be in the form of a pre-hearing ‘walkthrough’ or accessible information about proceedings (for example, in an easy read or visual format).
2. Knowledge and awareness of neurodivergence:
    a. Introduction of a systematic and practical form of screening/assessment for neurodivergence prior to court hearings, that is ‘needs-led’ and not solely contingent on identification of an existing clinical diagnosis.
    b. Improved information sharing between criminal justice agencies and across the life of a case, to ensure that all relevant professionals are aware that an individual involved in a case is neurodivergent.

   c. Systematic training for judicial figures, legal professionals, and court staff on neurodivergence. Such training should be practical and experiential (if possible), evidence-based and be designed with input from individuals with lived experience of neurodivergence in the criminal justice system.
   d. Provision of appropriate and individualised information on neurodivergence to juries, to minimise prejudicial decision-making.
   e. More consistent engagement of Liaison and Diversion services, Bail Information Services, and pre-sentence reports to appropriately inform judicial decision-makers about the relevance of neurodivergence to various decisions.
3. Providing reasonable adjustments
   a. Granting of adjustments more readily, without recourse to expert assessments. This could, and should, include a range of low-cost adjustments, such as fidget toys, ear defenders, short adjournments, and provision of aids to communication.
   b. Greater use of adjustments and special measures, including, but not limited to, extension of special measure eligibility; and better funding and resourcing of intermediaries who are able to appropriately support neurodivergent individuals.
   c. Minimum standards of training, particularly for Magistrates, on hidden disability, vulnerability, the Equality Act 2010, and the UN Convention on the Rights of Persons with Disabilities (UNCRPD).
4. Dealing with issues of funding and time poverty
   a. Continued investment in criminal legal aid services, in line with the recommendations for a sustainable sector outlined by both the Bellamy Review and the Criminal Legal Aid Advisory Board Annual Report.[55] The recent announcement by the Ministry of Justice of a 12% increase in fees across the board is very welcome and now exceeds the minimum recommendations of the Bellamy Review.[56] However, this cannot be regarded as the end of this issue considering decades of neglect and decline.[57] In terms of this review, the rationale for this suggestion is that continued investment in representation in police stations and courts will ultimately facilitate better prepared and more effective defence representation with efficiencies for courts.
   b. Greater funding available for adjustments (suitable adjustments should enable effective participation and may therefore produce efficiencies for the court).
5. Fitness to plead and diversion
   a. When a court is made aware, prior to plea, that a defendant is neurodivergent and/or vulnerable, serious consideration should be given to assessing whether they are in fact to plead. For example, Brown et al found (in 2022) that approximately 5% of defendants were either unfit to plead or 'borderline unfit'.[58] They estimated (based on extrapolation and current statistics) that around 76,000 defendants a year were either unfit or in need of assessment

[55] Bellamy (n 43); Criminal Legal Aid Advisory Board (CLAAB), Annual Report 2024 (November 2024).
[56] Ministry of Justice, 'Millions invested in legal aid to boost access to justice and keep streets safe' (19 December 2024).
[57] The Law Society, 'Criminal legal aid funding increase a step forward for vital public service' (20 December 2024).
[58] Brown et al (n 3)

(compared with the average of 100 individuals found unfit per annum).[59] This suggests an urgent need for courts to be much more proactive in identifying unfitness as early as possible, as there is likely a large population of defendants who cannot participate effectively in court proceedings.

b. Diversion from court proceedings and/or criminal penalties should be seriously considered when individuals are neurodivergent. Other pathways for treatment and/or rehabilitation (such as community health care or, in extreme cases, hospitalisation) would likely be more appropriate for a variety of individuals, though it is appreciated this is also contingent on appropriate provision beyond the criminal justice system. It may be appropriate to consider neurodivergence as part of any future expansion of the Intensive Supervision Courts (ISCs) pilot.[60]

[59] Ibid.

[60] See CFE Research and Revolving Doors, 'Process evaluation of Intensive Supervision Courts pilot: Interim report' (January 2025, Ministry of Justice. ICSs are problem-solving courts which 'diverts offenders with complex needs away from short custodial sentences and into enhanced community-based sentences which address underlying causes of offending' (p.6). Arguably, neurodivergence will, for some offenders, form part of a complex set of underlying challenges for which specialised support is needed.