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# Defining the “Appropriate” in “Appropriate Adult”: Restrictions and Opportunities for Reform

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☞ Appropriate adults; Suspects

*The appropriate adult (AA) safeguard is potentially an important source of protection for vulnerable suspects in England, Wales and Northern Ireland. This paper maps out the role of the AA as provided in law and guidance, drawing attention to some of the problems with—and restrictions placed on—the safeguard. In identifying the “appropriateness” of the AA’s role, it is argued that various aspects of the role be more clearly defined, and it is further suggested that the safeguard needs to be reworked with an explicit commitment to the needs of the suspect. Finally, the paper urges that future research focuses on the qualities and activities when determining ‘appropriateness’ rather than simply the AA’s identity.*

## Introduction

Since 1986 there has been an explicit recognition within the law that vulnerable suspects<sup>1</sup> should be provided with additional protection when being investigated under suspicion of a criminal offence. The Police and Criminal Evidence Act 1984 (PACE) and its accompanying Codes of Practice introduced this requirement into the law through the provision of the appropriate adult safeguard (hereafter AA or “the safeguard”).<sup>2</sup> Prior to PACE, the Judges’ Rules and their Administrative Directions provided guidelines through which the police should conduct their investigations. The Judges’ Rules attracted criticism, particularly for their failure to protect suspects.<sup>3</sup> Until the changes to PACE Code C in July 2018, the safeguard was provided to young suspects, i.e. those under the age of 18 (otherwise known

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<sup>1</sup> The term “suspect” is problematic—see M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence* (HMSO, 1993), p.168.

<sup>2</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (TSO, 2019); Home Office, *Code D Revised Code of Practice for the identification of persons by Police Officers* (TSO, 2017); Home Office, *Code of Practice in connection with: The detention, treatment and questioning by Police Officers of persons in police detention under Section 41 of, and Schedule 8 to, the Terrorism Act 2000. The treatment and questioning by Police Officers of detained persons in respect of whom an authorisation to question after charge has been given under Section 22 of the Counter-Terrorism Act 2008* (TSO, 2018); Home Office, *Code E Revised Code of Practice on audio recording interviews with suspects; Code F Revised Code of Practice on visual recording with sound of interviews with suspects* (TSO, 2018).

<sup>3</sup> See D. Brown, T. Ellis and K. Larcombe, *Changing the Code: Police Detention Under the Revised PACE codes of Practice* (London: Home Office, 1992); H. Fisher, *Report of an Inquiry by the Hon. Sir Henry Fisher into the Circumstances Leading to the Trial of three persons on Charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* (HMSO, 1977/78).

as “juveniles”),<sup>4</sup> the mentally disordered (those with any “disorder or disability of the mind”) and the mentally vulnerable (those who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies). Since July 2018, a functional test in respect of adult suspects has been introduced within the Codes.<sup>5</sup> Other than where an interview is urgent, suspects falling under one of the vulnerability categories “must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the [AA].”<sup>6</sup> The safeguard must be implemented by a custody officer (an officer of at least rank sergeant who is present at a designated police station—see PACE s.36) where he has reason to suspect that the individual is vulnerable,<sup>7</sup> although in the case of a voluntary interview<sup>8</sup> this responsibility rests with the investigative officer.<sup>9</sup> The AA’s role, in brief, and as will be explained in greater detail below, is to facilitate communication; to support, assist and advise the suspect; to ensure that the police are acting fairly; and to enable the suspect to understand their rights and entitlements, ensuring also that such rights and entitlements are respected.<sup>10</sup> The safeguard itself provides, however, been noted as problematic, in part because of issues with its implementation,<sup>11</sup> and in part because of the safeguard itself (as will be discussed later).

This article provides both the most up-to-date and in-depth examination of how “appropriateness” can be defined in respect of the AA. Whilst discussion is directly

<sup>4</sup> Although prior to *R. (on the application of HC)*, this was set at 17. See *R. (on the application of HC) v The Secretary of State for the Home Department* [2013] EWHC 982 (Admin); [2013] Crim. L.R. 918.

<sup>5</sup> See R. Dehaghani and C. Bath, “Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C” [2019] Crim. L.R. 213.

<sup>6</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.11.15. Special care should be exercised by investigating officers when they are questioning vulnerable suspects and facts should be corroborated where possible—Note for Guidance E2.

<sup>7</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019).

<sup>8</sup> The term “voluntary” is problematic—see J. Kendall, *Regulating Police Detention: Voices from Behind Closed Doors* (Bristol: Policy Press, 2018).

<sup>9</sup> In homicide cases, whilst the custody officer is ultimately responsible for arranging that an AA attend a police interview, it is often the investigating officer who arranges for the AA to attend: see J. Holmes, *Personal Correspondence*, 19 December 2019.

<sup>10</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019).

<sup>11</sup> See T. Nemitz and P. Bean, “Protecting the rights of the mentally disordered in police stations: The use of the appropriate adult in England and Wales” (2001) 24 *International Journal of Law and Psychiatry* 595; P. Bean and T. Nemitz, *Out of depth and out of sight* (Loughborough: University of Loughborough, 1995); K.J.C. Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009); Brown, Ellis and Larcombe, *Changing the Code: Police Detention Under the Revised PACE codes of Practice* (London: Home Office, 1992); T. Bucke and D. Brown, *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); G.H. Gudjonsson, I. Clare, S. Rutter and J. Pearce, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities. Royal Commission on Criminal Procedure Research Study No 12* (HMSO, 1993); S. Medford, G.H. Gudjonsson and J. Pearce, “The efficacy of the appropriate adult safeguard during police interviewing” (2003) 8 *Legal and Criminological Psychology* 253; NAAN, *The Home Secretary’s Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police* (NAAN, 2015); NAAN, *There to Help 2: Ensuring provision of appropriate adults for vulnerable adults detained or interviewed by police An update on progress 2013/14 to 2017/18* (NAAN, 2019); C. Palmer, “Still Vulnerable After All These Years” [1996] Crim. L.R. 633; C. Palmer and M. Hart, *A PACE in the right direction?: The effectiveness of safeguards in the Police and Criminal Evidence Act 1984 for mentally disordered and mentally handicapped suspects—A South Yorkshire Study* (Sheffield: University of Sheffield, 1996); C. Phillips and D. Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes. Home Office Research Study No 185* (London: Home Office, 1998); R. Dehaghani, “He’s just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody” (2016) 55(4) *Howard Journal of Crime and Justice* 396; R. Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (Abingdon: Routledge, 2019).

relevant to England and Wales (where the safeguard is a requirement under the PACE Codes of Practice), lessons contained herein are also relevant to Northern Ireland (where the safeguard exists by virtue of the Police and Criminal Evidence (NI) Order 1989) and Scotland, as well as to other jurisdictions where similar (but albeit more limited) provisions are available.<sup>12</sup> The discussion here is relevant and important not only for academic and policy researchers, but also for practitioners—AAs, legal representatives and independent custody visitors (who have an increasingly important role in the oversight of AA implementation and AA quality). Further, whilst the focus of this article is principally on the safeguard within the context of the criminal process, such lessons may be transferrable to other settings where the AA is used, such as immigration and, in particular, age assessments (although here, it should be noted, the AA has a very different role).

Several core terms—appropriateness, effectiveness, identity, qualities, and activities—first require definition. Appropriateness in the context of the AA is taken to mean whether the safeguard has been proper or suitable in the circumstances. The matter of effectiveness focuses on whether the AA has produced the desired results. The issue of identity pertains to who the AA is and should—or should not—be. This is related to qualities (i.e. the characteristics of the AA) and activities (i.e. what the AA should—and should not—do). Bound-up with each of these elements is the AA’s purpose: the safeguard has been interpreted and/or constructed as an evidential protection (securing the admissibility of evidence at court),<sup>13</sup> a due process safeguard (ensuring fair treatment throughout the system),<sup>14</sup> and a welfare mechanism protecting the physical and material well-being of the suspect.<sup>15</sup> It has also been viewed as a crime reduction measure<sup>16</sup> or as a means through which to provide emotional support.<sup>17</sup> As will be identified later, there are numerous problems with questions of “appropriateness”, “effectiveness” and so on because: (a) the purpose of the safeguard has evolved over time and can be interpreted widely (and by different actors), and (b) there are differences in approach(es) between different forms of guidance which engenders inconsistency. To assess claims of success either in terms of appropriateness or effectiveness, the central purpose of the AA’s role must be clear; without this, such assessments may be confused, complex, and contradictory.

This article is organised in three parts. Within Part 1, I shall examine how the safeguard is framed in law—legislation and guidance, and case law—and in non-legislative guidance. In doing so, I will map out the safeguard (relying on various forms of guidance) and explore the issues of identity, qualities, and activities. Within Part 2, I explore the problems with and restrictions on the AA safeguard, examining how the safeguard is limited in law and, by drawing upon

<sup>12</sup> See Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>13</sup> See, e.g., J. Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] *Crim. L.R.* 785.

<sup>14</sup> H. Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139.

<sup>15</sup> Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139.

<sup>16</sup> Particularly for YOTs whose role also encompasses crime reduction, within the broader frame of the youth justice system, see Crime and Disorder Act 1998 (CDA 1998).

<sup>17</sup> T. Jessiman and A. Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246.

previous research, in practice. Within Part 3, I will explore the question of “appropriateness” and will query whether the AA is appropriate and for whom such appropriateness applies.

## Part 1: Constructing the safeguard in law and in guidance

PACE itself does not provide any guidance on the safeguard (nor on the definition of vulnerability, for that matter). Indeed, the legislation does not assist with the role of the AA in any manner, other than in s.63B(1). This provision sets out who the AA can be in respect of a young person who is being tested for the presence of Class A drugs, detailing the content of Code C 1.7 (below). Otherwise, the closest the Act gets to discussing the AA safeguard and role is that contained under s.77,<sup>18</sup> which requires that a jury are advised where a “mentally handicapped” person has confessed in the absence of an “independent person”. There are a number of problems with s.77. First, and most fundamentally, this provision does not relate to AAs specifically: an “independent person” can, for example, be a legal representative or healthcare worker, although, according to s.77, must not be “a police officer or a person employed for, or engaged on, police purposes”. Further, s.77 applies only to a trial at the Crown Court and is restricted to those who are considered “mentally handicapped” (i.e. someone who “is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning”). The Crime and Disorder Act 1998 (CDA 1998) also makes some provision in respect of the AA safeguard: s.38(4) requires that youth justice services (namely YOTs) provide AAs to “safeguard the interests of children and young persons detained or questioned by police officers”, thus placing the AA safeguard on a statutory footing for young suspects. The duty that exists under the CDA 1998 for providing AAs for young suspects does not apply to adults, nor does a comparable statutory duty; proposals to introduce something similar have been, at least for the meantime, rejected.<sup>19</sup> The Policing and Crime Act 2017 (PCA 2017) s.74 also requires that an AA is present where a young suspect between 14 and 18 or a “vulnerable adult”<sup>20</sup> consents to the use of live link. However, neither the CDA 1998 nor the PCA 2017 provide any further guidance or information on the AA safeguard.

Given the lack of detail on the AA safeguard in legislation, Code C must be consulted for further information on the role and identity of the AA. In respect of young suspects, the AA can be a parent, guardian, a person from a local authority or voluntary organisation (where the young person is in the care of that local authority or voluntary organisation), or a social worker. If such individuals are unavailable, then the AA may be a “responsible adult” who is aged 18 or above,

<sup>18</sup>The definition of “mentally handicapped” under s.77 has, for example, been used in case law to ascertain whether someone required an AA, see *W* [1994] Crim. L.R. 130; see Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019) for discussion.

<sup>19</sup>NAAN, *The Home Secretary’s Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*. This is, however, currently being considered in the Scottish context—Scottish Government, *Establishing a Statutory Appropriate Adult Service in Scotland*, [https://consult.gov.scot/criminal-justice/appropriate-adult-service/consultation/published\\_select\\_respondent?\\_b\\_index=60](https://consult.gov.scot/criminal-justice/appropriate-adult-service/consultation/published_select_respondent?_b_index=60) [Accessed 21 September 2020].

<sup>20</sup>This term was proposed for use within Code C. However, this was changed after consultation to “vulnerable person”—see Dehaghani and Bath, “Vulnerability and the appropriate adult safeguard: examining the definitional and threshold changes within PACE Code C” [2019] Crim. L.R. 213.

barring some exceptions (see below).<sup>21</sup> For an adult, an AA may be a parent, guardian or another person who cares for the adult, or someone trained in dealing with the vulnerable, barring some exceptions.<sup>22</sup> Code C makes clear that for adults, whilst it may be preferable that someone is trained in, rather than lacking in, qualifications in relation to the care of the vulnerable, the suspect’s wishes to have a relative (lacking such qualifications) involved should be, if practicable, respected.<sup>23</sup> In addition to setting out who the AA could or should be, the Code also makes clear who the AA should not be. For example, the AA should not be involved in the offence nor should he or she be a solicitor (or other legal representative),<sup>24</sup> an independent custody visitor, or a victim or a witness,<sup>25</sup> if present at the station for that purpose. The AA must also not be a police officer, employed by the police, under the direction or control of the chief of police, or a person who is providing services, under a contractual arrangement to the police, to assist with the chief of police’s functions.<sup>26</sup> These requirements have been reinforced in case law, as will be explored later.

Within academic literature, AAs are typically categorised as: (1) friends/relatives (to include family members), (2) volunteers, or (3) professionals. The first category broadly describes those who are known personally to the suspect, either as a family member (usually parents or guardians in the case of young suspects) or a friend. The second category applies to those who are typically, although not necessarily, from an organised scheme and who do not know the suspect personally, such as individuals who volunteer as AAs and, whilst unpaid, have undergone some level of training. This category could also include those who have been approached to act as an AA but have had no prior training or experience (although such AAs have not been the focus of much, if any, research). The third category refers to those who act as AAs in a professional, paid capacity. This category may also include those who act as an AA *as part* of their job but who are not necessarily trained to act as an AA, such as social workers, although is more commonly used to refer to those who are employed *as* AAs. There are also a number of AAs who are care home staff;<sup>27</sup> such individuals are known to a child suspect personally but will act in their professional capacity. Moreover, some YOTs workers may be known to the child (or young person) personally if working with them on a criminal justice order but will also be acting in their professional (and potentially coercive) capacity.<sup>28</sup>

<sup>21</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7.

<sup>22</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7.

<sup>23</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7: Note for Guidance 1D.

<sup>24</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019). Although see Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019); R. Dehaghani and D. Newman, “Can—and should—lawyers be considered ‘appropriate’ appropriate adults?” 58(1) *Howard Journal of Crime and Justice* 3.

<sup>25</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019). For serious offences family member are often witnesses—but are still used as AAs. Thus, it can be suggested that this guidance is not always adhered to: Holmes, *Personal Correspondence*, 20 December 2019.

<sup>26</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7.

<sup>27</sup> This is particularly so given the high rate of children in care who are suspected and convicted of criminal offences—Howard League for Penal Reform, “Ending the criminalisation of children in residential care: Briefing One” (Howard League, 2017).

<sup>28</sup> I am grateful to one of the anonymous reviewers for these points.

Code C must also be consulted for information on the activities of the AA. According to Code C 2018 (which contains detail about the safeguard in list-form), the AA should support, advise and assist the vulnerable suspect in relation to any aspect of the Code or any other Code of Practice, or when the vulnerable suspect is “given or asked to provide information or participate in any procedure”.<sup>29</sup> These procedures are not limited to interview and can include charge, cautions, warnings in relation to adverse inferences, the taking of samples such as fingerprints, photographs and DNA, reviews of detention, and intimate searches.<sup>30</sup> The AA should also observe that the police are acting properly and fairly in relation to the suspect’s rights and entitlements, and must advise an officer of at least rank inspector if the police are not acting in such a manner. AAs must assist the person in their communication with the police, whilst respecting their right to silence, and help the person to understand their rights and entitlements and ensure that those rights are protected and respected. One such example is that AAs may request that a legal representative attend the police station (although the AA cannot force a suspect against their will to consult with the legal representative).<sup>31</sup>

Whilst Code C is undoubtedly more comprehensive on the safeguard than PACE, it is far from detailed; owing to these “gaps”, further information on the AA’s identities, qualities and required activities can be gleaned from the, albeit limited, case law on the safeguard. In the case law, the courts have considered whether an AA should have been called where he or she was not, where it was argued that the AA failed to act in accordance with the Code, or where the AA, because of their identity or qualities, was deemed to be inappropriate. According to the courts (albeit in first instance decisions, thus having little precedent value), the AA should not be a probation officer,<sup>32</sup> and, reiterating the Code, the courts also deemed it inappropriate for the AA to be a victim or witness in that particular case.<sup>33</sup> The AA should also not be vulnerable him or herself.<sup>34</sup> The courts’ approach to legal representatives in the role is somewhat more complicated: whilst a legal representative is prohibited from acting as an AA according to the Code, the courts have suggested that a legal representative *can* be an independent person and therefore evidence arising from an interview that has taken place without an AA but with a legal representative may nevertheless be admissible, as in *Lewis*.<sup>35</sup> This in effect, allows, at least for the purposes of evidence, for the legal representative to replace the AA.

The courts have also commented on the purpose of the AA safeguard, most commonly to reiterate the content of Code C. In *Campbell*, the safeguard was deemed to be a mechanism through which to minimise the risk of unreliable information being provided by the accused “by seeing that the interview is properly

<sup>29</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7.

<sup>30</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.16.1; paras 10.12; 10.11A read alongside para.10.11; Annex A paras 2B. 11.17; para.1.4.

<sup>31</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.6.5A.

<sup>32</sup> *O’Neill* unreported 16 October 1990 Birmingham Crown Court.

<sup>33</sup> *DPP v Morris* unreported 8 October 1990 QBD.

<sup>34</sup> *Morse* [1991] Crim. L.R. 195; although see *W* [1994] Crim. L.R. 130.

<sup>35</sup> The court refused to exclude the evidence under ss.76 or 78 and also felt that a jury direction under s.77 was not needed because a solicitor was present during interview: *Lewis* [1996] Crim. L.R. 260. See also *Aspinall* [1999] 2 Cr. App. R. 115; [1999] Crim. L.R. 741; *Brown* [2011] EWCA Crim 1606.

and fairly conducted and by facilitating, if need be, communication between the police and the suspect”.<sup>36</sup> For young suspects, the AA is someone who is “more experienced”;<sup>37</sup> an AA should be called to assist young people who—because of their young age and relative immaturity—“sometimes say things they do not mean”.<sup>38</sup> The AA for young suspects is also viewed as someone who is “older” and who can “assist with the answering [of] ... questions” or otherwise provide advice if such questions could not be answered.<sup>39</sup> That the criminal justice system is “intimidating” has also led the court to acknowledge the importance of the AA safeguard for young suspects.<sup>40</sup>

The desired characteristics, i.e. qualities, of the AA can also be gleaned from analysis of case law. The AA must be someone with whom the suspect has empathy.<sup>41</sup> Yet, inconsistencies appear within the case law: for example, in *Jefferson* the court did not consider “inappropriate” someone who criticised and contradicted the suspect;<sup>42</sup> arguably, the ability to share in the feelings and experiences of the suspect should equate to an approach that is neither critical nor contradictory. The courts have also noted that the AA should be sufficiently well equipped to deal with the demanding nature of the role, particularly in difficult or disturbing cases.<sup>43</sup>

Further, the question of AA presence has been addressed by the courts: the AA is not simply to be present at interviews within the custody suite or police station; they should also be present during interviews conducted outside such as on the street<sup>44</sup> and/or in a vehicle.<sup>45</sup> Their presence should also be sought once the suspect begins to make admissions to the police.<sup>46</sup> Whilst the AA should be present for various procedures (such as charge, reviews of detention, and the reading of rights and entitlements), and not simply at interview,<sup>47</sup> they need not necessarily be present for the administration of a breath-test,<sup>48</sup> other than when the suspect does not understand the explanation from the police as to the requirement of the breath-test.<sup>49</sup>

Whilst both Code C and the case law contain limited detail on the AA’s role, further information has been provided to AAs by NAAN.<sup>50</sup> Of particular note is

<sup>36</sup> *Campbell* [1995] 1 Cr. App. R. 522; [1995] Crim. L.R. 157.

<sup>37</sup> *Weekes* [1993] 97 Cr. App. R. 222 at [225]; [1993] Crim. L.R. 211.

<sup>38</sup> *Weekes* [1993] 97 Cr. App. R. 222 at [225]; [1993] Crim. L.R. 211

<sup>39</sup> *Weekes* [1993] 97 Cr. App. R. 222 at [227]; [1993] Crim. L.R. 211. On the basis of fairness, the court deemed the AA necessary.

<sup>40</sup> *R. (on the application of HC) v The Secretary of State for the Home Department* [2013] EWHC 982 (Admin).

<sup>41</sup> *DPP v Blake* [1989] 1 W.L.R. 432; (1989) 89 Cr. App. R. 179.

<sup>42</sup> *Jefferson, Times*, 22 June 1993 (CA).

<sup>43</sup> See, e.g., *Leach v Chief Constable of Gloucestershire* [1999] 1 W.L.R. 1421; [1999] 1 All E.R. 215. Here it was also noted that the police owe a duty of care towards the AA.

<sup>44</sup> *Fogah* [1989] Crim. L.R. 141.

<sup>45</sup> *Maguire* (1990) 90 Cr. App. R. 115; [1989] Crim. L.R. 815.

<sup>46</sup> *Weekes* [1993] 97 Cr. App. R. 222.

<sup>47</sup> See *Fogah* [1989] Crim. L.R. 141; *Maguire* (1990) 90 Cr. App. R. 115.

<sup>48</sup> *R. (on the application of DPP) v BE* [2002] EWHC 2976 (Admin); [2003] Crim. L.R. 338; *Stanesby v DPP* [2012] EWHC 1320 (Admin).

<sup>49</sup> See *Miller v DPP* [2018] EWHC 262 (Admin); [2018] Crim. L.R. 472. See also R. Dehaghani, “Condemning and condoning non-implementation of the appropriate adult safeguard: *R v Beattie* (Alfred David) and *Miller v DPP*” [2018] Crim. L.R. 646.

<sup>50</sup> See NAAN, “Information for family members”, <https://www.appropriateadult.org.uk/index.php/information/guidance-aa> [Accessed 21 September 2020]. Prior to 2018, there was a slight disconnect with NAAN and Home Office co-written guidance. Since the changes in 2018, the NAAN and Home Office co-written guidance seems to have been incorporated within Code C. The last Home Office issued guidance was published in 2003, whereas the last Home Office and NAAN co-written guidance was published in 2011: Home Office and NAAN, *Guide for Appropriate Adults* (Home Office and NAAN, 2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117682/appropriate-adults-guide.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117682/appropriate-adults-guide.pdf) [Accessed 21 September 2020]; Home Office, *Guidance for Appropriate Adults* (Home Office, 2003), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117625/guidanceappadultscustody.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117625/guidanceappadultscustody.pdf) [Accessed 21 September 2020].

the NAAN National Standards; these provide a wealth of detail on the AA safeguard.<sup>51</sup> The standards—updated in 2017–18 and published in 2018—introduced, for the first time, detailed information on how practitioners, i.e. AAs, could improve and develop their own practices. Importantly, the Standards provide guidance to AAs (and Commissioners and Scheme Managers) and, in contrast with Code C, contain considerable detail on the qualities that the AA should possess.

Across their 18 pages, they provide detailed guidance on the qualities and activities of AAs. They were written in collaboration with various agencies and were heavily informed by academic and policy research, Inspectorate Reports, as well as case law and the Codes. The standards require AAs to be proactive and assertive in their role and necessitate that the AA navigates and maintains positive relationships with the police, legal representatives, and suspects, amongst others. From a reading of the National Standards, it appears that they also urge AAs to be critical and reflexive in their practice; the AA is reminded of the need to consider the suspect’s vulnerability and the suspect’s wishes and desires when performing the various aspects of the role (as derived from Code C). An AA must also ensure that suspects are aware not simply of their required activities but also, for example, that the suspect understands that the AA is: (a) independent, and (b) cannot provide legal advice; the suspect should also be made aware of why the AA is being “inactive” at various points of the interview. The Standards highlight the importance of the AA’s contributions in relation to representations around detention, charge or the conducting of searches. Importantly, they also detail the qualities that an AA should ideally have, requiring that they are “non-judgemental, respectful of culture, calm, caring, supportive, protective, trusting and trustworthy”,<sup>52</sup> thus going beyond the Code C requirements. From these various sources, a picture of the “appropriate” AA begins to emerge.

The College of Policing Authorised Professional Practice (APP) on Mental Health<sup>53</sup> also makes some reference to the AA safeguard, although in doing so mostly reiterates Code C provisions (albeit those provisions that existed pre-2018), such as when the AA is required to attend and for what processes, and whether the AA can request the attendance of legal representatives. The guidance goes beyond the Code (see 1.7(b)), however, in that it urges custody officers to find and use an AA who understands the mental health condition/learning disability of the suspect and has the skills to address the communicative needs of that suspect. Further, it requires that the AA be issued with the Home Office Guide for AAs from 2011 (which has not yet been updated since the changes to Code C in 2018). Custody officers are also urged to be available to answer questions regarding the guidance and the AA role; police staff must also inform the AA of information on the role. As with the College of Policing, the Youth Justice Board (YJB) have

<sup>51</sup> The standards were developed by NAAN in consultation with its membership and funded via a Home Office grant. The author developed the “Evidence Base” and, through collaboration with NAAN, developed existing, and created new, standards.

<sup>52</sup> NAAN, *National Standards: National standards for the development and provision of appropriate adult schemes in England and Wales. Revised October 2018* (NAAN, 2018), p.75.

<sup>53</sup> College of Policing, “APP content > Mental health > Mental health – detention”, <https://www.app.college.police.uk/app-content/mental-health/mental-health-detention/#appropriate-adults> [Accessed 21 September 2020].

issued guidance to youth offending practitioners and managers, reiterating much of legislation, Codes of Practice, case law and NAAN guidance.<sup>54</sup>

These various forms of guidance are not, however, without their problems. In the section that follows, I examine how the safeguard is limited in law and guidance—by providing a critique of both the status of, and highlighting the problems with, the various provisions—and in practice by drawing on academic literature on the AA safeguard.

## Part 2: Problems with and restrictions on the safeguard

The first issue is that of the status of the AA safeguard: whilst, under the CDA 1998, there is a statutory provision for young suspects, there is no equivalent provision for adults. Further, and as noted above, PACE proper does not provide any detail on the safeguard (other than the limited reference to an “independent person” in s.77). The absence of a statutory safeguard creates issues with implementation and availability. There is little incentive for police officers to implement the safeguard other than to secure evidence (at present, remedy for non-implementation is, at best, exclusion of evidence at trial; a breach of the Code does not, of itself, render an officer liable to civil or criminal sanction).<sup>55</sup> There is no requirement placed on the police or a local authority to ensure that the safeguard is in operation for adult suspects. Bound-up with the absence of a statutory duty is the matter of service delivery, which is a particular concern for adult suspects. With no statutory provision, AA services are funded—if funded at all—through policing budgets<sup>56</sup> (raising issues with independence)<sup>57</sup> or via a local authority (the area of which does not always cover the police force area), thus creating a lack of consistency. The knock-on effect can also be a lack of availability or delays in responding to call-outs,<sup>58</sup> which, in turn, may have a bearing on the conduct of the interview and the outcome of the case<sup>59</sup> and could mean that an AA is not provided even when called for.<sup>60</sup> Restrictions on funding can result in the provision of an

<sup>54</sup> Youth Justice Board, “How to manage bail and remands: section 3 case management guidance Published 1 May 2019”, <https://www.gov.uk/government/publications/how-to-manage-bail-and-remand/how-to-manage-bail-and-remands-section-3-case-management-guidance> [Accessed 21 September 2020]. The YJB have worked in partnership with NAAN to produce guidance for those working as youth justice practitioners, including approving the NAAN National Standards (above).

<sup>55</sup> PACE s.67(10). See also Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>56</sup> M. Perks, *Appropriate Adult Provision in England and Wales: Report prepared for the Department of Health and the Home Office by Mark Perks Development Officer, National Appropriate Adult Network* (London: NAAN, 2010), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117683/appropriate-adult-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117683/appropriate-adult-report.pdf) [Accessed 22 September 2020].

<sup>57</sup> Perks, *Appropriate Adult Provision in England and Wales: Report prepared for the Department of Health and the Home Office by Mark Perks Development Officer, National Appropriate Adult Network*.

<sup>58</sup> Jessiman and Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246; Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139; K. Quinn and J. Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234; Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] *Crim. L.R.* 785.

<sup>59</sup> Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139.

<sup>60</sup> NAAN, *The Home Secretary’s Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*; NAAN, *There to Help 2: Ensuring provision of appropriate adults for vulnerable adults detained or interviewed by police An update on progress 2013/14 to 2017/18*.

inferior service or, in extreme circumstances, no service at all.<sup>61</sup> Further, delays in attendance can negatively influence perceptions of the safeguard<sup>62</sup> (thus potentially undermining its efficacy) and/or prolong the suspect's time in custody.

The absence of the AA safeguard from PACE legislation also necessitates reliance upon Code C. Yet, the Code is far from comprehensive in this regard (albeit it is more detailed now than it was prior to 2018).<sup>63</sup> Case law has also been conflicting and contradictory and there are, in any event, limited cases upon which to rely, rendering it difficult to ascertain what appropriateness means (and, indeed, for whom). Moreover, the courts do not consider whether the AA has been appropriate as their core consideration, considering instead whether the appropriateness—or otherwise—of the safeguard has rendered evidence inadmissible.

Whilst NAAN guidance (both National Standards and that written in combination with the Home Office) provides considerably more detail than legal material, these documents are advisory only and thus do not attract the same remedies for breach<sup>64</sup> (namely, exclusion of evidence and that is not automatic, but depends upon unreliability and/or unfairness). As per the NAAN guidance, a suspect who is attended by an “inappropriate” AA would not necessarily have access to remedies such as exclusion of evidence at trial and the securing of an “inappropriate” AA would not result in any repercussions for the police. At present, there is effectively no remedy for when an AA has not met a particular—or number of—standard(s) and whilst Bath has argued in favour of inspection and regulation whereby scheme managers may admonish or remove AAs, such an approach is yet to be adopted. It should also be recognised that NAAN is not a regulatory body but rather a membership organisation (which supports and represents organisations that deliver AA services across England, Wales, Northern Ireland and the Isle of Man). As a membership organisation, the remit of the Standards includes NAAN members only, and whilst non-NAAN members can obtain the materials, they are unable to access other NAAN resources such as Professional Development Days and the NAAN training pack. Therefore, whilst a significant improvement on PACE, Code C and the courts in terms of mapping out the AA safeguard, the NAAN guidance is significantly limited in effect.

There are also numerous problems with how Code C frames—and/or fails to delineate—the AA's role. Similar to the solicitor, the AA is dependent on the police for the protection of their safety<sup>65</sup> and must therefore carefully navigate interactions with the police, thus further undermining their ability to intervene (or

<sup>61</sup> As the NAAN report highlighted, identification rates in relation to vulnerability were significantly higher in police forces with better access to organised AA schemes compared with those forces with no such access—NAAN, *The Home Secretary's Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*.

<sup>62</sup> Jessiman and Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246. See also Criminal Justice Joint Inspectorate, *Joint Inspection on Work Prior to Sentence with Offenders with Mental Disorders* (HMIP, 2009); Her Majesty's Inspectorate of Constabulary, *The welfare of vulnerable people in police custody* (HMIC, 2015); NAAN, *The Home Secretary's Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*; Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] *Crim. L.R.* 785; Palmer, “Still Vulnerable After All These Years” [1996] *Crim. L.R.* 633.

<sup>63</sup> See Home Office, *Code D Revised Code of Practice for the identification of persons by Police Officers*.

<sup>64</sup> A similar criticism can be levied at the College of Policing guidance.

<sup>65</sup> See Quirk in respect of solicitors: H. Quirk, *The Rise and Fall of the Right of Silence* (Abingdon: Routledge, 2017).

pre-determining the decision not to intervene). This practical reality may discourage activity, but so too can the Code;<sup>66</sup> an AA can be asked to leave if they are unreasonably obstructive during interview.<sup>67</sup> Yet, the AA is further disadvantaged as the Code does not detail the circumstances that would constitute an unreasonable obstruction. Without such detail, it is possible for the police to remove the AA for purportedly obstructive behaviour and, at the same time, for the AA to have no recourse to counter the allegation. An AA’s failure to intervene can be beneficial from the police perspective as they will nevertheless have discharged their Code C obligations by obtaining an AA,<sup>68</sup> even if the AA has been of little benefit to the suspect. As such, evidence may therefore be admissible at trial. The AA is thus required to tread the thin line between activity and obstruction, and must not act in a manner that could be considered hostile or unresponsive.<sup>69</sup>

Fundamental to the AA’s role is the facilitation of communication; this aspect of the role is emphasised throughout Code C and is often the focus of the courts.<sup>70</sup> However, this function is not unproblematic: the guidance is unclear on what “facilitating communication” entails and, indeed, it was not until 2018 that the Code explicitly recognised that the AA should respect the suspect’s right to silence.<sup>71</sup> Importantly, silence is arguably both a form of communication and the absence of communication, yet the Code does not make this clear. Further, that an AA respects a suspect’s right to silence does not necessarily mean that the AA is required—or encouraged—to facilitate that right (by, for example, reminding the suspect of their right to silence). The reality may be such that the AA, particularly when attempting to navigate (complex) power dynamics and relationships with the police, will encourage the suspect to say something or will fail to intervene, an issue compounded further by the “unreasonable obstruction” provision above. Moreover, an analysis of the law on the AA safeguard would suggest that the AA’s role is to extract admissible evidence during interview.<sup>72</sup>

The AA’s role is also restricted by the lack of legal privilege: whilst a suspect can consult privately with their legal representative without the AA present,<sup>73</sup> the lack of legal privilege leaves the AA and, more importantly, the suspect at a disadvantage. It potentially excludes the AA from the pre-interview consultation

<sup>66</sup> Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] Crim. L.R. 785; Quinn and Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234; Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139; Medford, Gudjonsson and Pearse, “The efficacy of the appropriate adult safeguard during police interviewing” (2003) 8 *Legal and Criminological Psychology* 253; C. White, “Re-assessing the social worker’s role as an appropriate adult” (2002) 24(1) *Journal of Social Welfare and Family Law* 55.

<sup>67</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.11.17A.

<sup>68</sup> H. Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383; H. Pierpoint, “A Survey on Volunteer Appropriate Adult Services” (2004) 4(1) *Youth Justice* 32.

<sup>69</sup> Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383; Pierpoint, “A Survey on Volunteer Appropriate Adult Services” (2004) 4(1) *Youth Justice* 32.

<sup>70</sup> See Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>71</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019).

<sup>72</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019).

<sup>73</sup> *A Local Authority v B* [2008] EWHC 1017 (Fam)). See also C. Bath, “Legal Privilege and Appropriate Adults” (2014) 178(27) *Criminal Law and Justice Weekly*.

and thus prevents them from facilitating communication between the suspect and the legal representative prior to interview (although Code C has now made it clear that “facilitating communication” applies only between the suspect and the police). It further undermines the AA’s role as the AA will not be provided with the suspect’s account and therefore is limited when “facilitating communication” with the police.<sup>74</sup> Moreover, it can place the AA in conflict with the legal representative where the “advice” provided by the AA does not correspond with the advice provided by the legal representative.<sup>75</sup> Furthermore, surveillance of consultations between the AA and the suspect, whilst rare (more common are consultations taking place within earshot of officers) and deemed intrusive, are nevertheless permitted.<sup>76</sup>

As noted in Part 1, the AA role can be performed by a variety of individuals/groups; previous academic research has pointed towards problems with the different types of AAs. Friends and relatives, for example, have been known to be unsupportive, may pressurise the suspect to confess, may turn a blind-eye to police malpractice, could act in a confrontational manner, may exhibit negative attitudes towards the police, or may be too distressed to act in an active manner.<sup>77</sup> Yet, they can be beneficial from the perspective of expediency, cost-effectiveness,<sup>78</sup> and knowledge of the suspect (the AA is often “public, formal official and structured” rather than “private and informal everyday”<sup>79</sup> and therefore those who are known to the suspect may be preferred *because* of their knowledge of the suspect as compared with others who may be unknown to the suspect).<sup>80</sup> Volunteers—whilst also cost-effective—are often unrepresentative of the suspect as they are typically from affluent areas and may have had minimal contact with the police prior to their role.<sup>81</sup> They may tend towards being pro-police (and, accordingly, anti-suspect).<sup>82</sup> Indeed, many AAs may be former police staff or those who have otherwise worked in the criminal justice system.<sup>83</sup> Volunteers may also fail to detect police malpractice or, when detected, may be reluctant to intervene,

<sup>74</sup> Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>75</sup> See Quinn and Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234.

<sup>76</sup> *RE v The United Kingdom* App no. 62498/11 (ECtHR, 27 October 2015). Bath has argued that this is rare to the point of effective non-existence (Chris Bath *Personal Correspondence*, 5 November 2019).

<sup>77</sup> R. Evans, “Challenging a police caution using judicial review” [1996] *Crim. L.R.* 104; R. Evans and K. Puech, “Reprimands and warnings: populist punitiveness or restorative justice?” [2001] *Crim. L.R.* 794; B. Littlechild, “Reassessing the role of the ‘appropriate adult’” [1995] *Crim. L.R.* 540; Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383; Quinn and Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234.

<sup>78</sup> *Ibid.* Although, as Bath (*Personal Correspondence*, 5 November 2019), has highlighted, some police will choose parents when that is expedient and where the scheme is slow to respond, but not in cases where schemes respond promptly.

<sup>79</sup> F. Rock, *Communicating Rights: The Language of Arrest and Detention* (London: Palgrave Macmillan, 2007), pp.109–110 citing Barton and Hamilton 1998.

<sup>80</sup> Jessiman and Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246; Rock, *Communicating Rights: The Language of Arrest and Detention* (2007).

<sup>81</sup> Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383. See also Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>82</sup> Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383. See also Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>83</sup> Jennifer Holmes, *Personal Correspondence*, 19 December 2019.

particularly because they may not be well trained.<sup>84</sup> They may also lack the kudos of professionals or, as the *Leach* case highlights, the ability to deal with difficult or disturbing cases.<sup>85</sup> Their presence can typically be framed as a crude cost-cutting measure, and they may attract widespread criticism from those whose roles they have usurped.<sup>86</sup>

Social workers have also been noted as problematic choices: whilst undoubtedly trained in relation to various aspects of their social work practice, their training as AAs may be limited,<sup>87</sup> as may their contributions as AAs (when compared with the contributions made by relatives, for example). Social workers acting as AAs may also be incorrectly assumed, by the police, to be familiar with what is required of them when acting as an AA and, as such, the police may neglect to mention what is required of them. Social workers may seek to avoid conflict with the police (as their role requires that they maintain amicable relations with the police) and they may fail to intervene when required.<sup>88</sup> Further, those with a pre-existing relationship with the suspect tend towards over-familiarity and a lack of impartiality, whereas those unknown to the suspect, such as duty social workers, may fail to understand the suspect.<sup>89</sup>

Support offered to the suspect may also depend upon the “type” of AA: as Kemp and Hodgson have highlighted, young suspects attended by a member of YOTs may access mainstream services and avail themselves of the other services offered by YOTs, particularly in relation to health and welfare,<sup>90</sup> whereas those who were not attended by YOTs could not access these services. YOTs provision is also limited to young suspects and, as noted above, no comparable duty or provision exists in relation to adults. Adults may therefore be left unattended<sup>91</sup> and may be unable to access support in relation to housing, health, and/or welfare, for example (although it is worth noting that this support can be provided by liaison and diversion (L&D), and is not typically expected of the AA in any event).<sup>92</sup>

Previous research has also highlighted the wide interpretation of the role of the AA.<sup>93</sup> Code C makes clear that the AA should be independent of the police, but it

<sup>84</sup> NAAN, *The Home Secretary’s Commission on Appropriate Adults: There to help: Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police*. Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383; Littlechild, “Reassessing the role of the ‘appropriate adult’” [1995] *Crim. L.R.* 540; White, “Re-assessing the social worker’s role as an appropriate adult” (2002) 24(1) *Journal of Social Welfare and Family Law* 55.

<sup>85</sup> *Leach* [1999] 1 W.L.R. 1421.

<sup>86</sup> Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383.

<sup>87</sup> White, “Re-assessing the social worker’s role as an appropriate adult” (2002) 24(1) *Journal of Social Welfare and Family Law* 55. See also Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] *Crim. L.R.* 785.

<sup>88</sup> Pierpoint, “How Appropriate are Volunteers as ‘Appropriate Adults’ for Young Suspects?” (2000) 22(4) *Journal of Social Welfare and Family Law* 383.

<sup>89</sup> Quinn and Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234.

<sup>90</sup> V. Kemp and J. Hodgson, “England and Wales: Empirical Findings” in M. Vanderhallen, M. van Oosterhout, M. Panzavolta and D. de Vocht (eds), *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (Cambridge: Intersentia, 2016).

<sup>91</sup> Bradley, *Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (2009).

<sup>92</sup> This, of course, depends on the suspect being referred to L&D. It is worth noting that L&D is available only in England (although has not been rolled out across all police forces) and exists in the form of criminal justice liaison in Wales.

<sup>93</sup> Her Majesty’s Inspectorate of Constabulary, *The welfare of vulnerable people in police custody* (HMIC, 2015); Pierpoint, “A Survey on Volunteer Appropriate Adult Services” (2004) 4(1) *Youth Justice* 32; H. Pierpoint, “Reconstructing the Role of the Appropriate Adult in England and Wales” (2006) 6(2) *Criminology and Criminal*

does not provide a definition of independence and does not fully explain from whom this independence is required. The Code makes it clear that the AA must be independent from the police, but it is not clear whether the AA is permitted, by law, to be firmly on the side of the suspect. Kemp and Hodgson have highlighted how the question of independence has been interpreted by AAs. Some may view their purpose as one to assist the police whereas others will view themselves as independent umpires who neither work on behalf of the police nor the suspect;<sup>94</sup> volunteer AAs interpreted their role as something which would protect the police and safeguard the well-being of the young suspect whereas YOT workers placed themselves “firmly on the side of the juvenile”.<sup>95</sup> At a more general level, the nature of the AA’s role is subject to considerable interpretation to the point that AAs may fail to fully appreciate the nature of their role.<sup>96</sup> The AA’s overarching purpose has been constructed in a myriad of often conflicting ways: a due process safeguard, a crime prevention mechanism,<sup>97</sup> a welfare protection,<sup>98</sup> or a means of emotional support (and potentially each of these in various combinations).<sup>99</sup> The role is thus not only restricted in law and in practice by funding (or lack thereof), the functions, or the types of AAs, it is also restricted by its overall purpose. Despite such problems the AA can nevertheless have a positive impact on the investigative process and can be of benefit to the suspect, such as through increasing the likelihood that a legal representative attends the interview.<sup>100</sup> The AA’s presence may also lead to a decrease in interrogative pressure and may result in a more active legal representative,<sup>101</sup> and whilst the AA may be limited in their ability to facilitate communication, the supportive element of their role may be beneficial.<sup>102</sup>

Within the section that follows, I will examine how the “appropriate” AA can be defined and suggest some of the ways in which the role can be reformed.

### Part 3: Defining the “appropriate” AA: problems and potential

As part of the broad PACE framework, the AA’s role can be viewed in the context of safeguarding evidence. Indeed, remit for the Codes of Practice falls under the Home Office, which has responsibility for police powers, rather than the Ministry of Justice, which has responsibility for advancing justice. If the concern were for access to justice, suspect rights should arguably fall within the Ministry of Justice

*Justice* 219. See also Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>94</sup> Kemp and Hodgson, “England and Wales: Empirical Findings” in *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (2016).

<sup>95</sup> Kemp and Hodgson, “England and Wales: Empirical Findings” in *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (2016), p.142.

<sup>96</sup> Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] *Crim. L.R.* 785.

<sup>97</sup> Particularly for YOTs whose role also encompasses crime reduction, as part of the overarching aim of the criminal justice system, see CDA 1998.

<sup>98</sup> Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139.

<sup>99</sup> Jessiman and Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246.

<sup>100</sup> Pierpoint, “A Survey on Volunteer Appropriate Adult Services” (2004) 4(1) *Youth Justice* 32 citing Robertson, Pearson and Gibb 1996.

<sup>101</sup> Medford, Gudjonsson and Pearse, “The efficacy of the appropriate adult safeguard during police interviewing” (2003) 8 *Legal and Criminological Psychology* 253. Although note that this positive benefit did not extend to situations where family members attended as AAs for children.

<sup>102</sup> See Quinn and Jackson, “Of Rights and Roles: Police interviews with young suspects in Northern Ireland” (2007) 47(2) *British Journal of Criminology* 234.

remit. This is telling and would lead one to believe that the safeguard is principally in existence for the protection of evidence. Code C focuses heavily on this matter:

“Although juveniles or vulnerable persons are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to providing information that *may be unreliable, misleading or self-incriminating*. Special care should always be taken when *questioning* such a person, and the [AA] should be involved if there is any doubt about a person’s age, mental state or capacity. Because of the *risk of unreliable evidence* it is also important to obtain corroboration of any facts admitted whenever possible.”<sup>103</sup> [author’s emphasis added]

This, on its own, is not enough to make the case that the focus of PACE and Code C are on securing reliable evidence. Instead, one must look to the historical context of PACE and, in particular, the Judges’ Rules, which were directions to the police from judges on how to collect evidence so as to ensure its admissibility. Indeed, the remedy for breach of the Code (as noted in Part 1) is the exclusion of evidence at trial. Given the small number of cases reaching trial,<sup>104</sup> admissibility may be insufficient when securing the integrity of the process. It is therefore imperative that the process is fair and proper at this first—and often only—stage of the criminal process.

However, and as noted at the beginning of this paper, the AA’s role emerged out of a recognition of the need to protect vulnerable suspects, following a miscarriage of justice in the 1970s. In the spirit of the introduction of the safeguard, the AA’s role and purpose should be centred on the suspect. Whilst initially envisaged as part of the role of the social worker or a role that parents would perform,<sup>105</sup> the AA has evolved over time such that the role can now be performed by a vast array of individuals/groups. Further, since 2018, Code C has more clearly focused on a suspect’s rights and the fairness of police actions (as noted above).<sup>106</sup> The question of appropriateness very much depends upon the underpinning objective of the safeguard and it appears that there is a lack of clarity regarding the overall purpose of the safeguard (protecting evidence, protecting the suspect, or doing both (which will undoubtedly result in tension)).

Proceeding on the basis that the AA safeguard is informed by a desire to protect the suspect, a picture of AA “appropriateness” can be mapped out (although certainly some of these developments would also safeguard the integrity of the evidence). It would require that the AA prioritises the suspect’s best interests and would necessitate some changes to the PACE Codes of Practice. At present, an AA is not subject to legal privilege; the role is stifled in this regard: the AA can choose to sit in during the legal consultation but, in doing so, may place themselves and the suspect in a difficult position if, for example, the AA is compelled to give

<sup>103</sup> Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019) Note for Guidance 11C.

<sup>104</sup> J. Jackson, “Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence” (2016) 79(6) *Modern Law Review* 987.

<sup>105</sup> Royal Commission on Criminal Procedure, *The Royal Commission on Criminal Procedure Report* (HMSO, 1981), Cmnd.8092, 104-7.

<sup>106</sup> Compare Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2019), para.1.7A with Home Office, *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (2017), para.11.17.

evidence at trial. Providing legal privilege to the AA would enable them to facilitate communication between the legal representative and the suspect and would provide the AA with a clearer picture of the advice provided, and strategy agreed, during consultation.

It is, moreover, evident that the AA's role is stifled through the terminology used within Code C: the AA, as noted above, cannot be "unreasonably obstructive", yet there is no guidance on what this means. Further, the AA must facilitate communication, but it is still unclear whether this can be construed as the absence of communication (i.e. silence). It is therefore recommended that both terms are further explained within Code C: the AA should be clearly informed about what does, and what does not, constitute an "unreasonable obstruction" (such as intervening when police questioning is unfair and reminding the suspect of their right to silence and/or their right to legal advice).<sup>107</sup> In doing so, the AA would arguably be encouraged to adopt a more active approach. The Code also needs to be clearer on whether the AA can permit silence; the focus should not be on "facilitating communication", but instead should allow the suspect to get their story across in a manner that serves their best interests and allows them to effectively participate. Whilst perhaps aspirational rather than realistic, a change in police interview practices—with a focus on ascertaining the truth rather than getting the suspect to "cough" or otherwise constructing the case against the suspect<sup>108</sup>—would also be welcome.

In addition to changes to law, it is imperative that an AA has the qualities to enable them to respond to, and meet, the suspect's needs. The "appropriate" AA would arguably be able to empathise with the suspect and be critical and reflective in their practice. These qualities may be more difficult to ascertain without observing the AA in their role and, whilst this matter could be addressed during training, it must be acknowledged that there is no guarantee that the AA will take forward such lessons. The question of payment may also be relevant to the question of representativeness—most AAs are volunteers and therefore tend to be retired, older, and affluent (and potentially white); payment may encourage, and indeed allow, younger people from less affluent areas and those from BAME communities to become AAs. In doing so, the AA may be better able understand—and empathise with—the suspect. There may be good reason, therefore, as Pierpoint has argued, for the role to be professionalised.<sup>109</sup> Such issues rest, however, on the purpose of the AA safeguard: certainly, if the role is suspect-centred, it would make sense to ensure that the AA meets the suspects' needs; if the AA is there to safeguard the evidence, it may be enough that they are simply present.

<sup>107</sup> According to Chris Bath, AAs have been accused of being "unreasonably obstructive" where they have, for example, reminded the suspect of the right to legal advice.

<sup>108</sup> See M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Abingdon: Routledge, 1991).

<sup>109</sup> Pierpoint, "Extending and Professionalising the Role of the Appropriate Adult" (2011) 33(2) *Journal of Social Welfare and Family Law* 139. Indeed, Dhami and Sim found that professional AAs are more likely to contribute than non-professional AAs: M. Dhami and M.P.Y. Sim (2014), *Measuring the Effectiveness of Appropriate Adults*, Presentation. Professional AAs may, however, be undesirable from the service-user perspective, particularly because of a lack of confidentiality, trust, and knowledge of individual needs: see Jessiman and Cameron, "The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers" (2017) 45(4) *British Journal of Learning Disabilities* 246. Bath has also suggested that the same issue applies to volunteers.

As a safeguard for the suspect, it is important that the AA is given time to explain rules, processes, and procedures to all suspects, whether it is the suspect’s first or 500th time in police custody (although the AA may need to be responsive to the suspect and be careful to tread the fine line between being helpful and being patronising). Whilst delays can be detrimental to the suspect’s well-being, efficiency should not be prioritised over fairness; an AA should be provided with enough time to successfully and sufficiently challenge any breaches of the suspect’s rights, and should similarly be provided with enough time to ensure that the AA can actively perform their safeguarding role.<sup>110</sup> Whilst undoubtedly a matter for scheme managers, it is also important that the AA is not on duty for long periods as this may lead to exhaustion and may therefore adversely impact upon the quality of support provided to the suspect.<sup>111</sup> At present, the Code does not comment on such issues and it is thus unclear whether evidence would be excluded if the AA was, for example, given insufficient time to explain rules, processes, and procedures. If the safeguard were to be reframed as something through which to protect the suspect, these factors *would* indeed be relevant to the question of admissibility (as the focus would not be simply on whether the AA is provided, but also on whether the AA has, more broadly, been appropriate and effective).

It is also imperative that the AA is present before<sup>112</sup> and beyond<sup>113</sup> the interview. With regard to the former, this would ensure rapport-building and enable the suspect to understand the process, particularly in respect of (the uptake of) legal advice and the ability to use rights and entitlements. For the latter, it would allow for reviews of detention,<sup>114</sup> reviewing the content of (and highlighting issues with) the interview, and signposting to support services.<sup>115</sup> Such an approach would marry the legal, welfare and any crime reduction aspects of the AA role.<sup>116</sup>

A suspect-centred safeguard would dictate that the AA should have specific knowledge of the custody and investigative processes and broad knowledge of the criminal process. The AA should also have knowledge of the specific barriers faced by the suspect (as relevant to the situation, such as communication in interview), but should preferably know the suspect or be able to easily build rapport. Where the AA is known to the suspect, and where the suspect has a diagnosed condition, the AA would (it could be assumed) know of the condition that the

<sup>110</sup> An efficient, rushed approach could also make the AA susceptible to ineffective participation, for example through pressure or a lack of understanding: Pierpoint, “Extending and Professionalising the Role of the Appropriate Adult” (2011) 33(2) *Journal of Social Welfare and Family Law* 139.

<sup>111</sup> H. Pierpoint, “Quickenning the PACE: The Use of Volunteers as Appropriate Adults” (2008) 18 (4) *Policing and Society* 397.

<sup>112</sup> The AA’s presence beyond the interview may also be beneficial for evidential purposes, as things that happen or occur before (in particular) or after interview can have a bearing on the integrity of the evidence.

<sup>113</sup> The AA has an explicit post-interview role in Scotland: L.D.G. Thomson, V. Galt and R. Darjee, “Professionalizing the role of appropriate adults” (2007) 18(1) *The Journal of Forensic Psychiatry & Psychology* 99, 101.

<sup>114</sup> I. Cummins, “Boats against the current: vulnerable adults in police custody” (2007) 9(1) *The Journal of Adult Protection* 15.

<sup>115</sup> Thomson, Galt and Darjee, “Professionalizing the role of appropriate adults” (2007) 18(1) *The Journal of Forensic Psychiatry & Psychology* 99, 101. It is worth noting, however, that the PACE framework does not exist in Scotland and this could therefore have a bearing on the role of the AA, i.e. when any comparison is made with Scotland, the wider context should be borne in mind.

<sup>116</sup> Kemp and Hodgson, “England and Wales: Empirical Findings” in *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (2016). Jessiman and Cameron, “The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers” (2017) 45(4) *British Journal of Learning Disabilities* 246. Pierpoint, “Reconstructing the Role of the Appropriate Adult in England and Wales” (2006) 6(2) *Criminology and Criminal Justice* 219. It should be noted that crime reduction is not necessarily a recognised part of the AA’s role; the introduction of YOTs as AAs arguably prompted such.

suspect has and, additionally, how that condition affects the suspect. Where the AA is not personally known to the suspect (i.e. they are a volunteer or professional), the AA may have some knowledge regarding mental health, learning difficulties/disabilities, and the wider factors<sup>117</sup> that could render an individual vulnerable; without such knowledge, doubts could be cast on the efficacy of the AA safeguard.

The safeguard could be informed from a service-user perspective, building on Jessiman and Cameron's research.<sup>118</sup> Within their study, service-users viewed calmness and the ability to care as fundamental qualities of the AA. Service-users also valued psychiatric knowledge and knowledge of and training in aspects of learning disabilities. An AA who was respectful of race, culture, and sexual identity was valued, as was someone who was protective, kind, confident, trustworthy, honest, a people person, a good listener and good communicator, and, ideally, the same gender as the suspect. Confidentiality and knowledge of the correct procedures were also highly valued by service-users. It is evident that some of these aspects are aspirational—such as gender and possession of psychiatric knowledge—but it is important that the AA safeguard in some way reflects what service-users want and need.

The AA's role has developed over time, as noted above, and there has thus been a blurring between the different "types": YOTs, for example, could be volunteers but could potentially be paid; family members and friends could also be considered "volunteers" as they are not being remunerated when acting as AAs; "volunteers" could be considered "professional" if they are trained; and "professionals" may not necessarily be trained as AAs. There are both advantages and disadvantages to each of these "categories" of AAs. Yet, this evolution has also created some conflict in the purpose of the AA (such as YOTs who must also be involved in crime reduction)<sup>119</sup> and has created disparities between young and adult suspects (a statutory duty for the former but not the latter). In a related manner, the same safeguard—albeit performed by different individuals/agencies and with inequity as to the statutory footing—operates for both young and adult suspects. Yet, at a very basic level, young suspects and adult suspects may—and arguably do—have very different needs. Further, the absence of a statutory safeguard for adults can result in patchy provision and can discourage uptake of the safeguard.<sup>120</sup> It is therefore recommended that the safeguard is subject to legislative review with a focus on: (a) who can, and should, perform the role, (b) whether a statutory duty is required, and (c) whether two separate safeguards (one for young suspects and another for adults) should be introduced. It is also recommended that future research explicitly recognise the evolving role of the AA and should categorise AAs based on training, knowledge, and experience when assessing "appropriateness".

<sup>117</sup> See G.H. Gudjonsson, "The psychological vulnerabilities of witnesses and the risk of false accusations and false confessions" in A. Heaton-Armstrong, E. Shepherd, G.H. Gudjonsson and D. Wolchover (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives*. (Oxford: Oxford University Press, 2006), pp.61–99.

<sup>118</sup> Jessiman and A. Cameron, "The role of the appropriate adult in supporting vulnerable adults in custody: Comparing the perspectives of service users and service providers" (2017) 45(4) *British Journal of Learning Disabilities* 246. The specific qualities and knowledge desired differed between those with learning disabilities and those with a mental health condition.

<sup>119</sup> Pierpoint, "Reconstructing the Role of the Appropriate Adult in England and Wales" (2006) 6(2) *Criminology and Criminal Justice* 219.

<sup>120</sup> Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

## Conclusion

This article has mapped-out the role of the AA in law and in practice. When seeking to determine what “appropriateness” means in the context of the AA safeguard, various problems emerge. One issue is that the safeguard is principally framed as an evidential safeguard: PACE makes no mention of the safeguard; Code C largely frames it as something which assists with the extraction of reliable information (although the explicit inclusion of the caveat on the right of silence is an important development and indeed may make a difference);<sup>121</sup> and the courts, when considering whether an AA should have been called or whether the AA has been appropriate, are considering the admissibility of the evidence (and not whether the suspect has been adequately supported). The safeguard also suffers from a clear and consistent underpinning objective and so too, then, does any research that seeks to assess “appropriateness”. The problem lies not with those evaluating the safeguard, but instead with the legislative framework(s) and arguably with those—namely the Home Office—who are responsible for the PACE Codes of Practice. The lack of clarity of the guidelines on the AA only serve to further undermine the AA’s already precarious position.<sup>122</sup> It is therefore imperative that the underpinning objectives of the safeguard are clarified and that any future evaluations of the AA are informed by these objectives. Research should also seek to focus on qualities—“hard” such as knowledge, training, and experience, and “soft” such as empathy, reflectiveness, and attentiveness—rather than identity.

As Fennell has argued “the role of facilitating communication may be over-emphasized to the extent that the adult becomes an agent of the interrogating officers”.<sup>123</sup> Yet, the issues extend much further and the role thus suffers as, by extension, do those who are attended by the AA.<sup>124</sup> Until there is an explicit commitment to protecting the suspect and until the AA safeguard, in law, maps onto this, the AA may continue to be an agent of the state and a back-covering mechanism for the police.<sup>125</sup>

<sup>121</sup> See Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).

<sup>122</sup> See also Dehaghani, “He’s just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody” (2016) 55(4) *Howard Journal of Crime and Justice* 396; R. Dehaghani, “Custody officers, Code C and Constructing Vulnerability: implications for policy and practice” 11(1) *Policing* 74; Dehaghani, “Condemning and condoning non-implementation of the appropriate adult safeguard: R v Beattie (Alfred David) and Miller v DPP” [2018] Crim. L.R. 646.

<sup>123</sup> P. Fennell, “Mentally disordered suspects in the criminal justice system” (1994) 21 *Journal of Law and Society* 57, 67.

<sup>124</sup> Hodgson, “Vulnerable Suspects and the Appropriate Adult” [1997] Crim. L.R. 790.

<sup>125</sup> Dehaghani, *Vulnerability in Police Custody: Police decision-making and the appropriate adult safeguard* (2019).